IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-Ā-KAHU ROHE

CRI-2017-470-000025
[2017] NZHC 843

BETWEEN	RAYMOND JOSEPH TUKAKI Appellant
AND	THE DISTRICT COURT AT TAURANGA First Respondent
	THE COMMONWEALTH OF AUSTRALIA Second Respondent

Hearing:	11 October 2017
Appearances:	Craig Tuck and Rynae Butler for the Appellant Heidi Wrigley and Ashley Shore for the Respondents
Judgment:	31 October 2017

JUDGMENT OF MOORE J

This judgment was delivered by me on 31 October 2017 at 3:30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] Raymond Joseph Tukaki is alleged to have committed serious sexual and violent offending in Australia's Northern Territory while he was living there in 1999. In 2001 or 2002 Mr Tukaki returned to his home in New Zealand and has been living here for the last 15 years or so. Early last year, arrest warrants were issued out of the Darwin local court. These warrants were endorsed in New Zealand by a District Court Judge following which Mr Tukaki was arrested.

[2] In May 2017 Judge Ingram, in the District Court at Tauranga, heard Mr Tukaki's challenge to the Commonwealth of Australia's ("Australia") application to extradite him. Judge Ingram found that Mr Tukaki was eligible for surrender under Part 4 of the Extradition Act 1999 ("the Act"). The Judge also declined to refer his case to the Minister of Justice ("the Minister"). He made a surrender order.[1]

[3] Mr Tukaki now challenges those decisions. He says that Judge Ingram erred in law, in various respects, in determining he was eligible for surrender. He also says the Judge was wrong when he declined to refer his case to the Minister.

Extradition charges – background facts

[4] Mr Tukaki faces six serious charges involving allegations of assault and sexual violence. They are as follows:

(a) sexual intercourse without consent (x 1);[2]

(b) unlawful assault (x 2);[3]

(c) gross indecency with a female under 16 (x 1);[4]

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1 *Commonwealth of Australia v Tukaki* [2017] NZDC 10792 at [27] and [28].

2 Criminal Code Act (Northern Territory), s 192(2)(a) and (3); maximum penalty of life imprisonment.

3 Section 188(2)(a) and (b); maximum penalty of five years' imprisonment on indictment or two years on summary conviction.

4 Section 129(2); maximum penalty of 14 years' imprisonment.

(d) indecent dealing with a child under 16 (x 1);[5] and

(e) assault on a child (x 1).[6]

Background

[5] Mr Tukaki is 42 years old. He now lives and works in Te Kaha in the Eastern Bay of Plenty. He is Māori.

[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.

[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 alleged 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.

[8] Mr Tukaki went on to have two children with Ms M. It is understood they both reside in Australia.

[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.

[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.

[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,

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5 Section 132(2)(c), (3) and 4; maximum penalty of 10 years' imprisonment.

6 Section 188(2)(b) and (c); maximum penalty of five years' imprisonment on indictment or two years' imprisonment on summary conviction.

warrants to arrest issued and the extradition documentation forwarded to New Zealand in May 2016.

Procedural background and jurisdiction

[12] Mr Tukaki's appeal is brought under s 68 of the Act which provides:

> "**68 Appeal on question of law only**
>
> (1) This section applies if the District Court determines under section 24 or 45 that a person is or is not eligible for surrender in relation to any offence or offences for which surrender is sought, and either party considers the determination erroneous in point of law.
>
> (2) If this section applies, the party may appeal against the determination to the High Court on a question of law only."

[13] On 1 August 2017 Heath J directed counsel to identify the points of law on which the appeal was brought. These were set out by counsel in a memorandum dated 7 August 2017.

[14] At a telephone conference before Muir J on 22 August 2017 the following five points of law were identified and accepted as appropriate:

(a) Question 1: Whether his Honour erred in law in failing to assess the "unjust" limb separate from the "oppressive" limb under s 8(1)(c) in determining that Mr Tukaki is eligible for surrender to Australia.

