IN THE COURT OF APPEAL OF NEW ZEALAND

CA716/2014
[2016] NZCA 83

BETWEEN	MARTIN JAMES MAILLEY Appellant
AND	DISTRICT COURT AT NORTH SHORE First Respondent
AND	NEW ZEALAND POLICE Second Respondent

Hearing:	3 February 2016
Court:	Randerson, Wild and Kós JJ
Counsel:	FMR Cooke QC for Appellant No appearance for First Respondent (abides the Court's decision) N E Walker and K E Hogan for Second Respondent
Judgment:	23 March 2016 at 3.30 pm

JUDGMENT OF THE COURT

A Leave is granted to the appellant and the second respondent to adduce fresh evidence.

B The appeal is dismissed.

C No order as to costs.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This is an extradition case with a tortuous history. This is the second time the case has been appealed to this Court. On this second appeal three main issues are raised:

(a) *Scope of remit*: What was the scope of this Court's remittal of the case to the District Court in its 2013 judgment following the hearing of the first appeal?[1] More specifically, did the District Court,[2] and subsequently the High Court,[3] correctly understand the task remitted?

(b) *Interpretation of s 48(4)(a)(ii) of the Extradition Act 1999 (the Act)*: Did the District Court, and subsequently the High Court, correctly interpret s 48(4)(a)(ii)?[4]

(c) *Relief*: If the answer to either issue (a) or (b) is 'No', what form of relief should this Court grant?

[2] As will become clear, issues (a) and (b) are closely related.

Fresh evidence

[3] By application filed on 17 December 2015, Mr Cooke QC applied under r 45 for leave to adduce fresh evidence in support of the appeal. This comprised second affidavits of Dr Graeme Whittaker and Dr Rui Mendel, both sworn or affirmed on 15 December 2015. Counsel for the second respondent objected to these. We accepted them provisionally. These affidavits essentially update the appellant's medical situation. We therefore grant the appellant leave to adduce this further evidence. During the hearing Ms Walker handed up an email from the office of the Director of Public Prosecutions in Queensland advising on the sentence Mr Mailley is likely to face if he is convicted there. We accepted it on the same basis as the

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1 *Mailley v District Court at North Shore* [2013] NZCA 266 [CA decision].
2 *Commonwealth of Australia v Mailley* DC North Shore CRI-2008-044-1978, 20 June 2014, a decision of Judge Pippa Sinclair. However, we will refer in this judgment simply to 'Judge Sinclair' [Decision of Judge Sinclair].
3 *Mailley v District Court at North Shore* [2014] NZHC 2816 [HC decision under appeal].
4 This section is set out in [29] below.

appellant's fresh evidence, and now make an order granting the second respondent leave to adduce this further document in evidence.

Background

Factual

[4] Mr Mailley is a New Zealand citizen. The Commonwealth of Australia is seeking to extradite Mr Mailley to Australia to face fraud charges in Queensland. The charges arise out of alleged offending between 1999 and 2002. In a judgment delivered in the North Shore District Court on 16 September 2009, Judge Hubble summarised the charges and the background to them as follows:[5]

> [1] Martin James Mailley holds a passport in that name. He also holds passports in the names of James Martin Caldwell, Martin James Craigie and Francis John Springall and has used other aliases, including James Houston. As he was born in New Zealand under the name of Martin James Mailley, I will continue to adopt that name. Mr Mailley is wanted by the Queensland Police for alleged fraudulent dealings involving more than $2 million. Police allege that, prior to his first arrest in Australia, he was in receipt of welfare but was living on fraudulently obtained credit cards. When first arrested he had numerous drivers licenses and more than 18 credit cards in 12 different identities. Charges in relation to possession of those cards and the use of them and numerous charges of breach of bail, remain unresolved in the Lower Court in Australia.
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> [2] On arrest, Mr Mailley, was also charged with eleven counts of breaching s 408(C)(1)(B) of the Queensland Criminal Code. These charges involved fraudulent dealings successfully carried out by Mr Mailley and his de facto partner, Sabrina Nutarelli, or attempts by them to carry out these dealings, which were interrupted at the time of his arrest.
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> [3] The charges carry a maximum 10-year sentence or 7-year sentence respectively.

[5] Ms Nutarelli pleaded guilty to her part in the fraudulent dealings and was convicted and sentenced to three years imprisonment. Her sentence was suspended after she had been in prison for six months.

[6] Although the Australian Police assert Mr Mailley also confessed to his involvement in the frauds, he did not plead guilty and was committed to the Beenleigh District Court in Queensland for trial. He was also charged with

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5 *New Zealand Police v Mailley* DC North Shore CRI-2000-063-544086, 16 September 2009 [Decision of Judge Hubble].

numerous breaches of bail, usually involving his changing address without notice or committing further fraud offences. Despite this, he was again granted bail, but again breached it. He was only located by the police after some months, as a result of his committing or attempting to commit further fraud offences. He was again released on bail to appear in court on 30 March 2005. When he did not appear a warrant was issued for his arrest.

