IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2016-485-843
[2017] NZHC 2109

UNDER	the Extradition Act 1999, the New Zealand Bill of Rights Act 1990, the Judicature Amendment Act 1972, the common law, and the International Covenant on Civil and Political Rights, and the United Nations Convention against Torture
IN THE MATTER OF	a request for extradition to China, and a decision to extradite the applicant, breaches of the New Zealand Bill of Rights Act 1990, and International Law remedies of Public Law compensation, declarations and orders in the nature of Prohibition Certiorari and Mandamus
BETWEEN	KYUNG YUP KIM Applicant
AND	THE MINISTER OF JUSTICE First Respondent
	THE ATTORNEY-GENERAL Second Respondent

Hearing:	3 and 4 April 2017 (further submissions received 6 and 27 April 2017 and 5 May 2017)
Appearances:	T Ellis and G Edgeler for the Applicant A Powell, A Todd and G Taylor for the First and Second Respondents
Judgment:	31 August 2017

JUDGMENT OF MALLON J

Table of contents

Introduction

[1] The Minister of Justice determined that Mr Kim is to be surrendered to the People's Republic of China to face a charge of intentional homicide (the Minister's Decision). Mr Kim seeks judicial review of the Minister's decision.

[2] This is the second time the Minister has determined to surrender Mr Kim to China. Mr Kim successfully applied for judicial review of the first decision (the Minister's first decision). In making her first decision the Minister had relied on assurances obtained from China that Mr Kim's fundamental rights would be protected if he was surrendered. On judicial review, the Minister was directed to reconsider her first decision in light of three matters (the first judicial review):[1]

(a) the effectiveness of assurances obtained from China given New Zealand's apparent inability under those assurances to disclose information about Mr Kim's treatment to third parties;

(b) whether the assurances would sufficiently protect Mr Kim from ill-treatment and his right to silence during pre-trial interrogations, given that the assurances do not provide for his lawyer to be present during these interrogations, and that China's apparently conflicting criminal procedure laws may compel Mr Kim to answer questions during these interrogations; and

(c) the extent to which the monitoring arrangements will be proactively undertaken.

[3] Following the first judicial review the Minister reconsidered her decision in light of further information she obtained and submissions made on behalf of Mr Kim. She was confident Mr Kim's treatment would be proactively monitored and satisfied that New Zealand would be able to disclose information about Mr Kim's treatment to third parties in appropriate circumstances. She considered Mr Kim's rights would be sufficiently protected despite the absence of a lawyer during pre-trial

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1 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 [*first judicial review*].

interrogations and was satisfied Mr Kim could refuse to answer questions during pre-trial interrogations. She concluded that none of the mandatory restrictions on surrender applied and surrender was appropriate having regard to the relevant discretionary grounds.

[4] Mr Kim challenges the Minister's Decision on a number of grounds. A number of these reassert grounds which were rejected in the first judicial review although some additional points are made. The main new grounds concern:

(a) the draft General Comment of the United Nations Committee against Torture (draft General Comment), which was released after the Minister's Decision, on the basis she was functus officio;[2]

(b) public statements made by the President of the Supreme People's Court about judicial independence and the separation of powers;

(c) comments made by a Chinese official after the first judicial review as reported in New Zealand media; and

(d) the effect on Mr Kim and his family of his lengthy detention.

[5] Overall Mr Kim contends the Minister was wrong to rely on China's assurances because they do not promote its compliance with international treaties, they seek to provide protection for Mr Kim that is not available to others in the Chinese criminal justice system, and in any event China cannot be relied on to adhere to the assurances. The matters advanced on Mr Kim's behalf are raised as errors of law, a failure to consider relevant considerations or taking into account irrelevant considerations, a failure to give adequate reasons and making an unreasonable decision.

The background

[6] The background is described in detail in my earlier judgments.[3] In summary, Mr Kim is a New Zealand resident of Korean ethnicity. He has lived in New

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2 *General Comment No 1 (2017) on the implementation of Article 3 of the Convention in the context of Article 22* Committee against Torture 60th session CAT/C/60/R.2 2 February 2017.

Zealand, with his family, for many years. In 2009 he lived in Shanghai for around four months. He is accused by Chinese authorities of killing a young woman during this time. Mr Kim had left China by the time the woman's body was discovered. Following his return to New Zealand China sought his extradition. He denies killing the woman and has never been interviewed about the matter by Chinese authorities.

[7] The Minister decided China's request should be dealt with under the Extradition Act 1999. This meant the standard procedure under that Act applied.[4] The final stage of this process requires a decision by the Minister on whether to surrender the person. The Act contains both mandatory and discretionary grounds for declining surrender.[5] On 30 November 2015 the Minister determined Mr Kim was to be surrendered to China.

[8] Mr Kim applied to the Court for discharge of the extradition proceedings on the basis that the process had taken far too long. That application was unsuccessful.[6] An alternative application for bail was, however, successful.[7] By that time Mr Kim had been detained in prison in New Zealand for over five years.

[9] The first judicial review application was made in the context of China not having committed to the International Covenant on Civil and Political Rights (the ICCPR) and the United Nations Convention against Torture (the Convention) to the extent New Zealand has,[8] and adverse international commentary on China's human rights record. Mr Kim contended the Minister's first decision had not fully understood the realities of China's legal system in which pre-trial torture was

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3 *Kim (first judicial decision)* above n 1; *Kim v Minister of Justice* [2016] NZHC 1491 [*discharge decision*]; and *Kim v Attorney-General* [2016] NZHC 2235 [*bail decision*]. The discharge decision contains the most comprehensive account of the background.

4 New Zealand does not have a bilateral extradition treaty with China. This meant the extradition request must be made to the Minister. The Minister then decides whether the request should be dealt with under the Extradition Act. If she does so, the standard procedure under that Act applies. See *Kim (discharge decision)* above n 3 at [17]-[37] for more details.

5 Extradition Act, ss 7, 8 and 30.

6 *Kim (discharge decision)* above n 3.

7 *Kim (bail decision)* above n 3.

8 New Zealand has signed and ratified the ICCPR and the Convention, the first and second Optional Protocols to the ICCPR, and the Optional Protocol to the Convention. China has signed the ICCPR but not ratified it. It has not signed or ratified either the first or second Optional Protocol. It has signed and ratified the Convention but it has not agreed to arts 20 and 22 and has not signed or ratified the Optional Protocol.

endemic, a fair trial was not possible and China's assurances about his treatment and that he would not be subject to death penalty could not be relied upon.

[10] I held that the Minister must exercise her discretion whether to order surrender consistently with New Zealand's international obligations and the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). The information about China was such that surrender could be ordered only if China's assurances about Mr Kim's treatment, his fair trial rights and the death penalty, were adequate and likely to be effective. In the three respects identified above[9] I was not satisfied the Minister had explained why the assurances were adequate and likely to be effective. The Minister was directed to reconsider her decision in light of these matters.

[11] The Minister filed an affidavit setting out the steps she undertook following that judgment. She sought additional information and advice from officials, and invited and received further submissions from Mr Kim. She received briefings from Ministry of Justice officials on 31 August 2016[10] and 19 September 2016.[11] The two briefings supplemented the information before the Minister when she made her first decision. She was also provided with the substantial briefing paper of 23 November 2015 and the other associated material that she had previously seen. In light of this information the Minister was advised to consider afresh whether to surrender Mr Kim.

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9 At [2] above.

10 The 31 August 2016 briefing addressed the particular matters I had directed the Minister to consider.

11 The 19 September 2016 briefing provided further advice and information about some particular matters, namely that China had now, at New Zealand's request, agreed to provide New Zealand diplomatic or consular representatives with access to full and unedited recordings of all pre-trial interrogations of Mr Kim during the investigation phase within 48 hours of each interrogation having taken place. The Minster received a letter from the Minister of Foreign Affairs, Hon Murray McCully on 16 September 2016 advising that he instructed his officials to request visits to Mr Kim as frequently as the Minister considered necessary to ensure Mr Kim's well-being during the investigation phase, and that there would be dedicated resources to guarantee that visits of the necessary frequency can take place. The two briefings also addressed a) further submissions made on behalf of Mr Kim; b) new information about China's justice system that post-dated the Minister's previous decision; c) letters exchanged between the Minister and Mr McCully; d) advice from the Ministry of Foreign Affairs and Trade (MFAT); e) advice from Professor Fu Hualing (an expert in Chinese criminal law); and f) a range of associated materials.

[12] On 19 September 2016, the day before Mr Kim's bail application was to be heard, the Minister again determined to surrender Mr Kim to China. She explained her reasons in a letter to Mr Kim dated 3 October 2016 (the Minister's Reasons). On the same day the Minister also advised the Minister of Foreign Affairs, Mr McCully, that officials should visit Mr Kim during the Chinese investigation phase at least once every 48 hours and no less than once every 15 days from then until the trial.

Approach to judicial review

[13] In my first judicial review judgment I said:[12]

> I am mindful of these difficulties and in particular that the question for me is whether the Minister's power has been lawfully exercised. However fundamental human rights, involving potential risks to Mr Kim's life and liberty, are at stake. It is an area where the court is required, in its supervisory jurisdiction, to closely scrutinise the Minister's exercise of the power. That is not to say there should be no deference accorded to matters requiring the Minister's judgment. Heighted scrutiny is not a merits review. While it is difficult to define with precision what heightened scrutiny entails, in the present context I consider it requires the court to ensure the decision has been reached on sufficient evidence and has been fully justified, while recognising that Parliament has entrusted the Minister (not the courts) to undertake adequate enquiries and to exercise her judgment on whether surrender should be ordered.[13]

[14] Counsel for Mr Kim does not take issue with that approach. He simply emphasises the now well established need for heightened scrutiny where human rights are at stake.