(b) Question 2: Whether his Honour erred in law in determining that the principle of comity means that there is a justified expectation that a defendant's human rights (including a right to fair trial) will be upheld by the Australian Federal, State and Territory jurisdictions.

(c) Question 3: Whether his Honour erred in law in determining what factors may be relevant to a "circumstance of the case" under s 8(1)(c).

(d) Question 4: Whether his Honour erred in law in applying the "compelling or exceptional circumstances" position of s 48(4)(a)(ii) to s 8(1)(c) of the Act".

(e) Question 5: Whether his Honour erred in law in determining that the case did not warrant referral to the Minister under s 48(4)(a)(ii) by failing to give proper consideration to whether there were "compelling or exceptional circumstances" making it "unjust or oppressive" to surrender the appellant.

[15] However, shortly before this appeal was heard, Mrs Wrigley, for Australia, by memorandum expressed the view that of the five questions of law identified only the first three properly fell within the Court's appellate jurisdiction. The other two questions, which focus on Judge Ingram's refusal to refer the case to the Minister under s 48 of the Act more properly relate to issues which must be determined by way of judicial review. This is because s 68(2) permits appeals only against "the determination" which is identified in s 68(1) as a determination about eligibility for surrender under ss 24 or 45. The refusal to refer the matter to the Minister under s 48 of the Act is not such a determination. It involves the exercise of a judicial discretion. Thus any challenge must be by way of judicial review.

[16] Counsel were agreed that the most appropriate course would be for the appellant to file and serve judicial review proceedings in respect of the issues arising out of the fourth and fifth questions. It was agreed that such a course would not prejudice the parties in terms of the way they had prepared for the hearing.

[17] Accordingly, Mr Tuck, for Mr Tukaki, filed pro forma judicial review proceedings. The grounds for review repeat Questions 4 and 5, namely that Judge Ingram erred in law in those respects. The relief sought is a declaration the District Court's decision is invalid and that the matter be remitted back to the District Court for reconsideration.

[18] Thus the issues for determination before me proceeded both by way of appeal (in respect of Questions 1 to 3) and by way of judicial review (in respect of Questions 4 and 5).

The statutory regime

[19] Extradition procedures between New Zealand and Australia (and other designated States) are governed in this country by Part 4 of the Act which provides for a simplified "fast track", and "backed warrant" procedure. Part 4 reflects one of the stated objects of the Act which is to provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia.[7]

[20] A person will be eligible for surrender under s 45(2) of the Act when the following requirements have been 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:
>
> > (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.

[21] Under s 45(3) a person will not be eligible for surrender if he or she satisfies the Court:

> (a) that a mandatory restriction of surrender applies under s 7 of the Act; or
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> (b) that his or her surrender would not be in accordance with the provisions of a treaty between New Zealand and Australia.

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7 Extradition Act 1999, s 12(d).

[22] In the present case none of the requirements set out above was contested by Mr Tukaki. His argument was that the discretionary restriction on surrender under s 8(1)(c) of the Act applied and therefore the Judge should have determined he was not eligible for surrender under s 45(4).

[23] If a person is eligible for surrender, the Court must issue a warrant of detention for that person under s 46(1). Immediately after the issue of the warrant the Court must make a surrender order unless it considers the person's case should be referred to the Minister under s 48(1) or (4).[8]

[24] Only s 48(4) is in issue. That section permits the Court to refer the case to the Minister if it appears that:

(a) any of the restrictions on the surrender on the person under s 7 or s 8 apply or might apply;[9] or

(b) 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.[10]

[25] 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—
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> (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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8 Extradition Act 1999, s 47(1).
9 Section 48(4)(a)(i).
10 Section 48(4)(a)(ii).

and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

(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."

[26] The issue before Judge Ingram was whether discretionary restrictions of surrender under s 8 applied and, in the alternative, whether the Court should refer Mr Tukaki's case to the Minister under s 48(4)(a) of the Act.

[27] Judge Ingram found that:

(a) Mr Tukaki was eligible for surrender; and

(b) there were no factors requiring his case to be referred to the Minister.