[7] In the course of searching again for Mr Mailley, the Australian police discovered that "many hundreds of thousands of dollars" had been transferred from Australia to numerous New Zealand bank accounts in the name of Mr Mailley or members of his family.[6] The police correctly concluded that Mr Mailley had fled to New Zealand and sought his extradition.

Procedural

[8] Upon application under s 41 of the Act on 14 March 2008, Judge Morris endorsed the Australian arrest warrant to authorise its execution in New Zealand.[7]

[9] Mr Mailley was arrested on 2 July 2008. That same day the police applied to the District Court under s 45 of the Act for the Court to determine Mr Mailley's eligibility for surrender.

[10] Almost a year passed before that s 45 eligibility application came on for hearing in the District Court. Two days were allocated in early June 2009, but the hearing, which was before Judge Hubble, ran over four days and was not completed until early September 2009. We need not go into the events that occurred over that period: they are chronicled in Judge Hubble's judgment.[8] It is relevant that Mr Mailley was in custody for about half that period (until 17 December 2008), and then on bail.

[11] In a decision delivered on 16 September 2009, Judge Hubble reserved to Mr Mailley leave to apply under s 8 of the Act, which deals with discretionary

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6 Decision of Judge Hubble, above n 5, at [7].

7 Part 4 (ss 39–59) of the Extradition Act 1999 provides a special, comparatively streamlined, procedure for extradition from New Zealand to Australia.

8 At [15].

restrictions on a surrender.[9] Subject to the outcome of any such application, the Judge determined that Mr Mailley was eligible for surrender.

[12] A hearing of the s 8 issues foreshadowed by Mr Mailley was scheduled for March 2010.

[13] Very shortly before the scheduled hearing (two Australian police witnesses, required by Mr Mailley for cross-examination, had already flown to New Zealand for the hearing), Mr Mailley abandoned his s 8 application, advising he proposed to appeal Judge Hubble's decision under s 45 of the Act. The fixture for the s 8 application was then vacated and on 17 March 2010 Judge Hubble made final his determination of Mr Mailley's eligibility for deportation. A surrender order and a warrant for Mr Mailley's detention were then issued.

[14] Before the surrender order took effect,[10] Mr Mailley appealed to the High Court by way of case stated on two questions of law. Neither question is of any continuing relevance. The case stated was filed in the High Court in August 2010.

[15] In September 2010, Mr Mailley applied to the High Court for judicial review, raising essentially the same two issues the District Court had stated for decision of the High Court.

[16] In a judgment delivered on 12 April 2011, Ellis J answered the questions in the case stated adversely to Mr Mailley and dismissed his application for judicial review.[11]

[17] Mr Mailley appealed to this Court against the dismissal of his application for judicial review. That appeal was dealt with in a judgment of this Court delivered on 28 June 2013.[12] Relevant points in this judgment are:

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9 Section 8 is set out in [25] below.

10 Section 47(2) stipulates that the surrender order does not take effect for 15 days after the issue of the warrant of detention or after the final determination of any appeal if the outcome is that the appellant is eligible to be surrendered for extradition.

11 *Mailley v New Zealand Police* [2011] 3 NZLR 223 (HC).

12 CA decision, above n 1.

(a) It records that the Court had earlier, over the opposition of the New Zealand police, granted Mr Mailley leave to amend his grounds of appeal to include, as a new ground, "whether there has been an injustice in the lower Courts in not addressing the issues under s 8 and s 48(4) of the [Act]"?[13]

(b) As to the alleged failure of the lower Courts to address the s 8 issues, the Court held:

> [48] In our view, this ground of appeal is unsustainable. We are satisfied that a deliberate decision was made not to pursue the s 8 application and in those circumstances the failure of the lower courts to address s 8 is not reviewable.
> …

The Court went on to express the view that Mr Mailley's s 8 application would not, in any event, have succeeded.

(c) In dealing with the new ground of appeal of failure to address s 48(4)(a)(ii), this Court indicated "we consider Mr Mailley is on stronger ground".[14] The Court set out s 48(4) and summarised the evidence before it about Mr Mailley's mental and physical health. These are the critical paragraphs in the section of the judgment that followed:

> [57] Some but not all of this medical information was known to Mr Mailley's previous legal representatives but it is common ground that they did not ever specifically turn their minds to the application of s 48(4)(ii). Some of the material was also before the District Court but never addressed in the context of s 48(4). As already mentioned, Judge Hubble identified health as an issue for the s 8 application, but following *Wolf* that was clearly incorrect.[15] In the High Court, the mental health issues and the potential application of s 48(4) were not pleaded and therefore not addressed by Ellis J.
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> …

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13 At [29]. The leave judgment is *Mailley v District Court at North Shore* [2013] NZCA 6.
14 At [49].
15 *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) (footnote added).