[15] The respondents submit this approach was broadly correct. The "broadly" qualifier is for two reasons. First, they submit that, in considering the adequacy of the information before the Minister, the Court must be alert to the risk of collapsing the relevant/irrelevant considerations ground of review. Secondly, the respondents submit that heightened scrutiny also involves a lower, less-deferential,

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12 *Kim (judicial review decision)* above n 1 at [7].

13 In taking this approach, I have relied upon the discussion of the intensity of review in Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013), especially at [11-086] to [11-102] and [11-127]. See, also, *R v Secretary of State for the Home Department Ex p. Launder* [1977] 1 WLR 839 at 979 and 982. This case involved an extradition request by the Hong Kong government, in respect of a British national, at a time when Hong Kong's sovereignty was being transferred from the United Kingdom to China. The Court acknowledged that it was a case where "anxious scrutiny" was required but also considered that deference was required when there was room for two different views about whether China would preserve the existing criminal justice system in Hong Kong.

reasonableness threshold. Rather than a "so unreasonable that no reasonable authority could ever have come to it" threshold,[14] the test was whether the decision was open to a reasonable decision maker.[15]

[16] On the first point, I accept that heightened scrutiny might be seen to involve a blurring of the traditional approach to relevant and irrelevant considerations.[16] For example, reviewing the sufficiency of the information before the Minister might be seen as requiring the Minister to consider matters that the Extradition Act does not expressly or impliedly require her to consider. An alternative view is that the important issues at stake in a heightened scrutiny context necessarily broadens the relevant considerations impliedly required by the Act. It is proper to hold the decision maker to more exacting standards of informed decision making in this context.

[17] Further, what is said to be a "blurring" or a collapsing of the ground reflects that there is much overlap in the grounds of judicial review in any event: there is not necessarily a bright line as to where one ground ends and the other begins. For example ensuring a decision is made on sufficient information can be viewed as being about whether a decision is reasonable or about whether all relevant considerations have been taken into account.[17] It is unreasonable for a Minister to

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14 The respondents refer to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA); and *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537 (CA).

15 The respondents refer to *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA); *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA); *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17; [2005] 2 NZLR 597; and *Wolf v Minister of Immigration* [2004] NZAR 414 (HC).

16 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183 per Cooke J: "What has to be emphasised is that it is only when the statute expressly or impliedly indentifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision."

17 I regard this as not inconsistent with the comments of Cooke P in *New Zealand Fisheries Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552: "[T]he relevant considerations which the Minister was bound to take into account included such facts obviously material to the mandatory statutory consideration as were or ought to have been known to himself or the Ministry. That is to say, the duty to consider statutory criteria extends to facts so plainly relevant to those criteria that Parliament would have intended them to be taken into account and a reasonable Minister would not fail to do so." In a heightened scrutiny case, it is right to require more of a decision maker about the information on which they base their decision.

make a decision about a person's fundamental rights on inadequate information. Information that is materially relevant to the Minister's decision, which the Minister knew or ought to have known existed, must be considered. If it is not, the Minister's decision cannot stand.

[18] On the second point I accept the unreasonableness ground of review will be established if the Minister's decision was not one that was open to a reasonable decision maker. That is the appropriate test at a general level. Some judges have endeavoured to give this test more content.[18] Their criteria are helpful, although they overlap with other traditional grounds of review.[19] I am not sure, however, that it is right to treat any such statements as comprehensive.

[19] In my view the unreasonableness ground of review allows some scope for the Court to stand back and conclude that, despite a proper process (compliance with natural justice, taking into account all and only the relevant considerations required by the statute, having sufficient information, making no material mistake of fact or error of law), a reasonable decision maker would not have made this decision. It is a backstop check on the lawful exercise of a power which does not depend on tightly set specific criteria against which unreasonableness can be made out.

[20] This does not turn the review into a wholesale merits review. In the judicial review context the Court must respect that the decision has been entrusted to the person or body whose decision is under review. Different reasonable minds can make different reasonable decisions and proper deference must be given to the decision maker's assessment of matters. The Court cannot substitute its own view of

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[18] For example, Wild J in *Wolf*, above n 15, considered that a decision would not be reasonably open to a decision maker if vital evidence was not taken into account, an unjustified or illogical inference was drawn, or there was a breach of natural justice in drawing that inference. The respondents endorsed this approach. Palmer J in *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [30] considered a decision would be unreasonable if "it is not supported by any evidence, or if the evidence is inconsistent with or contradictory of it, or if the only reasonable conclusion contradicts that determination" although noted there may be other grounds for unreasonableness. Dunningham J in *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227, [2015] NZAR 1049 at [26] considered a decision would be unreasonable "where the decision-maker had more than one option, but the decision reached was unsupported by reasoned justification … [or] where the decision was so disproportionate in its weighing of competing factors, that the outcome was unreasonable".

[19] For example, a breach of natural justice or an error of law.

the conclusion which should have been drawn from those matters where the conclusion reached by the decision maker is one that is reasonably open to her.[20]

[21] The other legal issue I consider should be mentioned is how the discretionary, as opposed to the mandatory, restrictions on surrender under the Act should be approached. These categories of restrictions do not neatly equate to mandatory and discretionary relevant considerations in a judicial review sense. It is only via the discretionary restrictions that some of New Zealand's international commitments and NZBORA rights can be taken into account.

[22] In particular New Zealand's international commitment to fair trial rights under the ICCPR, and whether a person is at risk of being subject to the death penalty, fall under the discretionary (rather than mandatory) restrictions under the Extradition Act. Fair trial rights and every human being's inherent right to life are, however, rights that are so fundamental that they must be considered in a judicial review sense. A failure to consider them would be an unlawful exercise of the Minister's discretionary power under the Extradition Act. It would be an error of law because the available discretion can and therefore must be given an interpretation consistent with New Zealand's international obligations and the NZBORA. It would also give rise to an unreasonable decision if person to be surrendered would not receive a fair trial or was at risk of receiving the death penalty.

The use of assurances per se

[23] As he did in the first judicial review, counsel for Mr Kim submits New Zealand should not extradite anyone to China because of its poor human rights record. He submits that to do so does not promote China's compliance with international treaties. He says that, if China wants to have other countries extradite persons to its jurisdiction, it should demonstrate its commitment to the international treaties. He says assurances from a country which has not demonstrated such a

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[20] A neat summary of the position is found in Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at [57.1]: "Unreasonableness (or "irrationality") means a public authority has acted in a way which was not reasonably open to it. This principle involves judicial interference with those questions of substance having built-in latitude: such as judgment, discretion and policy. That, given the need to avoid the forbidden substitutionary method, generally means a strong and clear case of unreasonableness is needed, though this is a flexible and contextual test."

commitment cannot be relied upon and nor should they be. This is because, even if they are complied with, they are not consistent with the rule of law in that they protect only Mr Kim and not others detained or appearing before the courts in China.

[24] This view about the use of assurances has the support of respected international organisations. The competing view, accepted by courts in a number of jurisdictions, is that assurances give effect to the rule of law by ensuring persons who should stand trial on criminal charges do so, while also protecting that person's rights. Both views represent credible, logical positions. They are discussed in my judgment on the first judicial review.[21]

[25] In short, the Extradition Act contemplates that a Minister might seek assurances from an extradition country.[22] Despite strong criticism from some international bodies about their use, courts have accepted assurances in order to be satisfied that a person will be treated in accordance with international obligations if they are surrendered. It is a decision for the Minister, not the court, whether New Zealand's commitment to international obligations is better served by seeking assurances and ensuring they are adhered to, or by declining to extradite a person until China's commitment to the prohibition on torture is demonstrated.[23] Having decided to seek assurances, the Minister's approach to her Decision (as in her first decision) was consistent with that taken in other jurisdictions. This was to consider Mr Kim's particular circumstances in light of the nature and quality of the assurances, against the background of the general situation in China.[24]

[26] Following the Minister's Decision Mr Kim's position has received further support in the form of the draft General Comment issued on 2 February 2017.[25] This

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21 *Kim (first judicial review)* above n 1 at [144]-[160].
22 At [144]. Section 30(6).
23 At [160].
24 At [169]-[184].
25 Committee against Torture above n 2. General Comments are authoritative interpretations of their provisions (see, for example, in the context of the ICCPR, Yogesh Tyagi *The UN Human Rights Committee Practise and Procedure* (Cambridge University Press, Cambridge, 2011) at 302). The Committee has issued three General Comments in relation to the Convention. One of those, General Comment No 1 is about "the implementation of article 3 of the Convention in the context of article 22". Article 3 prohibits a State party extraditing a person to another State if there are substantial grounds for believing the person will be in danger of being subject to torture. Article 22 provides for the Committee to receive individual complaints of violations by a State party of the Convention and sets out a procedure for dealing with such complaints.

contained a number of statements about a State's obligations to prevent torture and ill treatment and the non-refoulement principle. Significantly for present purposes it included the following draft comment about the use of assurances:

> 19. The term "diplomatic assurances" as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards.
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> 20. The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of "non-refoulement", provided for by article 3 of the Convention, and they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.

[27] These paragraphs could be read as the Committee saying that assurances should never be used where substantial grounds to believe a person is in danger of being tortured exist. An alternative reading is that assurances are not per se impermissible. Rather, they cannot be used improperly, as they would be if their nature and quality was insufficient to ensure a person's right not to be subjected to torture is protected.