The appeal

[28] Mr Tukaki brings the appeal under s 68 of the Act.

[29] The guiding principles are those contained in the Court of Appeal's judgment in *Brown v R* where the Court held that in order to constitute a question of law the question must raise one or more of the following errors:[11]

(a) misdirection of law apparent in the decision;

(b) failure to take into account a relevant matter, or taking into account an irrelevant matter; or

(c) a factual finding unsupported by any evidence, or an omission to draw an inference of fact that is the only inference reasonably possible on the evidence.

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[11] *Brown v R* [2016] NZCA 325, (2015) 30 FRNZ 471 at [60].

[30] It is against those guiding principles that I now turn to consider each of the questions posed in these proceedings.

Question 1: Whether his Honour erred in law in failing to assess the 'unjust' limb separate from the 'oppressive' limb under s 8(1)(c) in determining that Mr Tukaki is eligible for surrender to Australia.

[31] Mr Tuck submits that Judge Ingram applied the wrong test by failing to assess the "unjust" limb separate from the "oppressive" limb under s 8(1)(c) of the Act. While accepting that the "unjust" limb is not made out on the facts of the present case, Mr Tuck submits that the Judge did not properly address the "oppressive" limb and the factors relevant to determining whether a discretionary restriction to refuse the surrender of Mr Tukaki was made out.

[32] In support of this submission Mr Tuck submitted that Judge Ingram failed to properly apply the two-step approach mandated by the Court of Appeal in *Commonwealth of Australia v Mercer*.[12] As I understood Mr Tuck's submission it was that the Judge effectively conflated the unjust and oppressive considerations without undertaking the sort of discriminatory and focused analysis of the two terms as required by the Act.

[33] An accused person meets the test under s 8(1)(c) by establishing that the circumstances which exist "because of" a delay in prosecuting the alleged offending make it is either unjust or oppressive to surrender the person. Mr Tuck is correct when he submits that injustice and oppression are concerned with different questions. However, the test under s 8(1)(c) is made out if either of these two limbs is satisfied. Injustices present only if a fair trial is either not possible, or not likely, in the requesting State.[13] Oppression, in the context of s 8(1)(c), is concerned with the hardship to a person resulting from changes to his or her circumstances between the alleged offending and the extradition.[14] Oppression means "oppressing, harsh or cruel".[15]

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12 *Commonwealth of Australia v Mercer* [2016] NZCA 503.
13 At [43](b).
14 At [51].
15 *Mailley v District Court at North Shore* [2016] NZCA 83 at [58].

[34] As Mrs Wrigley submits, despite the distinction which can be drawn between the separate notions of injustice and oppression, there may exist some common ground or overlap. In *Mercer* the Court quoted Lord Diplock in *Kakis v Governor of The Public of Cyprus* when, in discussing the two limbs of injustice and oppression, it noted:[16]

> "… There is room for overlapping, and between them they would cover all cases where to return [the extraditee] would not be fair."

[35] However, as the Court of Appeal observed in *Mercer*:[17]

> "as a matter of construction … each limb has some separate meaning despite the scope for overlap."

[36] The question for the present appeal is whether Judge Ingram gave sufficient consideration to both oppression and injustice in the context of s 8(1)(c). I am satisfied that he did for the reasons which follow.

[37] On at least five occasions the Judge made express reference to the two limbs of s 8(1)(c). It is plain he drew a distinction between the two concepts and framed the question early in his judgment in the following way:

> "[8] In this case the defence submit that the amount of time that has passed since the offences alleged to have been committed is now substantial, being somewhere between 17 and 19 years in each case. It is further submitted that in all the circumstances of the case it would be unjust to or oppressive to surrender this respondent."

[38] The Judge then developed this question by giving consideration to all factors which were potentially relevant to each of the two limbs under s 8(1)(c). He specifically addressed Mr Tukaki's claim that he had been given a false sense of security from prosecution. At some length he discussed Mr Tukaki's change in personal circumstances, repeating aspects of Mr Tukaki's affidavit in which he deposed that since his return to New Zealand in 2001 or 2002 he had resettled himself in the community of Te Kaha, established himself on his family land and obtained

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16 *Kakis v Governor of the Public of Cyprus* [1978] 1 WLR 779 (HL) at 782, quoted in *Commonwealth of Australia v Mercer,* above n 12, at [33].