> [63] In all the circumstances, we agree it would be unjust for Mr Mailley to be extradited without s 48(4)(a)(ii) being addressed when there are matters worthy of consideration and when the reason it has never been addressed before is not because of a deliberate decision but because it has been overlooked by both counsel and the Court.
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> …
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> **Result**
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> [70] The appeal is allowed and the decision of the High Court and the surrender order made in the District Court are quashed. We remit the proceeding back to the District Court, but solely for the purposes of considering whether the case should be referred to the Minister of Justice under s 48(4)(a)(ii) because of Mr Mailley's health. The finding of the District Court that Mr Mailley is eligible for surrender under s 45 is confirmed.

[18] The relevant formal order of the Court was:

> B The matter is remitted to the District Court to determine whether under s 48(4)(a)(ii) of the Extradition Act 1999 the case should be referred to the Minister of Justice for reasons relating to Mr Mailley's health. The decision of the District Court that the grounds for surrender otherwise exist is confirmed.

Issue (a): Did the Courts below err in their understanding of the scope of this Court's remit to the District Court?

[19] We see no ambiguity in this Court's remit of the case to the District Court. The Court's formal order B set out in [18] above required the District Court "to determine whether under s 48(4)(a)(ii) of [the Act] the case should be referred to the Minister of Justice for reasons relating to Mr Mailley's health".

[20] The new evidence this Court had received comprised medical reports about Mr Mailley's mental health problems, and about the fact that Mr Mailley suffered from heart disease. This Court's concern, explained in the paragraphs set out in [17](c) above, was that this evidence constituted matters worthy of consideration under s 48(4)(a)(ii) but, through oversight by counsel and the District Court, had never been considered.

[21] We agree with Mr Cooke QC's submission that the Court's concern was to preclude Mr Mailley from reopening, in the District Court, the s 8 matters he had

formally abandoned. What the Court said in [48] of its 2013 judgment, set out in [17](b) above, reinforces that this was the Court's concern in framing its remit to the District Court.

[22] This Court's remit did not, and could not, limit the scope of s 48(4)(a)(ii). The District Court was obliged to give that section its full effect when it reconsidered the case.

[23] The real — and important — issue on this appeal is the correct interpretation of s 48(4)(a)(ii), to which we now turn.

Issue (b): Did the Courts below err in their interpretation of s 48(4)(a)(ii) of the Act?

The scheme of the Act

[24] Part 1 contains preliminary provisions. After general (s 2) and specific (ss 3 to 5) interpretation sections, s 6 deals with the application of the Act.

[25] Next, under the heading "*Restrictions on surrender"*, s 7 sets out mandatory restrictions on surrender and s 8 sets out discretionary restrictions. It is agreed there are no mandatory restrictions here. Section 8 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
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> (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
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> (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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> (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 next relevant provision is s 12, which makes up pt 2 of the Act. Section 12 provides:

> **12 Object of this Act**
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> The object of this Act is to provide for the surrender of an accused or convicted person from New Zealand to an extradition country or from an extradition country to New Zealand, and in particular—
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> (a) to enable New Zealand to carry out its obligations under extradition treaties; and
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> (b) to provide a means for New Zealand to give effect to requests for extradition from Commonwealth countries; and
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> (c) to provide a means for New Zealand to give effect to requests for extradition from non-Commonwealth countries with which New Zealand does not have an extradition treaty; and
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> (d) to provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia and certain other countries; and
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> (e) to facilitate the making of requests for the extradition of persons to New Zealand.

[27] Part 3 of the Act does not apply here[16] save for s 30, to which we revert in [32] below.

[28] Turning to pt 4, we need say nothing further about ss 41 to 47, which detail the procedure to be followed through to the issue of a warrant for detention of the person to be extradited. That procedure has been followed here. As explained in [14] above, Mr Mailley's appeals to the High Court prevented the order for his surrender for extradition taking effect.

[29] The relevant part of s 48 provides:

> **48 Referral of case to Minister in certain circumstances**
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> …
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> (4) If—
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> (a) it appears to the court in any proceedings under section 45 that—

[16] Part 3 deals with extradition to certain treaty countries, of which Australia is not one.

(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).

(5) If the court refers the case to the Minister under subsection … (4), the court must send to the Minister a copy of the warrant of detention together with a copy of all other documents before the court in the case, and such report on the case as the court thinks fit.