[28] It appears, based on submissions made to the Committee, that a number of countries have understood these comments as meaning the first of these interpretations or, at least, that if this is what the Committee intended it is wrong. They have submitted that there should not be blanket ban on the use of assurances and they should be permissible if strict criteria are met.[26] New Zealand is one of the countries that has made such a submission. Its submission was made on 24 March 2017. It said:

> New Zealand shares the Committee's view that diplomatic assurances should not be used as a loophole to undermine the principle of non-refoulement. However, New Zealand considers that the General Comment does not accurately reflect the current state of international law in this area, or the fact that the practice of seeking diplomatic assurances is well established internationally. Because of this, New Zealand cannot accept the suggestion in paragraph 20 of the draft Comment that diplomatic assurances are *per se* contrary to the principle of non-refoulement.

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[26] This is noted in a report of a Committee meeting to discuss the draft General Comment on 28 April 2017.

[29] New Zealand's submission referred to the *Othman* decision.[27] It said New Zealand considers that, where diplomatic assurances meet the strict thresholds established in the case law, "they can be employed consistently with the principle of non-refoulement, and indeed can provide a mechanism to promote compliance with a State's obligations under [the Convention]." New Zealand's submission requested reconsideration of paras 19 and 20.

[30] Others, including a combined submission from nine NGOs with an interest in this area, submitted that para 20 should make it clear that assurances are contrary to the prohibition on refoulement and should not be used at all. Mr Kim's counsel, Dr Ellis, also made submissions to the Committee. As he has advanced for Mr Kim in this case, he submitted that para 20 should be amended to state that assurances undermine the principle that all are equal before the law. While they may protect an individual in States where mass violations of human rights occur if they are adhered to, they do nothing to assist others in that State who do not have the benefit of assurances.

[31] Dr Ellis' submissions to the Committee also referred to academic writing about the problems with assurances.[28] In this writing the author argues, amongst other things, that the decisive factor in whether assurances will be complied with is "the relative importance of the human rights of the individual compared to the day-to-day relations of the two States in a geopolitical context". A similar point is made by Dr Ellis on Mr Kim's behalf in this judicial review. He submits that trade deals between China and New Zealand are of major significance to New Zealand. China is New Zealand's second largest trading partner for exports and third largest for imports. He submits that it is hard to see that the importance of these trade links will not subconsciously influence ministers.

[32] On 13 February 2017 Mr Kim asked the Minister to reconsider her decision in light of the draft General Comment.[29] The Minister declined to do so in a letter

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27 *Othman (Abu Qatada) v The United Kingdom* (2012) 55 EHRR 1, [2012] ECHR 817 which is discussed in the *Kim (first judicial review)* above n 1 at [149]-[153].

28 University of Oxford "The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment" (2006) Refugee Studies Centre Working Paper No 32.

29 The revision of the General Comment had been earlier signalled by the Committee. In its 55th to 58th sessions the Committee began the process of revising General Comment No 1. On 6 December 2016, in its 59th session, the Committee began the process of drafting the draft General Comment.

dated 7 March 2017. She considered she was functus officio: that is, her decision-making role was complete and it was not appropriate for her to reconsider her decision. The matter was now one for the Court.

[33] Mr Kim contends the Minister was wrong in her view that she was functus officio. He relies on the comments of Lord Hope in *R v Secretary of State for the Home Department, ex p Launder*:[30]

> The situation has changed since 1995 when the decisions were taken… Although we are concerned primarily with the reasonableness of the decisions at the time when they were taken we cannot ignore these developments. We are dealing in this case with concerns which have been expressed about human rights and the risks to the [claimant's] life and liberty. If the expectations which the Secretary of State had when he took his decisions have not been borne out by events or are at risk of not being satisfied by the date of the [claimant's] proposed return to Hong Kong, it would be your Lordship's duty to set aside the decisions so that the matter may be reconsidered in the light of the changed circumstances.

[34] Mr Kim also refers to s 16 of the Interpretation Act 1999 and my consideration of s 16 in *Pub Charity Inc v Secretary of Internal Affairs*.[31] That decision concerned resetting a date for a penalty (a suspension) to be served which, due to intervening events, had passed without the penalty being served. It was not a case where the exercise of the statutory power (to set the date) created vested rights such that finality demanded the power be exercised only once regardless of the circumstances that may arise.[32]

[35] The respondents also refer to *Pub Charity* and the cases discussed in that decision. They submit the decision whether to extradite a person is a decision determining rights where finality is required. It is irrevocable once communicated to Mr Kim and, subject to appeal rights, the Act contemplates the decision, once made, will be acted upon immediately. If the decision is wrong because of new information not considered by the Minister, the remedy lies with the High Court. They say the proper course would be for the Minister to stay her decision and refer the matter to the Court, potentially seeking an order by consent for the decision to be quashed and reconsidered.

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30 *R v Secretary of State for the Home Department, ex p Launder* above n 13 at 860-861.
31 *Pub Charity Inc v Secretary of Internal Affairs* [2015] NZHC 195.
32 At [81].

[36] The issue concerns whether there could be circumstances in which it would be open to the Minister to revisit her decision in light of new information received after she made her decision but prior to Mr Kim's transportation to China. The comments of Lord Hope referred to above relate to a Court, on review, considering new developments after the Secretary of State had made his decision. The Court does not consider whether the Secretary could have reopened his decision in light of new information. However, if the court has a duty to set the decision aside, it might be said that here the Minister must have that duty also if the changed circumstances are brought to her notice and are sufficiently material as to alter her view on the matter. The nature of the issues at stake are such that it might be said the Minister retains responsibility for her decision and can revoke it, if the circumstances require this, up until her decision is finally implemented.

[37] My inclination is that the Minister would have this duty, but it is not necessary for me to decide this. The draft General Comment is before me. If the Committee's comments on the use of assurances are material,[33] in the sense that they may have led the Minister to reach a different view, the proper course would be for me to quash her decision and direct reconsideration.[34] Are they material in that sense?

[38] I consider the status of the General Comment is relevant to that question. It is still in draft form. The next stage is for the Committee to deliberate. As at 1 June 2017 the Committee envisaged further discussions would take place at its July to August 2017 sessions with a view to adopting the revised General Comment at its November to December 2017 session. Mr Kim's counsel had hoped this would occur earlier so he could make submissions to this Court on the finalised General Comment. Given the timeframe indicated by the Committee he invited the Court to proceed with judgment.

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[33] Mr Kim's counsel submitted the Minister was required to take into account other matters discussed in the draft General Comment. This submission was not developed at the hearing and, as a table provided by the respondents showed, the matters had (where applicable) been taken into account by the Minister. They do not raise new matters which she has failed to take into account. The only issue relates to the use of assurances if the Committee's view is that assurances per se should not be relied on to protect against torture.

[34] This is the approach I took in relation to new evidence provided to the Court in *Kim (first judicial review)* above n 1 at [14].

[39] On the material before me, it is by no means certain that para 20 will remain in its current form. The Act requires the Minister to make her decision promptly.[35] The Minister was not required to delay her decision until the Committee finalised its revised General Comment. The Minister's approach to the assurances is consistent with case law. She might have preferred the view that compliance with the Convention is better promoted by refusing to extradite a person where torture is an issue, consistent with the international organisations who oppose the use of assurances. That was not, however, the only reasonable view open to her. She was entitled to consider whether the assurances protected Mr Kim personally from torture and ill-treatment and, if they did, to give effect to the public interest in the prosecution of alleged serious criminal offending by ordering his surrender.[36]

[40] For these reasons Mr Kim's challenge to the Minister's Decision on the basis she has relied on assurances fails.[37] The validity of her decision remains dependent on the nature and quality of the assurances.

Torture

The restriction

[41] The Minister could not order Mr Kim's surrender if there were substantial grounds for believing he would be in danger of being subjected to an act of torture in China.[38] Nor should the Minister order his surrender if there were substantial grounds for believing he would be subject to cruel, degrading, or disproportionately severe treatment or punishment.[39] There must be a real risk of torture or ill-treatment. This means a risk which is more than a suspicion or theory. But something less than highly probable suffices.[40]

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35 This is discussed in *Kim (discharge judgment)* above n 3 at [68] and [105].

36 The important competing considerations at play are mentioned in *Kim (first judicial review)* above n 1 at [5].

37 I do not consider whether the Minister's decision should be reconsidered if the Committee ultimately determines that a blanket ban on assurances is appropriate because that is not currently the position.

38 Extradition Act, s 30(2)(b); ICCPR, art 7; the Convention, art 3; NZBORA, s 9; *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289 at [79] and [91]; *Kim (first judicial review)* above n 1 at [27].

39 Extradition Act, s 30(3)(e); ICCPR, art 7; NZBORA, s 9; *Zaoui* above n 38 at [79] and [91]; and *Kim (first judicial review)* above n 1 at [27].

40 This was the test put forward by the respondents based on *Report of the Committee against Torture* GA 53rd Session A/53/44, 16 September 1998 at Annex IX at [6] and [7]; *Agiza v Sweden* CAT/C/34/D/233/2003 (20 May 2005); Committee against Torture above n 2 at [11]. The appellant did not take issue with this. I proceed on this basis.

The first judicial review

[42] The information before the Minister established substantial grounds for believing torture remained a real issue in China. The risk is greatest for those in well known "high risk" groups.[41] There was limited information, from a reputable source, suggesting that a charge of murder elevated a person's risk.[42] There was limited and general information suggesting that the main centres were safer.[43]

[43] Further information before the Court confirmed that, as at 2015, "the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for convictions".[44] Mr Ansley, an expert in the Chinese justice system, gave evidence that the risk of torture was elevated for a person charged with murder. Mr Ansley also considered that being a foreigner elevated a person's risk.