17 *Commonwealth of Australia v Mercer,* above n 12, at [28].

local employment. The Judge also gave consideration to a submission that Mr Tukaki could not receive a fair trial in Australia due to his Māori heritage.

[39] Furthermore, any criticism that Judge Ingram considered some of the circumstances in relation only to the injustice limb and not the oppression limb must fail. Judge Ingram confronted these issues directly. After first observing that Mr Tukaki's change in personal circumstances since the alleged offending did not bear on the fairness of his trial and thus did not satisfy the injustice limb, Judge Ingram found that those circumstances were not unusual. I agree with Mrs Wrigley that such a finding can only have been relevant to whether or not the oppression limb, rather than the injustice limb, was met.

[40] It is thus apparent that Judge Ingram did consider whether the two limbs of s 8(1)(c) had been separately established. Furthermore, irrespective of whether Mr Tukaki's personal circumstances as discussed above qualified as oppressive, Judge Ingram properly concluded that these factors were not "circumstances of the case" which could be relied upon to meet either of the limbs of s 8(1)(c). For reasons developed more fully below, such personal factors do not qualify as "circumstances of the case" unless they reveal a close nexus to any delay.

[41] For these reasons I am satisfied this question must be answered in the negative.

Question 2: Whether his Honour erred in law in determining that the principle of comity means that there is a justified expectation that a defendant's human rights (including a right to fair trial) will be upheld by the Australian Federal, State and Territory jurisdictions.

[42] Mr Tuck submits that the notion of comity was wrongly understood by Judge Ingram to include a presumption of similarity in human rights. He points out that a key aspect to the backed warrant procedure is the concept of comity, a term which, despite its importance, is not mentioned in the Act or its predecessors. He submits that comity is broadly defined in the non-legal sense to mean "courtesy and considerate behaviour towards others". In the context of extradition the purpose of comity was to allow States to deviate from the principle of sovereignty in order to fulfil the goal of international co-operation in transnational crime.

[43] In developing this submission Mr Tuck pointed to Judge Ingram's observation that comity underpins Part 4 "there is a justified expectation that a defendant's human rights (including the right to a fair trial) will be upheld by the Australian Federal, State and Territory jurisdictions".[18]

[44] Mr Tuck submits that, even if this were a safe assumption, there is no evidence to indicate New Zealand and Australia "are on a par with human rights standards". He says that in the absence of a Bill of Rights Act or comparable provisions in the Australian constitution it is questionable whether the presumption of similarity extends to the full range of human rights which ought to be considered by the Courts.

[45] In oral submissions Mr Tuck further developed this point when he submitted that the incarceration rates of indigenous Australians in the Northern Territory are the highest of indigenous peoples anywhere in the world. From this he invited me to draw the inference that the criminal justice system in the Northern Territory is necessarily compromised with the effect that not only can there be no assumption that Mr Tukaki would receive a fair trial but also, in the event of a conviction or convictions, his incarceration would be oppressive.

[46] In evaluating this criticism it is necessary to consider how Judge Ingram actually addressed the issue of comity in his judgment. His Honour said:[19]

> "In relation to an extradition request by Australia, the principle of comity which underpins Part 4 of the Extradition Act 1999 means that there is a justified expectation that a defendant's human rights (including the right to a fair trial) will be upheld by the Australian Federal, State and Territory jurisdiction. This Court cannot infer that a fair trial is impossible without clear and straightforward evidence sufficient to meet the required standard of proof on the balance of probabilities. That issue will almost always be best addressed and resolved in the appropriate Australian Court."

[47] The use of the words "justified expectation that the defendant's human rights (including right to a fair trial) will be upheld by the [Australian jurisdictions]" is all but a direct recitation of the Court of Appeal's observations in *Mercer* where that Court observed:[20]

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18 *Commonwealth of Australia v Tukaki,* above n 1, at [22].
19 *Commonwealth of Australia v Tukaki,* above n 1, at [22].
20 *Commonwealth of Australia v Mercer,* above n 12, at [18].