[30] Section 49 then prescribes the Minister's task:

49 Minister must determine if person to be surrendered if case referred

(1) If a case is referred to the Minister under section 48(1)(a) … the Minister must determine in accordance with the grounds set out in subsections (2) to (4) of section 30 whether the person is to be surrendered, as if the case had been referred to the Minister under section 26.

(2) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

[31] As to s 26, we need only note that the Court, having determined that the person is eligible for surrender, is required by s 26(1)(c) to send the Minister a copy of the warrant of detention plus a copy of everything the Court had when it made the determination and any report to the Minister it thinks fit. So the Minister is notified of the case in that routine way.

[32] Section 30, part of which is referred to in s 49(1), provides:

30 Minister must determine whether person to be surrendered

…

(3) The Minister may determine that the person is not to be surrendered if—

…

(b) it appears to the Minister that a discretionary restriction on the surrender of the person applies under section 8; or

(c) the person is a New Zealand citizen and—

(i) if there is a treaty in force between New Zealand and the extradition country, it does not preclude the surrender of New Zealand citizens;

…

but the Minister is satisfied that, having regard to the circumstances of the case, it would not be in the interests of justice to surrender the person; or

(d) without limiting section 32(4)[17], it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person; or

(e) for any other reason the Minister considers that the person should not be surrendered.

…

The District Court's approach

[33] Judge Sinclair held the case should not be referred to the Minister under s 48(4)(a)(ii).

[34] Although Mr Cooke may not agree with Judge Sinclair's assessment of Mr Mailley's mental and physical health, the Judge did consider these matters.[18] Rather, the complaint is that Judge Sinclair erred in her interpretation of s 48(4)(a)(ii), in particular in deciding that she could not consider, under s 48(4)(a)(ii), certain other matters counsel had urged on her. We summarise these matters and the Judge's reasoning.

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17 Section 32(4) would make s 30(3)(c) applicable here even if Mr Mailley was also an Australian citizen.

18 Decision of Judge Sinclair, above n 2.

[35] The first was the seriousness and age of Mr Mailley's alleged offending. These are two of the discretionary restrictions listed in s 8. Had she been considering referral to the Minister under s 48(4)(a)(i), the Judge held she could have considered any of the s 8 discretionary considerations listed relevant to the case. But the Court's consideration was only under s 48(4)(a)(ii), to which the s 8 considerations were irrelevant. Further, unlike s 8, which refers to "all the circumstances of the case", s 48(4)(a)(ii) lacks a catch-all provision. This reinforces that "the circumstances of the case" — as opposed to "circumstances of the person" — are not to be taken into account under s 48(4)(a)(ii).[19]

[36] The second matter was the time Mr Mailley had spent in custody and subsequently on restrictive bail conditions since being arrested in New Zealand. The Judge found this did come within the words "circumstances of the person" in s 48(4)(a)(ii). However, it was not a "compelling or extraordinary" circumstance. Rather, it was a necessary consequence of the extradition proceeding (because the Court may not remand at large a person arrested on an extradition warrant: s 44(2)(b). It resulted also from Mr Mailley's own choices and actions.[20]

[37] The third matter was the impact of extradition on Ms Nutarelli and the couple's daughter. This could not be taken into account under s 48(4)(a)(ii), because it was not a circumstance personal to Mr Mailley. Rather, it was a circumstance of the case.[21]

Judgment of the High Court

[38] Keane J endorsed Judge Sinclair's interpretative approach to s 48(4)(a), essentially agreeing that (i) and (ii) are discrete grounds.[22] He pointed out that the specific grounds in s 30(3)(b) and (d) on which the Minister may decline surrender are identical to those under which the Court may refer the issue of surrender to the Minister under s 48(4)(a)(i) and (ii) respectively. The third ground, in s 30(3)(e),

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19 At [76]–[87].
20 At [88]–[92].
21 At [93]–[97].
22 HC decision under appeal, above n 3.

conferring a general residual discretion on the Minister, has no counterpart in s 48(4). The Judge commented "[t]hat is significant in itself".[23] He explained:

> [79] The residual discretion confirms that each of the preceding prescribed grounds is discrete. It also confirms that, even where the Court must under Part 4 decide surrender, once it refers that issue to the Minister on the ground that it would be unjust or oppressive to extradite, the Minister retains a larger discretion. The Minister may decline surrender for reasons, which do not fit within the specified grounds, and may not meet the exacting tests they impose.