[44] The information before the Minister about the general situation in China, confirmed by the information before the Court, meant that the Minister could not order Mr Kim's surrender unless she could be satisfied that Mr Kim was not personally at risk. The only basis on which she could be so satisfied was if the assurances removed the risk. The assurances covered various matters intended to protect against torture and to protect fair trial rights (which in turn also protect against torture, for example, if improperly obtained evidence could not be used at

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41 *Kim (first judicial review)* above n 1 at [54] for example a political or religious dissident, ethnic minority or human rights defender.

42 Human Rights Watch "Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China" (2014) <www.hrw.org>; and *Kim (first judicial review)* above n 1 at [65].

43 *Kim (first judicial review)* above n 1 at [66].

44 *Concluding Observations on the Fifth Periodic Report of China* Committee against Torture CAT/C/CHN/CO/5, 3 February 2016 at [20], discussed in *Kim (first judicial review)* above n 1 at [80]-[82].

trial).[45] I found that "at face value the assurances appear to provide substantial protections for Mr Kim's benefit".[46] However whether they would in fact protect Mr Kim depended on whether:

(a) China was likely to adhere to the assurances;

(b) New Zealand was able to monitor Mr Kim's treatment effectively;

(c) New Zealand would in fact proactively monitor Mr Kim's treatment; and

(d) there were available sanctions if China did not adhere to the assurances.

[45] There were issues about these matters which were not answered in the material before the Minister when she made her decision. I directed the Minister to reconsider her decision because of the following unanswered matters:

> [259] The principal reason why I consider the surrender order must be reconsidered is that the Minister has not explicitly addressed why she is satisfied that the assurances could be relied upon to protect Mr Kim when

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45 *Kim (first judicial review)* above n 1 at [188]-[212]. China provided assurances that a) Mr Kim would not be tortured; b) he would be brought to trial without undue delay; c) New Zealand representatives would be informed in a timely manner of where Mr Kim was detained and any changes to that; d) Mr Kim could contact New Zealand representatives at all reasonable times for the purpose of obtaining information about his treatment; e) New Zealand representatives could visit Mr Kim with an interpreter, a Chinese qualified medical professional, and a Chinese qualified legal expert once every 15 days; f) additional visits could be arranged on request; g) during these visits New Zealand representatives could interview Mr Kim in private and without being monitored, Mr Kim could be medically examined if he consents to this, and New Zealand representatives would have access to the parts of the detention facility to which Mr Kim had access and his living quarters in that facility; h) there would be no reprisals against persons who supplied information about Mr Kim's treatment to New Zealand representatives if the information is provided in good faith; i) Mr Kim was entitled to a Chinese qualified lawyer of his choosing, to receive legal aid according to Chinese law, and to meet with his lawyer in private without being monitored; j) New Zealand representatives will be able to attend any open court hearings relating to Mr Kim and, if a hearing is closed pursuant to Chinese law, these periods will be as short as possible; k) New Zealand representatives will be provided with information about the status of the case by Chinese authorities; l) on request Chinese authorities will provide New Zealand representatives with full, unedited recordings of any pre-trial interrogations and of any period when a court hearing is closed; m) China will, in its dealings with Mr Kim, comply with applicable international legal obligations and domestic requirements regarding fair trial; and n) any issue about the interpretation of the assurances or any issue about Mr Kim's treatment was to be discussed between China and New Zealand to resolve the issue in a manner satisfactory to both sides.

46 *Kim (first judicial review)* above n 1 at [214].

> they do not appear to permit New Zealand representatives to disclose information about his treatment to third parties. Issues concerning the assurances are left to be resolved on a bilateral diplomatic basis. In view of New Zealand's limited experience with assurances from [China] and the limited information from other countries about their experience with [China] honouring assurances, this may be inadequate to protect Mr Kim's rights. I consider this requires explicit consideration by the Minister.
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> [260] In addition, the Minister has concluded that Mr Kim will receive a trial that to a reasonable extent complies with the rights in art 14 of the ICCPR. However, in reaching that conclusion, she has not explicitly addressed whether the assurances sufficiently protect Mr Kim from ill-treatment and his right to silence during pre-trial interrogations, when they do not provide for Mr Kim to have the right to a lawyer present for all pre-trial interrogations. The assurances do provide that all interrogations will be recorded and provided, on request, to New Zealand representatives. The Minister has not, however, specifically addressed whether this is an adequate substitute for the presence of a lawyer in light of the power exerted by public security officers (said recently by the UN Committee to wield excessive power and be without effective control) and when the presence of a lawyer when an accused is questioned by the police is a well established right in this country. There is also the issue of whether Mr Kim will be compelled to answer questions in view of the apparently conflicting criminal procedure laws on this issue. At the moment that has been the subject of communications between officials from the two countries, but it is not specifically addressed in the assurances.
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> [261] Lastly I note that if the assurances are relied on to order Mr Kim's surrender, the Minister will need to be satisfied that the access to Mr Kim which is permitted in the assurances will be proactively undertaken. On the information provided to this Court it is unclear what visits will actually occur (as opposed to what access is permitted) and whether any reliance can be placed on South Korea to monitor Mr Kim's treatment (it is unclear if enquiries have been made with South Korea about this).

[46] In summary, it was questionable whether it was open to the Minister to rely on the assurances if New Zealand could not disclose to third parties any breach of the assurances unable to be resolved through bi-lateral discussions, Mr Kim would not have access to a lawyer during pre-trial interrogations, and without there being arrangements in place to ensure proactive monitoring. The Minister had not explained why she was satisfied the assurances protected Mr Kim against the risk of torture or ill-treatment in light of these issues.

Further information obtained by the Minister

[47] The Minister received further reports and commentary about China which post-dated her first decision. She was advised of the concerns in the Committee's

fifth periodic report on China.[47] This included, for example, continued reports of torture and ill-treatment during pre-trial detention, courts often dismissing requests to exclude improperly obtained confessions, police selectively recording parts of interrogations and meetings between lawyers and suspects often being monitored. The Minister was also advised of the contents of an Amnesty International report on torture which supported these comments. This included the following comments:[48]

> While not conclusive, the verdicts do seem to show that courts are inconsistently applying the process by which claims of extracting "confessions" through torture and excluding illegal evidence are handled….
>
> … whether primarily through lack of awareness or through lack of will, the Chinese authorities are failing to implement the recent laws and regulations aimed at curbing the use of confessions extracted through torture. As a result, there has yet been very little improvement in eradicating the pervasive use of torture in the Chinese criminal justice system.

[48] The Minister also received a letter from the Executive Director of Amnesty International about Mr Kim's case. The letter requested that the Minister not return Mr Kim. It opposed any reliance on diplomatic assurances and said it had serious concerns about China's human rights record.

[49] The Minister received advice from Professor Fu Hualing, a Professor of Law at the University of Hong Kong. Advice was sought from the Professor about whether Mr Kim was at risk of torture during the pre-trial detention phase, particularly given that it seemed he had no right to a lawyer during interrogation and it was unclear if he had a right to silence. The Professor's advice covered the following matters:

(a) Length of detention: Mr Kim is likely to spend about eight months in a detention facility in the investigative, examination, and trial phases. Of this, two months are likely for the investigative phase, one month for the procuracy to decide whether to institute a prosecution in court, and around five months for the trial and lodging and hearing any appeal (trial of second instance). There are provisions for the investigation phase detention to be extended by one month in

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47 Committee against Torture above n 44.

48 Amnesty International *No End in Sight: Torture and Forced Confessions in China* (Amnesty International Publications, London, 2015) at 48-51.

complicated cases (with the approval of the next highest level procuracy) and a further extension of two months (with the approval of the provincial-level procuracy). Professor Fu's opinion was that these extensions were unlikely to be sought in this case. There was also a possibility of an extension of half a month for the procuracy to decide whether to prosecute.

(b) Interrogation: A suspect is interrogated by the police at the investigative stage and by the prosecutors at the prosecution stage. Lawyers are not present during any of these interrogations. The procurators do not attend the interrogation.[49] Shanghai is part of a pilot programme in which procurators may be allowed to attend police interrogation but such participation is not usual.

(c) Right to silence: Mr Kim has a duty to answer questions from investigators if the questions are relevant to the case under investigation.[50] This is, however, qualified by a number of important legal rules. First, a refusal to answer questions is not a crime nor an aggravating factor in sentencing. Secondly, a person may not be found guilty "without being judged so by the People's Court according to law" (which Professor Fu describes as the Chinese equivalent to the presumption of innocence).[51] Thirdly, the prosecution has the burden of proof[52] and must produce sufficient, effective, and lawfully obtained evidence to prove guilt beyond reasonable doubt.[53] Fourthly, forced confessions are prohibited, a court is duly bound to exclude evidence that is unlawfully obtained, a mere confession is not sufficient for a conviction and a court can convict without a confession.[54]

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49 The procuracy's functions include supervising the police and penal institutions. They may make remedial recommendations. It has made 869,775 remedial recommendations in the four years between 2012 and 2015 relating to over 26 million criminal cases.