> "[18] That comity means a more expedited 'fast track' procedure applies. *There is a justified expectation of the respondent's human rights (including right to a fair trial) will be met by Australia*." The procedure is therefore referred to as a "backed warrant procedure" with New Zealand asked to back the overseas warrant for arrest. Indeed one of the specific objects of the Act is to "provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia."
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> [Emphasis added]

[48] Furthermore, Judge Ingram's analysis of Part 4 is supported by recent Court of Appeal authority. In *Radhi v District Court at Manukau* the Court said:[21]

> "[15] Extradition between Australia and New Zealand is governed by Part 4 of the Act. Part 4 provides a less formal more streamlined extradition procedure than those relating to most other countries and it reflects a high degree of comity between New Zealand and Australia."

[49] Judge Ingram's comments, when viewed against that background of appellative authority, confirms he was correct in his understanding and use of the principle of comity. In the absence of cogent evidence to the contrary he was quite right to expect that Mr Tukaki's human rights would be met by Australia. This is reflected by the statutory burden of proof which is placed on the extraditee to establish a breach of human rights.[22] Despite Mr Tuck's submissions, he was unable to point to anything other than a general claim that Mr Tukaki fears his human rights may be breached or any evidence that there is, in fact, such a risk.

[50] For these reasons this question must be answered in the negative. I am satisfied Judge Ingram made no such error of the sort alleged.

Question 3: Whether his Honour erred in law in determining what factors may be relevant to a "circumstance of the case" under s 8(1)(c).

[51] Mr Tuck submits that having considered a number of factors advanced on Mr Tukaki's behalf, his Honour wrongly concluded that "re-establishing oneself in a foreign jurisdiction is no more than the inevitable consequence of relocation".[23] While conceding that a consideration of "circumstances of the case" requires proof of a nexus

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21 *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 692 [*Radhi,* Court of Appeal Judgment] at [15].

22 Extradition Act 1999, s 45(3) and (4).

23 *Commonwealth of Australia v Tukaki,* above n 1, at [25].

between the matters under consideration and the statutory ground, here delay, Mr Tuck's complaint is that the Judge's consideration of "the circumstances of the case" was assessed only in the context of whether ordering extradition would be "unjust" rather than "oppressive". He submits that Mr Tukaki's personal circumstances and, more particularly, his unique position as Māori is a relevant factor.

[52] Both counsel agree that the Court of Appeal's decision in *Mailley* is relevant to the resolution of this question.[24] There, the Court considered it was "well established" that the personal circumstances of a person may be considered as part of the "circumstances of the case". However, this is permissible only where there is a "clear nexus" between those circumstances and the delay.[25] The requirement for a "clear nexus" arises from the use of the words "because of" in s 8(1) which infers a causal relationship must exist between the circumstances and the delay.

[53] Judge Ingram found that Mr Tukaki's personal circumstances, in particular those arising from his re-establishment in New Zealand following his departure from Australia after the alleged offending, were not "circumstances of the case" which could be considered in the context of s 8(1)(c). His Honour observed that these circumstances were "no more than the inevitable consequence of relocation" and thus lacked the required nexus with the delay which might otherwise have permitted them to be considered under s 8(1)(c). It is instructive to reproduce in full the relevant passage from Judge Ingram's decision:

> "[25] Here, the fact that Mr Tukaki has returned to New Zealand and made a credible job of re-establishing himself on family land in the Te Kaha community does not bear on the question of whether a fair trial is possible. The change in his personal circumstances is not unusual, as has been observed in such cases as *Woodcock v Government of New Zealand* and *Commonwealth of Australia v Mercer* and *Curtis v Commonwealth of Australia*. These cases make reference to the obvious point that re-establishing oneself in a foreign jurisdiction is no more than the inevitable consequence of relocation. Nor is it a 'circumstance of the case' under the provisions of s 8."
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> [Citations omitted]

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24 *Mailley v District Court at North Shore*, above n 15.