[39] Keane J then dealt with the words "unjust or oppressive" in s 48(4)(a)(ii). He was "unconvinced that the English cases are useful analogies".[24] He referred to this Court's judgment in *Wolf v Federal Republic of Germany*.[25] *Wolf* was a pt 3 extradition case, in which this Court held the phrase "all the circumstances of the case" in s 8(1) necessarily excluded the personal circumstances of the person sought to be extradited. Only circumstances related to the three discretionary restrictions listed in s 8 could be considered. Keane J continued:

> [89] In that, the Court also necessarily confined the extent to which the Minister under s 30(3)(b) could hold surrender to be unjust or oppressive. Analogously, it confined equally the ground on which the Court could under s 48(4)(a)(i), refer a case to the Minister. Under Part 3 personal circumstances are reserved to the Minister under s 30(3)(d), when deciding surrender. Under Part 4, by contrast, personal circumstances have first to be assessed by the Court when deciding whether to refer surrender to the Minister under s 48(4)(a)(ii). The words are identical. In this case the Court of Appeal clearly appreciated that to be so in the remit it made.
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> (footnote omitted)

[40] Next, Keane J considered whether Judge Sinclair had correctly applied the remit this Court had directed to her. By analogy with the approach taken by the Supreme Court in *Ye v Minister of Immigration* to s 47(3) of the Immigration Act 1987, the Judge held s 48(4)(a)(ii) requires the court first to find qualifying compelling or extraordinary circumstances, and only then to consider whether it would be unjust or oppressive to surrender the person — the latter a discrete second conclusion not dictated by the first.[26] That, in the Judge's view, accorded with the

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23 At [78].
24 At [85].
25 *Wolf v Federal Republic of Germany*, above n 15.
26 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34]. We address this point at [51] below.

analysis of s 8(1), and thus of s 48(4)(a)(i), undertaken by this Court in *Wolf*. It confirmed that s 48(4) sets out two distinct bases on which the court may conclude that surrender is unjust or oppressive, the first founded on "all the circumstances of the case", the second on "the circumstances of the person". Each of those categories is "very comprehensive, though within a range of specified categories and to a specified standard".[27]

[41] Under the heading "Compelling or extraordinary circumstances — discrete or cumulative?" Keane J, after again referring to *Ye,*[28] stated:[29]

> … the Supreme Court appears to me to have endorsed an assessment that allows for all circumstances contended to be relevant to be assessed both discretely and cumulatively. A circumstance may be 'extraordinary or compelling' in isolation or it may not. But, even to assess an individual circumstance, any naturally interrelated circumstance must also be relevant. Otherwise the analysis would be artificial. In the end, therefore, the issue whether there are 'circumstances', which are 'extraordinary or compelling' calls, I consider, for a cumulative assessment.

[42] Keane J then analysed Judge Sinclair's approach. He noted that, although she had found Mr Mailley's health problems were not extraordinary or unusual, she went on to assess whether, if those problems were extraordinary or unusual, it would be unjust or oppressive to extradite him, taking into account the four countervailing factors on which Mr Mailley relied, though they were beyond the scope of the remit.

[43] But, she had distinguished those factors personal to Mr Mailley (the time he had spent on remand and the impact on him of being separated from his wife and child) from those not personal and thus beyond the scope of the remit. She assessed those two factors individually without considering whether, if combined with Mr Mailley's risk of suicide set against his physical and mental health problems, they would constitute extraordinary or compelling circumstances rendering surrender unjust or oppressive. Keane J accepted the Judge's approach would have "amounted to an error of principle" were it not for the limited remit.[30] In the light of this Court's remit, however, the Judge dismissed Mr Mailley's application for judicial review.

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27 HC decision under appeal, above n 3, at [97].
28 *Ye v Minister of Immigration*, above n 26, particularly at [36] and [38].
29 HC decision under appeal, above n 3, at [102].
30 At [116].

The arguments on appeal and our view

Interpretation of s 48(4)(a)(ii)

[44] For two reasons we consider the first part of s 48(4)(a)(ii) restricts the Court's consideration to "circumstances of the person". First, those are the words the provision uses. Secondly, s 48(4)(a)(ii) is an alternative to s 48(4)(a)(i). It is one "or" the other.[31] Section 48(4)(a)(i) is the provision allowing the court to consider the circumstances of the case. It imports the mandatory restrictions on surrender in s 7 and the discretionary ones in s 8. All those restrictions are "circumstances of the case" not of the person. For example, if a person faced a trivial charge resulting from offending allegedly committed back in the 1970s, and it appeared the charge was being pressed maliciously, that would be at the obvious end of the spectrum of cases the court might refer to the Minister under s 48(4)(a)(i). None of those three considerations says anything about the alleged offender.