50 Criminal Procedure Law (CPL), art 118.

51 Article 12.

52 Article 49.

53 Article 53.

54 Articles 50, 53 and 56-58.

(d) Place of detention: Traditionally torture, when it happens, mostly occurs inside police stations where investigators have full control. To prevent torture, the CPL (as amended in 2012) requires the police to transfer a detainee to a detention facility promptly within 24 hours after detention takes place.[55] Subsequent interrogation must take place within a detention facility. Mr Kim will be detained and interrogated in a detention facility.

(e) Recording of interrogation: The detention facility manages the recording process and also keeps the record. There are rules to prevent manipulation of recording. The entire interrogation is to be recorded, the procuracy has the power to supervise the proper recording and can order its production for examination, and the court can order the production of the recording.

(f) High risk cases: Recent allegations of torture have been made in two types of cases. The first type concerns offences endangering national security, broadly defined to include alleged separatism and political dissent. The second type concerns serious corruption. There have been reports of torture in the in-house detention system operated by the Communist Party which is authorised to detain senior party and government leaders for interrogation. Torture within regular detention facilities in relation to ordinary criminal cases, including murder, has been rarely reported since 2012. Professor Fu says that the Supreme People's Court has "sent out strong signals that exclusion of confession statement[s] obtained through torture is a judicial duty and is politically possible".

(g) Changing culture: There is an emerging culture against torture in the criminal process. China needs international cooperation and mutual legal assistance in criminal matters so that it can seek extradition of its economic fugitives. It needs credibility in international communities

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[55] Article 83.

and Mr Kim's case offers an opportunity for that. Professor Fu's opinion is that:

> It will be highly unlikely that Mr Kim will be tortured to confess his crime given the reputational cost and given the evidence that the police have gathered. As a result, there will be no need at all to manipulate recording to disguise torture or ill-treatment.

[50] The Minister received further advice from MFAT officials as to whether New Zealand could disclose to third parties a breach of the assurances by China. This included advice that was previously before the Minister.[56] Additionally the Minister was advised that officials regarded it as "very unlikely" that bilateral consultation would not resolve all matters if any issue arose.[57] This was because any serious unresolved issue would have serious repercussions for the relationship between China and New Zealand, as well as China's international reputation. If, however, a serious issue did arise which could not be resolved by bilateral consultation, New Zealand would regard the assurances as broken and its own commitments of no further effect. In that event New Zealand could take any action it considered appropriate and necessary.

[51] The Minister also received further advice from her officials about monitoring of the assurances. She was advised that New Zealand is committed to ensuring that the monitoring arrangements provided in the assurances would be "proactively undertaken" and that New Zealand would "commit the necessary staff and resources to do so". She was advised that Mr Kim would be under the consular jurisdiction of the New Zealand Consulate-General in Shanghai (the place of detention as indicated by China). The Minister was advised of the staffing arrangements at the Consulate-General, that consular assistance formed a core part of MFAT's responsibility and the

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[56] This included that New Zealand has a long-standing history of comprehensive and effective cooperation with China on a wide range of issues; both New Zealand and China have an interest in ensuring that there is a constructive and long-term basis for cooperation on legal and law enforcement issues, which is based on an expectation that both countries will meet their commitments in good faith; it is expected the assurances will be adhered to; and officials expect the bilateral consultation process to resolve any issues.

[57] The advice also included that limited and controlled disclosure of information, necessary to monitor and ensure the proper treatment of Mr Kim, is permitted by the assurances; it is not unreasonable for China to expect some level of confidentiality so that information is not inappropriately disclosed to unauthorised recipients; and New Zealand may share comments of a general nature with other countries or third parties of its experience with China in respect of diplomatic assurances.

Consulate-General had the capacity, training and experience to conduct monitoring visits to persons in detention. Officials advised that the Consulate-General would be instructed to "prioritise this important responsibility" of monitoring Mr Kim in detention as permitted by the assurances.

[52] On 15 August 2016 the Minister of Foreign Affairs, Mr McCully, wrote to the Minister. He gave his assurance that he will instruct his officials to provide the required monitoring of Mr Kim if he were extradited to China. He noted MFAT's experience in doing so and that he would prioritise these monitoring obligations. He also offered his views as to the reliability of China's assurances. He stated that Chinese ministers and officials are very motivated to comply with these obligations, driven by their desire to extradite "economic fugitives" from New Zealand. They seek to convince the New Zealand government they can be relied upon to act in accordance with their assurances on such matters. He said:

> It is my own clear view that Chinese Ministers and officials will give the very highest priority to living up to their assurances to you in relation to the Kim case. The Chinese Government know that at this stage of their efforts to convince the rest of the world of the integrity and respectability of their systems, their performance in relation to the Kim case will have a critical influence on the future attitude of the New Zealand Government, and that of other governments.

[53] On 16 September 2016 Mr McCully wrote to the Minister stating:

> … I want to reassure you that I continue to place high priority on the monitoring of the welfare of Mr Kim Kyung Yup while in detention in the event that he is extradited to China.
>
> I have instructed my officials to visit Mr Kim as frequently as you consider necessary to ensure his well-being during the investigation phase. I further confirm that there will be dedicated resource[s] in place at our Consulate in Shanghai to guarantee that visits take place, whether every 48 hours or even daily, if that is what is needed.
>
> I have made clear to my Ministry the Government's expectations of them in this regard.

[54] On 3 October 2016 the Minister wrote to Mr McCully asking him to convey to his officials that, in addition to any visits sought by Mr Kim, MFAT should plan to visit him at least once every 48 hours during the investigation phase, and no less than every 15 days from then until the completion of the trial.

[55] At the Minister's request, China agreed to provide New Zealand diplomatic or consular representatives with access to full and unedited recordings of all pre-trial interrogations during the investigation phase within 48 hours of each interrogation taking place.[58]

The Minister's Decision

[56] The Minister's Reasons for ordering Mr Kim's surrender were approached, essentially, in two parts. First she addressed the three specific matters I had directed her to consider. Secondly she addressed each of the grounds which Mr Kim had relied on as to why he should not be surrendered.

[57] As to the specific matters I had directed her to consider:

(a) The Minister was satisfied, on the basis of MFAT's advice, that she would be able to disclose information about Mr Kim's treatment to third parties in appropriate circumstances.

(b) "[O]n balance" the Minister was satisfied the assurances, proactive monitoring of them, Mr Kim's legal rights in China and the circumstances of his case were sufficient to protect his rights despite the absence of a lawyer during pre-trial interrogations. In reaching this view the Minister relied on Professor Fu's advice about Mr Kim's risk of torture, his advice on Mr Kim's rights under the CPL, the content of the assurances,[59] the advice from MFAT, her instructions to MFAT officials about proactively monitoring Mr Kim and China's agreement to provide full recordings of all pre-trial interrogations within 48 hours of each interrogation taking place.

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[58] This was sought by the Minister because she was concerned that otherwise New Zealand representatives might only receive the recordings up to two months after an interrogation had taken place.

[59] Noting in particular the assurances that China will comply with international legal obligations and domestic requirements regarding fair trial, it will comply with its obligations under the Convention, it will provide New Zealand representatives with full and unedited recordings of all interrogations of Mr Kim, Mr Kim could contact New Zealand representatives and New Zealand representatives could visit Mr Kim with a medical professional and legal expert.

(c) The Minister was confident, on the basis of MFAT's advice and her instructions to it as to when visits were to take place, that Mr Kim's treatment would be proactively monitored.

[58] The Minister's Reasons then turned to the torture restriction on surrender.[60] She first referred to Dr Ellis' submission that torture is endemic in China, China does not comply with its obligations under the Convention and as such cannot be trusted to comply with its assurances. She referred to Mr Ansley's view that torture is so routine it would be "astonishing if a person accused of homicide were not subject to torture". She referred to Professor Fu's view that "the entire criminal justice system is well-aware of the problem, alert to it, and ready to take action against it". She also referred to updated reports from the Committee[61] and Amnesty International.[62]

[59] As to the general situation in China, the Minister noted the following: in practice, torture and ill-treatment have been used to extract confessions and punish detainees; since 1988 China has invested significant resources in addressing the issue of torture and ill-treatment; while the use of torture and ill-treatment appears to have been reduced, particularly in urban areas, commentators and the United Nations "still consider it a significant problem, particularly in cases involving well known high-risk groups".

[60] However the Minister considered there were not substantial grounds to believe that Mr Kim would be in danger of being tortured because:

(a) The assurances: China's assurances about Mr Kim's treatment were detailed and specific. They provide for New Zealand Consular officials to monitor Mr Kim's condition.[63] This would act as a significant deterrent to China. The assurances would be proactively

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60 Extradition Act, s 30(2)(b).

61 Committee against Torture above n 44.

62 Amnesty International "No End in Sight: Torture and Forced Confession in China" (2015) Amnesty International <www.amnesty.org>.

63 The Minister referred to the possibility that South Korea may also monitor Mr Kim's treatment as it would have access to him. I have not placed any reliance on this in considering whether the Minister's Decision was reasonable. Officials advised the Minister she should not rely on this because it was not known if South Korea would monitor Mr Kim and it was outside the Minister's control. I agree with the advice the Minister was given about this.

monitored in a timely manner and supported by sufficient resources and the prompt provision of interrogation recordings. There were effective mechanisms to ensure compliance and deal with breaches.

(b) Mr Kim's personal circumstances: Mr Kim's personal circumstances put him at a lower risk of the use of torture to extract a confession. He is an "ordinary" criminal suspect (meaning that he is not a member of any well known high-risk group such as political or religious dissidents, ethnic minorities or human rights' defenders). The prima facie case against him appears to be relatively strong. His role in the alleged offending has already been investigated meaning that he might spend less time in pre-trial detention (the time a suspect is most at risk of torture). He would be tried in Shanghai, where commentators and the UN suggest incidents of torture are on the decline.