25 At [48]; confirmed by the Court of Appeal in *Commonwealth of Australia v Mercer,* above n 12, at [29].

[54] Furthermore, the absence of a clear nexus between Mr Tukaki's personal circumstances and the delay in this case is confirmed in Mr Tukaki's affidavit.[26] There he describes his return to New Zealand in the following way:

> "… a period of emotional and social isolation in Australia which left me wanting to return to whānau and a place of peace of healing."

[55] It is thus evident that Mr Tukaki's decision to return to New Zealand 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 whānau. Furthermore, his affidavit contains very little material to support what is now submitted on his behalf. It is correct that shortly after his return to New Zealand he changed his name from Reid to Tukaki. He says that this was not to frustrate any attempts to locate him. He also says he now lives on his family land and enjoys the support of his whānau. However, these grounds were not advanced or supported by evidence during the surrender hearing or even in the present proceedings. Furthermore, they are vague and non-specific. More importantly, none of these personal circumstances have come about by reason of the delay in investigating and prosecuting this matter. Mr Tukaki's cultural rights exist irrespective of the cultural identity and values he claims to have chosen to embrace following his return to New Zealand after the offending.

[56] It is also noteworthy that the claim his cultural rights will be breached is neither explained nor developed. There is no evidence that his whānau could not provide support during any remand period or, if convicted, while he is in custody as a sentenced prisoner. It is also apparent from the evidence that he is the biological father of two children in Australia.

[57] I cannot accept it would be "oppressive" for Mr Tukaki to be extradited on the evidence presented in this case. 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

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[26] Sworn on 27 March 2017.

do not constitute "circumstances of the case" which render his extradition oppressive in terms of s 8(1)(c).

[58] For these reasons this question too must be answered in the negative.

Questions 4 and 5

[59] I turn now to consider Questions 4 and 5 whether posed as part of the appeal or whether, more properly, by way of judicial review. Irrespective of the correct procedural pathway the issues to be resolved engage the same essential principles. The questions, whether posed as grounds of appeal or as grounds for review are expressed identically, as is the relief sought. Both these questions are directed towards Judge Ingram's refusal to refer the case to the Minister under s 48 of the Act.

[60] The questions are set out below:

(a) Whether his Honour erred in law in applying the "compelling or exceptional circumstances" position of s 48(4)(a)(ii) to s 8(1)(c) of the Act".

(b) Whether his Honour erred in law in determining that the case did not warrant referral to the Minister under s 48(4)(a)(ii) by failing to give proper consideration to whether there were "compelling or exceptional circumstances" making it "unjust or oppressive" to surrender the appellant.

[61] Before examining Mr Tukaki's challenge under these two heads it is necessary to examine the applicable law.

[62] After determining that a person is eligible for surrender, s 46 of the Act requires the Court to consider whether that person's case ought to be referred to the Minister under s 48(1) or (4) of the Act before making a surrender order in respect of that person. Section 48(4) provides:

"(4) If—

(a) it appears to the court in any proceedings under section 45 that—

(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

(b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—

the court may refer the case to the Minister in accordance with subsection (5)."

[63] This provision places the Court in the role of gatekeeper for those cases which are referred to the Minister who, under s 30, has the power to determine that the person not be surrendered for extradition.[27] Thus the Court's discretion to refer a case to the Minister under this section arises only if the statutory test is met.[28]

[64] Section 48(4)(a)(ii) is concerned only with the "circumstances of the person".[29] The circumstances of the case, such as those noted in ss 7 and 8, are not relevant considerations when determining whether there are compelling or extraordinary circumstances of the person which mean surrender would be unjust or oppressive.[30]

[65] "Extraordinary" refers to something which is out of the ordinary, unusual, uncommon or striking.[31] "Compelling" requires the personal circumstance in issue to be "very persuasive" or "very strong".[32] In the context of s 48(4)(a)(ii) the Court of Appeal has recently confirmed that "unjust" means "not just, contrary to fairness or justice", and "oppressive" means "oppressing, harsh or cruel".[33]