[45] A court making a decision under s 48(4) has a "gatekeeper" or screening role. It is checking either that any of the restrictions mentioned in s 48(4)(a)(i) apply or that the s 48(4)(a)(ii) threshold is met. If either applies, the court has a discretion to refer the case to the Minister. As Keane J pointed out, it is the Minister who, under s 30, has the power to determine that the person is not to be surrendered for extradition. That power includes the wide residual discretion contained in s 30(3)(e) — "… for any other reason …". The structure of the Act restricts the court to a gatekeeping role that should not be widened under the guise of "context", so as to usurp the Minister's power.

[46] The approach just outlined accords with the decision in *Wolf v Federal Republic of Germany*.[32] Three points made in *Wolf* bear repetition. First, the Court observed that s 30(3)(d) would be unnecessary if s 8 covered personal circumstances.[33] Section 30(3) sets out reasons for which the Minister may determine a person is not to be surrendered. Section 8 is referred to in s 30(3)(b),

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31 Although it could be both, in a case not restricted to just one of the two parts of s 48(4)(a).
32 *Wolf v Federal Republic of Germany*, above n 15.
33 At [49].

and s 30(3)(d) refers separately to compelling or extraordinary circumstances of the person including those relating to age and health — equivalent to s 48(4)(a)(ii).

[47] Further, we agree with Ms Walker's submission that the words "Because of …" at the start of s 48(4)(a)(ii) reinforce the conclusion that s 48(4)(a)(ii) limits the Court to considering whether surrender would be unjust or oppressive by reason of compelling or extraordinary circumstances of the person.

[48] Second, the Court considered the drafting history of s 8. Originally it had included a reference to circumstances of the person such as age and health, but that was removed prior to enactment.[34] It was clearly intended that circumstances of the person would be considered separately from the matters in s 8.

[49] Third, the Court noted that the phrase "of the case" is used twice within s 8: once in relation to "the trivial nature of the case" and again "having regard to all the circumstances of the case". It held the words must mean the same thing in both iterations.[35] The phrase "the trivial nature of the case" indicates "the case" means the extradition offences in question.

[50] Counsel agree the "circumstances of the person" here are Mr Mailley's age, the state of his mental and physical health and his family situation. Mr Cooke argued that the latter part of s 48(4)(a)(ii) ("… it would be unjust or oppressive to surrender the person …") requires Mr Mailley's personal circumstances to be considered in their context, which includes all the circumstances of his case. We do not accept that. We consider the context is limited to matters forming part of Mr Mailley's personal circumstances. That is, matters that give necessary colour or perspective to those personal circumstances.

[51] We comment also that we would prefer to avoid the "three ingredients" terminology Keane J adopted to considering s 48(4)(a)(ii).[36] It will usually not be possible to determine whether a circumstance is "compelling or extraordinary" in isolation from the consideration whether that circumstance would make extradition

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34 At [50]–[53].
35 At [57].
36 HC decision under appeal, above n 3, at [96].

"unjust or oppressive". There may be compelling or extraordinary circumstances of the person but they may not be such as to render it unjust or oppressive to surrender the person. For example, there may be a compelling medical condition but the availability of treatment in the country seeking extradition may mean that it would not be unjust or oppressive to surrender the person.

[52] To reinforce his argument, Mr Cooke cited a number of English cases, notably *Hutton v The Government of Australia* and *Re: Davies*.[37] He relied on these cases as supporting his interpretative approach to s 48(4)(a)(ii). We do not intend referring to any of these cases. We accept Ms Walker's submission that the English cases are readily distinguishable and are of little assistance.

[53] First, one of the cases Mr Cooke referred to was decided under the Extradition Act 1989 (UK)[38] and others under the Extradition Act 2003 (UK).[39] Both those Acts are framed differently from the New Zealand Extradition Act 1999. For example, the 2003 Act is designed to give effect to extradition arrangements between members of the European Union, and it classifies countries outside the Union as either countries where it is a requirement to demonstrate there is a prima facie case against the person sought and those where it is not.[40] The legislative scheme thus differs significantly from that in the New Zealand Act.

[54] Secondly, unlike New Zealand, under the two successive English Extradition Acts, it is the court rather than a Minister who had or has the power to order that a person not be surrendered for extradition.[41] In discharging that decision-making role, the English courts adopt the proportionality approach now established in English administrative law, particularly where human rights are involved.[42] The

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37 *Hutton v The Government of Australia* [2009] EWHC 564 (Admin); *Re: Davies* [1998] COD 1.83 (30 July 1997) (QB, Crown Office List).

38 *Re: Davies*, above n 37.

39 Including *Hutton v The Government of Australia*, above n 37; *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338; *Government of the United States of America v Shlesinger* [2013] EWHC 2671 (Admin); *Sburatoru v Giurgui Court in Romania* [2014] EWHC 2333 (Admin); and *Udvardy v Lencse* [2014] EWHC 3214 (Admin).