(c) Necessity for credibility: China needs international cooperation in criminal matters and credibility in the international community. China would wish to demonstrate its credibility in Mr Kim's case.

Submissions for Mr Kim

[61] Mr Kim challenges the lawfulness of the Minister's Decision in part by challenging the use of assurances at all. I have discussed above why I do not accept that the Minister's Decision was an unlawful exercise of her power on this basis. In addition Mr Kim contends the Minister erred in law or by taking into account irrelevant considerations/failing to take into account relevant considerations or acted unreasonably because:

(a) experienced international monitors are not allowed to access prisons in China and the Minister has not considered whether New Zealand officials are skilled at detecting torture and ill-treatment;

(b) permitting New Zealand officials to disclose breaches of the assurances does not prevent torture and ill-treatment, but merely provides a report of a breach after the fact;

(c) China's systematic failure to comply with the Convention makes it unreasonable to rely on China adhering to the assurances and the Minister should have considered the Committee's 2015 concluding observations that China has not implemented the recommendations it had previously made; and

(d) China lacks credibility in the area of torture.

[62] In support of these grounds, submissions are made about China's record of human rights abuses. Reliance is placed on Mr Ansley's evidence that "it is hardly possible to imagine a more egregious example of a consistent pattern of gross, flagrant or mass violations of human rights than the situation which obtains in China". Reliance is also placed on the Committee against Torture's concluding observations on China (3 February 2016).[64] This includes, for example, that, notwithstanding the numerous provisions prohibiting torture, there are consistent reports indicating the practise of torture and ill-treatment remains deeply entrenched in the Chinese criminal justice system.[65] The submission is made that China is a "terror regime" operating a system where "human life is cheap, and many behave as terrorists, barbarians, and mass murderers on a scale rarely seen in human history".[66] It is said that, under such a regime, it is wrong to rely on diplomatic assurances because China's word cannot be relied on.

Assessment

[63] Some of the matters raised by Mr Kim are a re-run of submissions rejected in the first judicial review. The fact that experienced international monitors are not allowed to access prisons in China and whether New Zealand officials are skilled at detecting torture and ill-treatment are in that category. In the first judicial review I said:[67]

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64 Committee against Torture above n 44.

65 At [20].

66 The submissions describe in some detail and draw parallels with some of the historical regimes involving atrocious abuse of human rights.

67 *Kim (first judicial review)* above n 1 at [215] and [221] – see n 167 referring to *Othman v United Kingdom* above n 27.

> [215] The assurances endeavour to protect against torture and ill-treatment through the extensive access which New Zealand representatives (together with an interpreter, a medical professional and a legal expert) are permitted. I do not consider the Minister was wrong to place reliance on the monitoring components of the assurance because they do not provide for an independent expert on torture to carry out the monitoring. As the Minister said, Mr Kim was not within a group recognised as being at a particularly high risk of torture. The Minister was entitled to consider that the extensive access permitted by the assurances would provide a measure of protection for Mr Kim. It will of course be necessary that New Zealand representatives carry out the visits that are contemplated.
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> …
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> [221] Notwithstanding the concern expressed by the UK Select Committee that consular services fall well below what is necessary, the information provided in the briefing paper indicates that New Zealand has some experience in monitoring the treatment of New Zealanders detained in Chinese prisons. It also, however, illustrates there are difficulties. Despite the monitoring provided by New Zealand officials it seems that in one case a complaint was made only following the detainee's return from [China]. It is not known from the information provided whether that complaint had validity. It is also not clear if the assistance referred to in the briefing paper is proactively provided or whether it depends on a request from the detainee.

[64] The Minister received further information about New Zealand's ability and intention to monitor Mr Kim. This information included details about the available resources, New Zealand's commitment to pro-actively monitor Mr Kim and the other reasons which decreased Mr Kim's personal risk of torture or ill-treatment. It was reasonably open to her to conclude that New Zealand was able to carry out the necessary monitoring on the basis of this information.

[65] I do not accept the Minister failed to consider that a disclosure of any breach after the event does not prevent torture and ill-treatment. It is apparent from the Minister's process and from the Minister's Reasons that she was alive to this issue. This is why there was such a focus on ensuring effective proactive monitoring would take place.

[66] The balance of Mr Kim's submissions on this issue go to whether China can be trusted to adhere to the assurances in light of its poor human rights record. I do not accept that the Minister failed to consider any of these matters. The Minister's first decision proceeded on the basis that torture was an issue in China. In the first judicial review I said:

> [214] Taken at face value the assurances appear to provide substantial protections for Mr Kim's benefit. Whether they will do so depends upon whether there can be confidence that they will be honoured in their full spirit. In considering this it is important to keep in mind that torture is a systemic problem in [China], a person is particularly at risk during pre-trial detention because the criminal justice system continues to rely heavily on confessions, the period of detention before a person must be brought before a Judge is too long, it is not always easy to detect when torture has occurred, and lawyers who raise human rights concerns may thereby put themselves at risk.

[67] Against these matters the focus of the Minister's reconsideration was placed squarely on the effectiveness of the assurances to protect Mr Kim from torture and ill-treatment. The further information she received after the first judicial review was directed to Mr Kim's risks during pre-trial detention and whether the assurances would protect Mr Kim. This included advice that China would want to demonstrate to the international community its proper treatment of Mr Kim because it needed cooperation in order to extradite economic fugitives. It was reasonably open to the Minister to conclude, in light of the information before her, that the assurances would protect Mr Kim from torture and ill-treatment and that accordingly this mandatory restriction on surrender did not apply.

Fair trial

The restriction

[68] The Minister may decide not to order surrender "for any other reason".[68] The Minister should not order Mr Kim's surrender if he would not have the following fair trial rights when surrendered:[69]

(a) the right to a fair and public hearing by a competent, independent and impartial tribunal;[70]

(b) the right to be presumed innocent until proved guilty by law;[71]

(c) the right not to be compelled to be a witness or to confess guilt;[72]

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68 Extradition Act, s 30(3)(e).
69 There are other criminal procedure rights, but for present purposes these are the key ones.
70 ICCPR, art 14(1); and NZBORA, s 25(a).
71 ICCPR, art 14(2); and NZBORA, s 25(c).

(d) the right to examine witnesses;[73]

(e) the right to be tried without undue delay;[74] and

(f) the right to a lawyer.[75]

The first judicial review

[69] The assurances included a number of matters intended to ensure Mr Kim would receive a fair trial.[76] They included an assurance that China would comply with applicable international and domestic fair trial requirements. If this assurance was adhered to in its full spirit it would address the issue that China has not committed to international obligations regarding fair trial rights to the same extent as New Zealand has.[77]

[70] As to Chinese domestic requirements, the information before the Minister indicated that the Chinese CPL had been revised to address most of its major deficiencies. The CPL does not contain an explicit provision that a defendant is to be presumed innocent until proved guilty.[78] Although there is a prohibition on anyone being forced to provide evidence proving his or her guilt, Amnesty International and Human Rights Watch have questioned whether this is effective because another provision provides that a criminal suspect must answer investigator's questions truthfully, but could refuse to answer questions irrelevant to the case. In light of these possibly conflicting provisions, New Zealand officials enquired of Chinese officials who advised that a defendant had the right to refuse to answer a question and there were no adverse consequences if they did.[79]

[71] There remained concerns, confirmed by the further evidence from Mr Ansley, about whether the judiciary was independent from the Communist Party of China.

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72 ICCPR, art 14(3)(g); and NZBORA, s 25(d).
73 ICCPR, art 14(e); and NZBORA, s 25(f).
74 ICCPR, art 14(c); and NZBORA, s 25(b).
75 ICCPR, art 14(3)(b) and (d); and NZBORA, s 24(c).
76 See n 45 above.
77 See n 8 above, China has signed the ICCPR but not ratified it. It has not signed or ratified either the first or second Optional Protocol.
78 At [98].
79 At [99].

There were also concerns that aspects of the law are not strictly followed in practice, particularly in cases involving "high-risk" groups.[80] Further, the conviction rate in China was 98-99 per cent. The advice to the Minister accepted this appeared to be startling, although it was partially explained by the fact that, if the court was inclined to enter an acquittal, rather than doing so it would convey this to the police and procuratorate who would usually withdraw the prosecution.[81]

[72] In these circumstances, surrender should not have been ordered if there were reasonable grounds to believe there would be state interference with Mr Kim's trial, that Chinese domestic law would not be followed in Mr Kim's case, or Chinese officials had provided incorrect information and Mr Kim did not have the right to silence. Because of the heavy reliance on confessions and the high conviction rate Mr Kim's rights during pre-trial detention were of particular concern. The assurances were intended to protect Mr Kim's rights during such interrogations, particularly access to recordings of such interrogations, and the ability of New Zealand officials to visit Mr Kim and attend any open court hearings. The assurances also addressed Mr Kim's right to a lawyer. They did not, however, address whether his lawyer could attend all pre-trial interrogations.

[73] The Minister's first decision did not explain why she was satisfied Mr Kim would receive a fair trial given the absence of his right to a lawyer during pre-trial interrogations, the apparent conflicting Chinese domestic law provisions as to whether Mr Kim would be compelled to answer questions, the apparent inability of New Zealand representatives to disclose information about Mr Kim's treatment to third parties, and the absence of information about what monitoring would actually take place. The Minister was directed to reconsider her decision in light of these matters.

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80 A recent example was the mass detention of some 230 human rights lawyers and associates which had been strongly condemned by lawyers and human rights monitoring agencies.