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27 *Mailley v District Court at North Shore,* above n 15, at [45].
28 *Radhi v District Court at Manukau* [2015] NZHC 3347 [*Radhi*, High Court Judgment] at [30].
29 *Mailley v District Court at North Shore,* above n 15, at [44].
30 *Radhi,* High Court Judgment, above n 28, at [31].
31 *Mailley v District Court at North Shore,* above n 15, at [62].
32 *Mailley v District Court at North Shore*, above n 15, at [62].
33 *Radhi,* Court of Appeal Judgment, above n 21, at [45] quoting *Mailley v District Court at North Shore,* above n 15, at [58].

[66] The threshold for referral to the Minister has been described as "high" because of the high public interest in sending those suspected of having committed offences overseas to the relevant jurisdiction to face trial and the importance of adhering to New Zealand's extradition obligations.[34]

[67] Even if the statutory test is met, the decision to refer a case to the Minister remains discretionary.

[68] Mr Tuck's complaint is that in determining whether there were compelling or extraordinary circumstances warranting referral to the Minister, Judge Ingram:

(a) failed to consider the effects of extradition on Mr Tukaki's values and identity as Māori;

(b) placed insufficient weight on the effects of extradition on Mr Tukaki's right to family;

(c) failed to consider as a relevant factor the effects of extradition on Mr Tukaki's wife; and

(d) failed to consider New Zealand's international obligations in regard to (a) to (c) above.

[69] In developing this argument Mr Tuck drew on what he submitted were parallels between Mr Tukaki's case and those which confronted the Court of Appeal in *Radhi*. Mr Radhi was a refugee, a status which elevated him to an unusual position which would have put him at risk of never being able to return to New Zealand, a risk which the Court of Appeal observed was not one shared by most who are extradited from this country.

[70] Mr Tuck pointed out Mr Tukaki's identity as a Māori places him in a unique position if extradited to the Northern Territory where he risks being denied his tikanga human rights. Additionally his immersion in Māori culture reflects a significant

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34 *Radhi,* Court of Appeal Judgment*,* above n 21, at [34].

change in his personal circumstances as may be seen by his decision to change his name from Reid to Tukaki. He submits that if extradited to Australia he would be likely to face racial discrimination or be subject to culturally inapt treatment in an Australian prison. By way of example, Mr Tuck submits that if Mr Tukaki is convicted and sentenced he would not have access to tikanga Māori or rehabilitation programmes and that after his sentence he would likely be deported to New Zealand without having the benefit of tikanga-based reintegration programmes proven for their efficacy in reducing re-offending.

[71] In advancing this argument Mr Tuck candidly accepts there is no supporting evidence for his proposition. However, I am prepared to accept as a matter of fact that if Mr Tukaki was imprisoned in New Zealand he would, most likely, be the beneficiary of such programmes and that if imprisoned in the Northern Territory he would not have access to these programmes. The question for me is whether these amount to compelling or exceptional circumstances and whether Judge Ingram erred by failing to give proper consideration to them making it unjust or oppressive to extradite Mr Tukaki.

[72] It is against the backdrop of these criticisms that I now consider Judge Ingram's decision. In declining to refer the case to the Minister the Judge said:

> "[27] I am satisfied that Mr Tukaki has not been able to establish any compelling or exceptional circumstances which would justify his case being referred to the Minister of Justice under the provisions of s 48(4)(a)(ii). He faces serious charges of sexual misconduct and violence against females. Having regard to the period of delay, and to the constitutional fair trial safeguards that apply to all trials, including those occurring in the Northern Territory of Australia, I am not satisfied that Mr Tukaki is able to establish any of the statutory grounds which would justify a refusal of surrender order."