40 As explained in *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 at [18].

41 Extradition Act 1989 (UK), ss 6(9)(c), 11(3) and 12; Extradition Act 2003 (UK), ss 11–25;

42 *Norris v Government of the United States of America* [2010] UKSC 9, [2010] 2 AC 487 at [30], [32] and [52]–[56]; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 at [33]; *H(H) v Deputy Prosecutor of the Italian Republic*, above n 39.

proportionality approach is mandated in some cases by art 8 of the European Convention on Human Rights, which has been incorporated into English domestic law as schedule 1 to the Human Rights Act 1998 (UK).[43] In the extradition context, the court considers whether extraditing the person in question is a proportionate response to the interests of justice in the United Kingdom extraditing alleged offenders. Lord Phillips gave an hypothetical example of this sort of reasoning in *Norris v Government of the United States of America*: where "extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member", the effect on the family member would make extradition disproportionate.[44]

[55] That is a distinctly different approach to the gatekeeping function of the courts in New Zealand, described in [45] above. Further, there is little or no room for the proportionality approach given our interpretation of s 48(4)(a)(ii), particularly the high threshold established by the words "… compelling or extraordinary circumstances of the person" and the restricted scope of the matters coming within s 48(4)(a)(ii).

Error in not referring the case to the Minister?

[56] We turn now to consider whether the High Court erred in upholding the District Court's decision not to refer Mr Mailley's case to the Minister, pursuant to s 48(4)(a)(ii).

[57] It remains common ground that the threshold under s 48(4)(a)(ii) is high. We say "remains" common ground, because it was common ground the first time this case was appealed to this Court. This Court observed:[45]

> [62] It was common ground that in order to qualify as extraordinary circumstances, the circumstances must be out of the ordinary, unusual, uncommon or striking, while "compelling" denoted "very persuasive" or "very strong" …

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43 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

44 *Norris v Government of the United States of America*, above n 42, at [65].

45 CA decision, above n 1.

[58] Nor was issue taken with Judge Sinclair's definition of "unjust" as "not just, contrary to justice or fairness" and "oppressive" as "oppressing, harsh or cruel".[46]

[59] If this Court considers Mr Mailley's case should be referred to the Minister under s 48(4)(a)(ii), then Mr Cooke invited us to do that, rather than remitting it to the District Court with a direction to reconsider whether to refer.

[60] When considering referral, Mr Cooke invited us to consider a range of factors. First were six factors Mr Cooke submitted were "circumstances of the person", as those words are used in the first part of s 48(4)(a)(ii).

[61] We can group the first of these three factors together: mental health; suicide risk; and physical health. Mr Mailley suffers from bipolar affective disorder consequent upon a brain injury sustained when he was 15 years old. He has a significant personality disorder. The fresh evidence we have received adds, to the mental health picture, that Mr Mailley has been diagnosed as having mild cognitive impairment and possible depression, both possible consequences of the obstructive sleep apnoea he suffers from, which causes chronic tiredness.

[62] Judge Sinclair preferred, over the evidence of Dr Mendel and Dr Fraser, the opinion of Professor Mellsop that the likelihood of Mr Mailley attempting or committing suicide if extradited or imprisoned is not high. The Judge noted that only one of Mr Mailley's two reliably-documented suicide attempts was triggered by the extradition proceeding. Further, she noted there was no evidence Mr Mailley had attempted suicide while imprisoned in Australia and then later in New Zealand, or around the time of the first appeal to this Court, nor the remittal back to the District Court.[47]

[63] In terms of physical health, the fresh evidence we have received is that Mr Mailley was diagnosed in August 2015 as having a tumour on his neck, suspected of being a secondary cancer spread from an unknown primary site. Mr Mailley did not attend at Auckland Hospital for the surgery that had been arranged to remove

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46 Decision of Judge Sinclair, above n 2, at [72].
47 Decision of Judge Sinclair, above n 2, at [49]–[53].

this. His doctor, Dr Whittaker, suspects that Mr Mailley may have "given up" trying to maintain his health. Mr Mailley also continues to have significant back pain.

[64] In our assessment, unfortunate though these health problems and consequent suicide risk are, they are not out of the ordinary. Further, there is no suggestion that the Australian authorities are not capable of dealing with these problems and the associated suicide risk.

[65] The fourth factor is Mr Mailley's family situation. He is now 64. He lives in Auckland with his wife and their 13 year old daughter. Both his wife and daughter are Australian citizens. Mr Cooke submitted that the available evidence, which comes from Dr Whittaker, is that extradition will break up the family unit. However, neither Mr Mailley nor his wife has filed an affidavit confirming this. In particular, Mr Mailley's wife has not deposed she will remain in New Zealand if Mr Mailley is extradited. As she and the couple's daughter are Australian citizens, they are able to return to Australia and live there permanently.