81 *Kim (first judicial review)* above n 1 at [96].

Further information received by the Minister

[74] Professor Fu's advice to the Minister confirmed information about China's high conviction rate. He explained this high rate was because of a combination of legal, political and cultural reasons:

(a) Not guilty verdicts: A not guilty verdict is seen as "an open challenge to the prosecutorial and police authority and is used with caution". A not guilty verdict is often regarded as an error on the part of the prosecution (the prosecutors and the related procuracy) and would bring adverse consequences. If the court is of the view, after hearing a case, that a defendant is not guilty, the court may choose not to announce a not guilty verdict in open court.

(b) Withdrawals: Many of the cases where a not guilty verdict may be available are withdrawn by the prosecution at trial. The court may direct this. Withdrawal of a prosecution in this way is of "dubious legal nature" and not clearly defined in the CPL but is frequently used.

(c) Data: There was no good data on the number of informal withdrawals. A rough estimate is that around five per cent of the prosecution's cases may have been withdrawn and there may be five to ten informal withdrawals for every not guilty verdict.

(d) Political factors: Professor Fu advised that:

> Politically all of the above takes place in larger circumstances that prioritises crime control. The objectives of procedural protection of rights in the criminal process, while having received significantly more attention in the recent years, still pales in comparison with the objective of maintaining stability through punishing crime. The court is largely an integral part of this larger system that is geared toward crime control.

[75] Professor Fu also explained that China practices an inquisitorial criminal justice system, although it has tried to introduce some adversarial elements into the process. The system relies on extensive pre-trial investigation by police, prosecutors

and judges. Lawyers play a relatively minor role. The trial relies extensively on documents and very few witnesses testify in court.

[76] As discussed above, the Minister also received further information from Professor Fu about Mr Kim's right to silence. This confirmed the advice officials had provided to the Minister when she made her first decision. Mr Kim could refuse to answer questions from investigators and has the presumption of innocence. Professor Fu also advised that forced convictions are not admissible at a trial and a confession alone is not sufficient for a conviction.[82]

[77] Mr Kim would not have access to his lawyer during pre-trial interrogations. However, as discussed above, the advice from Professor Fu confirmed that interrogations are to be recorded in full and there are rules intended to ensure this happens.[83] The Minister specifically sought and received confirmation that New Zealand representatives would have access to the recordings within 48 hours of each interrogation taking place.[84] She also received information about New Zealand's ability and intention to proactively monitor Mr Kim's treatment and its ability to disclose any breach to third parties.

The Minister's Decision

[78] As discussed the Minister's Reasons first addressed the specific matters she was directed to reconsider in the first judicial review. She considered Mr Kim's fair trial rights against that background.

[79] The Minister's Reasons on this topic referred to Dr Ellis' submission that fair trial rights are a foreign concept to China's criminal justice system and that the Minister could not rely on China's assurances about fair trial rights. She referred to Mr Ansley's evidence that the Communist Party of China controlled the legal system and the process of proving a person's guilt is so flawed that there was no way of knowing whether a convicted person was actually guilty or whether they were an innocent victim of an unfair process.

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82 Refer [47](c) above.
83 Refer [47](a) and (e) above.
84 Refer [55] above.

[80] The Minister referred to substantial revisions of the CPL in 1996 and 2012 which have addressed most of the law's major fair trial deficiencies. She noted that commentators and the UN remain concerned that the judiciary is not independent (with the risk of interference by the government or Communist party) and that aspects of the law are not strictly followed in practice (particularly in cases involving well-known high-risk groups).

[81] The Minister considered Mr Kim's circumstances. She was satisfied that Mr Kim would receive a trial in China that, to a reasonable extent, accorded with the fundamental principles of criminal justice reflected in art 14 of the ICCPR. This was because:

(a) The assurances provided were detailed and specific about matters relating to Mr Kim's trial. They provided for monitoring of Mr Kim's trial which would be a significant deterrent to China not adhering to the assurances.

(b) The assurances would be proactively monitored. There were effective mechanisms to ensure compliance and to deal with breaches. New Zealand and other countries have past experience of China honouring assurances.

(c) Mr Kim is an ordinary criminal suspect and not a member of any well-known high risk group. The assurances distinguish Mr Kim from other criminal suspects. There is also a relatively strong case against him. Those matters decreased the risk of non-compliance with fair trial rights or state interference.[85]

(d) Although Mr Kim would not have a lawyer present during interrogations, there would be no legal consequences under Chinese law if he refused to answer questions. The assurances enable Mr Kim to contact New Zealand representatives, New Zealand representatives can visit Mr Kim with a medical professional and legal expert, and

[85] See also [53](e) and (f) above.

China will promptly provide New Zealand representatives with full and unedited recordings of all interrogations of Mr Kim.

Mr Kim's submissions

[82] Mr Kim alleges the Minister made an error of law and failed to consider relevant considerations in her approach to Mr Kim's rights under art 14 of the ICCPR. The submissions fall into the following topics:

(a) The Minister's approach: It is submitted that the Minister approached this topic by considering whether Mr Kim would get a reasonably fair trial, when he is entitled to a fair trial not a qualified version of fair. She also failed to consider Professor Fu's qualification that Mr Kim will receive a fair trial "as much as Chinese law permits".

(b) The general position in China: It is submitted the Minister was wrong to take into consideration that China has a different fair trial scheme, because art 14 sets out fundamental fair trial principles that all States must adhere to. China's system does not adhere to these principles because there is a lack of equality, a lack of prompt legal assistance, the judiciary is not independent and the hearing is not public.

(c) The presumption of innocence: It is submitted that comments made by a Chinese official after the first judicial review show that China has already determined Mr Kim's guilt.

(d) No right to cross-examine: It is submitted Mr Kim will not have the opportunity to test the alleged "prima facie" case against him.

(e) The period of pre-trial detention: It is submitted the Minister misdirected herself as to Mr Kim's right to be promptly brought before a Judge, and failed to consider the Committee's 2015 conclusions expressing concern at the period of pre-trial detention.

(f) The right to a lawyer: It is submitted the Minister failed to consider that denying Mr Kim access to a lawyer at all stages of criminal proceedings, including during any interrogations, breached arts 14(3)(b) and (d) of the ICCPR. The Minister is also said to have failed to consider the Committee's 2015 conclusions that China should amend its legislation to "grant all detainees the right to have access to a lawyer from the very outset of deprivation of liberty, including during the initial interrogation by the police, irrespective of their charge".[86]

My assessment

a) The approach

[83] This ground concerns the correct approach to surrender when issues are raised about fair trial rights in the receiving country. For the reasons addressed in my judgment on the first judicial review, the Minister did not err in her approach to Mr Kim's fair trial rights by using the word "reasonable".[87] Nor was her approach wrong because of Professor Fu's comment "as much as Chinese law permits". Mr Kim's submission has taken this comment out of context. The context was the risk that China might manipulate the recording of interrogations to disguise torture. In response to whether that was a risk in Mr Kim's case, Professor Fu's view was that China was likely to adhere to its domestic legal requirements because it needs international cooperation to secure extradition of fugitives and Mr Kim's case provided an opportunity to demonstrate its credibility by providing him a fair trial. Mr McCully gave similar advice about China's motivations to adhere to its assurances due to its desire to extradite economic fugitives from New Zealand.

b) The general position in China

[84] The next ground concerns the general position in China. Counsel for Mr Kim submits that assurances to address fair trial rights in China are not appropriate. This is because, if they are adhered to, then Mr Kim will be treated differently from those

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86 Committee against Torture above n 44 at [13](a).
87 *Kim (first judicial review)* above n 1 at [110]-[112].

who do not have the benefit of assurances. Counsel submits this breaches the opening words of art 14(1) that "all persons shall be equal before the courts and tribunals". For the reasons discussed above in relation to the use of assurances per se, I consider the Minister was entitled to seek assurances and the Minister's Decision was not unlawful, unreasonable or disproportionate on this basis.

[85] As to whether it was possible to have a fair trial in China, this was also covered in the first judicial review. As I discussed in that judgment, the Minister was aware of and took into account the issues about China's legal system generally.[88] It was open to her to consider Mr Kim's particular situation against that general position. The Minister was satisfied Mr Kim's trial was not at risk of state interference and his trial would accord with the fundamental principles of fair trial.[89] Whether this conclusion was open to her substantially depended on the reliance that could be placed on the assurances.[90]

[86] Counsel for Mr Kim refers to developments in Australia, that were not considered at the time of the first judicial review, which reinforce the concerns that a fair trial in China is not possible. This relates to a bilateral extradition Treaty signed by Australia and China (in 2007) that was tabled in Parliament on 2 March 2016. A Joint Standing Committee of the Australian Parliament reported on this in December 2016.[91] This report referred to "serious concerns [which] have been raised over the human rights safeguards contained in the proposed Treaty action".[92] It referred to a "body of evidence" that suggested China "does not act in accordance with procedural fairness and rule of law standards in criminal proceedings".[93]

[87] The concerns included that China does not have an independent judiciary and is not a party to the ICCPR.[94] The Attorney-General's Department considered fair trial issues could be resolved by negotiating assurances on a case by case basis. The Law Council of Australia considered this was unsatisfactory for a number of reasons

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88 At [118]-[130].
89 At [101].
90 At [122].
91 Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties *Nuclear Cooperation – Ukraine; Extradition – China* (Report 167, December 2016).
92 At [3.10].
93 At [3.11].
94 The correct position is that China signed the ICCPR in 1998 but has not yet ratified it. It has not signed or ratified the first or second Optional Protocol to the ICCPR refer n 8 above.

including that it provided inadequate protection for an individual's right to a fair trial, and relied on the discretion of decision makers in each country, which could be influenced by a range of factors. In March 2017 the Federal Government decided not to proceed with the treaty at this time, reportedly in the face of its likely defeat in the Senate.[95]

[88] These concerns are essentially the same as those before the Minister when she made her first decision. The fact that Australia had similar concerns and decided not to proceed with a bilateral treaty with China, supports the validity of those concerns but does not add any new information about them. The Minister assessed Mr Kim's position against the general position in China (about which there was cause for concern). She relied on a number of factors which she regarded as distinguishing Mr Kim's situation from others.