[73] Although his reasons are briefly expressed and conclusory in nature, the quote above is contained in the penultimate paragraph of the Judge's decision. By this point in his judgment he had considered all of the various challenges raised on Mr Tukaki's behalf and considered the evidence before him. More particularly, immediately before this paragraph, Judge Ingram had discussed Mr Tukaki's claim that if extradited as an indigenous New Zealander he would have his human rights infringed. The Judge also

discussed Mr Tukaki's re-establishment in Te Kaha and the claim that if extradited he would be denied family or other support.

[74] Mrs Wrigley, who also appeared as counsel in the District Court, advises that the Judge's economical treatment of the issue under s 48(4)(a)(ii) is both appropriate and explicable given the approach adopted on Mr Tukaki's behalf at first instance. She says that in opposition to the application for a surrender order no reference of any kind was made to the provision. She says it was not contended that a referral to the Minister was required. The reference to s 48 was raised for the first time in Mr Tuck's written submissions filed for the surrender hearing. Furthermore, although reference was made to both sub-paragraphs (i) and (ii) of s 48(4)(a) no arguments were advanced to support the existence of exceptional or compelling circumstances justifying a referral to the Minister.

[75] Putting to one side the paucity of evidence to support the submission the claim that Mr Tukaki will receive different cultural treatment in Australia in the event of his extradition, it is not an "extraordinary" or "compelling" personal circumstance which would make it oppressive for him to be surrendered. I agree with Mrs Wrigley that these circumstances do not place him in an unusual or unique position. Māori comprise a significant proportion of the New Zealand population. Furthermore, any extraditee who is surrendered to a place which is not their native home will have to contend with cultural differences. That is a common consequence of extradition.

[76] Furthermore, it is difficult to see how it would be oppressive, from a cultural perspective, for Mr Tukaki to be returned to a country which he elected to live in for some years. Even incarceration in one's own country will necessarily have some impact or influence on the expression of cultural values. As Mrs Wrigley puts it, such an outcome is simply the unavoidable consequence of the proper operation of the criminal justice system.

[77] 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. Such an interpretation should not take priority over New Zealand's important bi-lateral

extradition obligations. This principle was recognised, albeit in the context of children's rights, by the Court of Appeal in *Radhi* when the Court observed:[35]

> "[34] … Extradition involves international obligations owed by a requested State to a requesting State. There is a high public interest in sending those suspected of having committed offences overseas back to the relevant jurisdiction to face trial. … Extradition involves an element of international reciprocity of considerable public interest to New Zealand. As Woolford J observed, extradition is concerned with 'international co-operation in the prosecution of crime and the removal of safe havens for those who are suspected of having committed criminal offences overseas.' Thus, while the international covenants in relation to children are relevant in an extradition case, it is necessary to bear in mind that the issue is not whether it is in the child's interest to be separated from his or her parents. The issue is whether a parent should be extradited, with a consequence being that the parent and child may be separated."
>
> [Footnotes omitted]

[78] Neither do I accept that the other personal circumstances relied upon by Mr Tukaki justify referral to the Minister. It is inevitable that Mr Tukaki, if extradited, will be separated from his whānau. However, the Judge made express reference to this issue when he observed that the absence of family or other support structures in Darwin carries little weight. He observed that no evidence had been presented to demonstrate why members of Mr Tukaki's family cannot either travel to Darwin or otherwise provide him with the resources he needs to support him while on remand awaiting trial.

[79] I agree with Judge Ingram that Mr Tukaki's family circumstances have no extraordinary quality about them. Neither are they compelling. Furthermore, Mr Tukaki has two children resident in Australia. Both must now be in their mid-teens. No explanation has been advanced as to why they would not be prepared or able to support their father.

[80] For these reasons I am satisfied that the Judge did not err in declining to refer the case to the Minister. As the Judge observed, Mr Tukaki faces serious charges of sexual misconduct and violence against females.

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35 *Radhi,* Court of Appeal Judgment, above n 21, at [34].

Conclusion

[81] For these reasons I am satisfied that each of the five questions of law should be answered in the negative. In terms of s 72(1)(a) or s 73(3) of the Act I am satisfied that Judge Ingram's determination should be confirmed.

Result

[82] The appeal and the application for judicial review are dismissed.

Moore J

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