[66] The final two "circumstances of the person" are the social and medical support networks Mr Mailley has in New Zealand. As to the first, Mr Cooke referred particularly to the support Mr Mailley has from his close friend Mr Lyttleton, who was in Court for the hearing of this appeal. We attach no weight to this point. Turning to Mr Mailley's medical support network in New Zealand, this includes Dr Mendel, the psychiatrist who treated him from 2008 to 2010 and has again been treating him since July 2015, and Dr Whittaker, who has been his doctor since December 2005. Without in any way detracting from the medical support these two doctors are providing to Mr Mailley, we reiterate the point that there is no suggestion that the Australian authorities cannot provide Mr Mailley with appropriate medical assistance. Mr Cooke accepted this.

[67] Mr Cooke then advanced several factors as relevant to whether "it would be unjust or oppressive to surrender" Mr Mailley in terms of the second part of s 48(4)(a)(ii). They are:

(a) the nature and seriousness of the alleged offending;

(b) the time lapse since the alleged offending;

(c) periods spent in custody or on bail; and

(d) the interests of justice generally.

[68] None of these is a "circumstance of the person" and the Courts below rightly excluded these factors from consideration under s 48(4)(a)(ii). Nevertheless, we comment briefly on these factors: First, the nature and seriousness of the alleged offending. We accept Mr Cooke's categorisation of the offending as "moderately serious". While Mr Mailley is alleged to have obtained approximately AUD 2 million fraudulently, the total amount of restitution sought by three of the banks involved is only AUD 73,223. We do not know the reason for this very substantial disparity. Judge Sinclair noted that the most serious of the charges Mr Mailley faces carry a maximum penalty of 10 years imprisonment.[48]

[69] Secondly, the time lapse since the alleged offending. Mr Mailley committed the alleged offences between 1999 and 2002. However, we are firmly of the view that Mr Mailley cannot take advantage of the lapse of time. But for his own actions in breaching his bail in Queensland and fleeing to this country using a false passport, Mr Mailley would have been tried in Australia in or about 2005. Our view on this factor accords with that expressed by this Court in *Wolf v Federal Republic of Germany*.[49]

[70] Thirdly, periods spent in custody or on bail. Mr Mailley was remanded in custody in Queensland from May 2003 until April 2004, and was then again remanded in custody following his arrest in New Zealand on 2 July 2008 until he was granted bail on 17 December 2008. We do not consider these periods mean that the interests of justice have been met. The fact remains that Mr Mailley has not been tried for moderately serious alleged fraud. The periods he has spent on remand will be relevant if and when he is sentenced; they are not relevant to whether he should face trial.

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48 Decision of Judge Sinclair, above n 2, at [3].

49 *Wolf v Federal Republic of Germany*, above n 15, at [33]–[36].

[71] Fourthly, the interests of justice generally. We consider the interests of justice will be served by extraditing Mr Mailley to Australia to face trial there. We endorse the following passage in the judgment of Woolford J in *Radhi v District Court at Manukau* about extradition, in particular as distinguished from deportation in the immigration context.[50]

> … The [UK] Supreme Court [in *H(H) v Deputy Prosecutor of the Italian Republic*] emphasised the "imperative" nature of extradition. Unlike deportation, where the rights of children and the right to family life are also routinely considered, extradition is an obligation owed by the requested state to the requesting state in return for a similar obligation owed the other way round, where there is a public interest in the extradition of those suspected of having committed offences overseas. It is concerned with international cooperation in the prosecution of crime and the removal of safe havens for those who are suspected of having committed criminal offences overseas. These considerations are absent from the immigration context where domestic policy decisions relating to the control of people unlawfully in the country are made.
>
> (footnotes omitted)

The "imperative" nature of extradition is underlined by s 12, the object section of the Act, set out in [26] above.

[72] Whether assessed separately or collectively, we share the view of both the District Court and the High Court that the "circumstances of the person" set out in [60] to [66] above do not meet the high s 48(4)(a)(ii) threshold for referral to the Minister. Essentially, we do not consider his personal circumstances either "compelling" or "extraordinary".

[73] We reiterate our view that the factors set out in [67] above have no relevance to the s 48(4)(a)(ii) assessment. But, even if we are wrong on that, they would not alter our assessment. We say that for the reasons explained in [68] to [71] above.

Issue (c): If the answer to either issue (a) or (b) is "No", what form of relief should this Court grant?

[74] In the light of our conclusions on the other two issues above, we do not need to consider this question.

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[50] *Radhi v The District Court at Manukau* [2015] NZHC 3347 at [37].

Result

[75] The appeal is dismissed.

[76] As Mr Mailley is legally aided, there will be no order as to costs.

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