[89] In this judicial review counsel for Mr Kim elaborated on submissions made at the first judicial review about the impossibility of judicial independence in China. He submits there must be both actual independence in the particular case and the appearance of independence. He submits there is no basis on which the Minister could believe that China has independent judges. In addition to Mr Ansley's evidence about this (discussed in the first judicial review) he refers to recent comments about judicial independence made by the head of China's Supreme People's Court.

[90] Specifically, media reported that Zhou Qiang, the President and Party Secretary of China's Supreme People's Court Party Group, in an address to the National Conference of Courts' Presidents on 14 January 2017, said that Western ideologies of judicial independence, separation of power and constitutional democracy must be rejected and the road of Socialist Rule of Law with Chinese characteristics must be followed. Media reports described shock and dismay at these comments and a call from academics and writers for him to resign.[96]

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95 Stephen Dziedzic "Australia-China extradition treaty pulled by Federal Government after back bench rebellion" (28 March 2017) ABC News <www.abc.net.au>.

96 "Zhou Qiang on judicial independence, the separation of powers, and constitutional democracy" (15 January 2017) China Research and Analyses <www.china-research.net>; "Calls Grow for Top Judge to Resign After Judicial Independence Comments" (20 January 2017) Radio Free Asia <www.rfa.org>; and Michael Forsythe "China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince" (18 January 2017) The New York Times <www.nytimes.com>.

[91] Counsel for Mr Kim submits these comments show a disregard for the Beijing Statement of Principles of Independence of the Judiciary.[97] He further submits the Minister failed to consider important academic commentary on judicial independence. One of these papers, for example, argues that there are constitutional limits to the substantive independence of Chinese judges (the National People's Congress, the highest order of state power in China, has the authority to supervise the judiciary) and ideally should be amended to provide constitutional protection of all six elements of de jour judicial independence.

[92] Mr Kim's counsel submits that Mr Kim cannot be surrendered when China's top judge reneges on judicial independence when it is politically convenient to do so. He submits that judicial independence is about both individual and institutional independence. He says the Minister has conflated independence with impartiality in arriving at her decision. He says the assurances relate to judicial independence specific to Mr Kim's case but not institutional independence.

[93] The respondents submit no weight should be placed on these media reports. We do not have proper evidence of them in the form of a transcript and nor do we have the full context. More importantly the respondents submit the question is not the generic question of judicial independence from the state in China, but whether the judge can make a decision without influence from the state in Mr Kim's case. They submit the Minister approached her decision in this way. They say she was aware of the concern about state influence, and took into account Mr Ansley's affidavit. They note she was provided academic writing by Mr Kim's counsel that was consistent with her view that state influence was unlikely in Mr Kim's case.[98] They say that, most importantly, the comprehensive assurances and monitoring

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97 At a conference of Chief Justices of the Asia Pacific region held in Beijing in August 1997 20 Chief Justices adopted a joint statement of principles of the independence of the judiciary. This was further defined at a conference held in Manila in August 1997. Signatories included the Vice President of the Supreme People's Court of China, representing the President of the Supreme People's Court. The Chief Justices of New Zealand and Australia were also signatories. The Chief Justice of Australia described the Beijing Statement as comprising "minimum standards for judicial independence making due allowance for national differences".

98 Randall Peerenboom *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, New York, 2010) at 104. This extract accompanied Dr Ellis' submissions of 11 September 2014 on behalf of Mr Kim and was included in the bundle of materials provided to the Minister. This expressed the view that there is limited or no systematic interference from Party organisers in routine criminal cases.

provided a significant deterrent to state interference in Mr Kim's case and that the Minister was correct to conclude that Mr Kim's fair trial rights were protected by the assurances.

[94] I consider the Minister's approach was reasonably open to her. The institutional structure of the judiciary is a systemic issue. Other courts have approached this issue by considering whether, despite a systemic issue in the receiving country, the country surrendering the individual can be satisfied the individual will receive a fair trial from a court that is not subject to political interference.[99] As mentioned, I accepted in the first judicial review that this approach was open to the Minister.[100] The reported comments of Zhou Qiang give pause. As do Professor Fu's comments on the political factors at play. Nevertheless it is Mr Kim's particular circumstances that are of importance.

[95] Although the Minister relied on a number of factors which she regarded as distinguishing Mr Kim from the position of others in the Chinese criminal justice system, as I concluded in the first judicial review, the critical factor was the assurances. The further information obtained by the Minister following my judgment addressed deficiencies in the information she had about this when making her first decision. It was reasonably open to her to be satisfied that China would adhere to its assurances in Mr Kim's case in light of the advice from Professor Fu and Mr McCully.

c) No right to cross-examine

[96] One of the matters the Minister regarded as relevant to Mr Kim's individual position was that the prima facie case against him appeared to be relatively strong and included scientific evidence which has been reviewed in New Zealand. This was regarded as decreasing the risk of non-compliance with fair trial rights or state intervention. This was also an aspect which Professor Fu referred to in his advice to the Minister.

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[99] *Kapri v Her Majesty's Advocate (for the Republic of Albania)* [2014] HCJAC 33; and *Brown v The Government of Rwanda* [2009] EWHC 770 (Admin).

[100] *Kim (first judicial review)* above n 1 at [121] and [122].

[97] Counsel for Mr Kim submits the Minister failed to consider that this was based on evidence of witnesses obtained by China before the amendments to its CPL. He submits there can be no guarantee that some or all of the witness statements are true and were not obtained under duress. Nor can reliance be placed on the DNA evidence because the DNA samples taken in China have not been reviewed in New Zealand.[101] He submits Mr Kim may be convicted on the basis of this prima facie evidence without having the right to cross examine in breach of art 14(3)(e).

[98] To the extent this is about the possibility of improperly obtained evidence it is speculative. To the extent it is about the absence of a right to cross examine witnesses, art 14(e) of the ICCPR provides that a person tried on a criminal charge has the right to examine witnesses against him (or her) and to obtain the attendance and examination of witnesses on his (or her) behalf under the same conditions as witnesses against him (or her).[102] This is not an unlimited right to obtain the attendance of any witness. It is the right to have witnesses relevant to the defence attend and to be given a proper opportunity to question and challenge prosecution witnesses at some stage of the proceeding.[103]

[99] Professor Fu's advice describes China's inquisitorial system and that China has tried to introduce some adversarial elements into the trial process. These adversarial elements were included in the Ministry's advice to the Minister when she made her first decision. She was advised that, following amendments to the CPL in 2012, witnesses shall appear before the court to give testimony if the prosecutor or defendant's lawyer objects to the witness' testimony, the testimony has a material impact on the case, and the court deems it necessary to ask the witness to appear before the court. The Judge may question witnesses and, with the permission of the Judge, the prosecution and the defence, may also question them. If the Judge declines permission, this can be raised on appeal

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101 China's analysis of the samples has been reviewed, but the samples themselves have not been.
102 NZBORA, s 25(f) is in similar terms.
103 Sarah Joseph and Melissa Castan *The International Convention on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, Oxford, 2013) at [14.169].

[100] These provisions, if adhered to in Mr Kim's case, comply with art 14(e). China has assured New Zealand that it will comply with its domestic requirements regarding fair trial. The Minister received advice about whether this could be relied upon. Professor Fu's opinion is that Mr Kim will receive a fair trial under Chinese law.

[101] A possible reason for scepticism is the very high conviction rate in China. Professor Fu provides a little more detail about this than what the Minister had before her when she made her first decision. Nevertheless, from a New Zealand perspective, even allowing for withdrawals of prosecution and not guilty verdicts which are not announced in open court, the conviction rate remains startlingly high. This was another reason why, whether it was reasonably open to the Minister to be satisfied Mr Kim would receive a fair trial, remained dependent on the assurances. As discussed the Minister's conclusion was available in light of the further information she received.

d) The presumption of innocence

[102] Following the first judicial review, a new matter arose concerning whether it was possible for Mr Kim to have a fair trial. It relates to statements made by a Chinese official reported in a number of media reports, including the *New Zealand Herald* on 6 July 2016. The official was asked for a response to this Court's first judicial review decision. The official is reported as saying that Mr Kim "is a suspect who fled to New Zealand after committing murder in China". The official refers to the safeguards of Mr Kim's rights and interests that China will provide and states:

> By playing up the issue of a 'just trial', [Mr] Kim and his lawyer scheme[d] to get away with the legal punishment. China will continue to cooperate with New Zealand on this case and jointly crack down on crimes.

[103] Counsel for Mr Kim submitted to the Minister that this showed China had already determined Mr Kim's guilt. The Ministry provided advice to the Minister about this. It said the report of the official's comments gave "some mixed messages". However, it was an "off the cuff" answer during a press conference by a spokesperson of a government department that has no role in investigating or trying Mr Kim. The Ministry considered it was not safe to conclude the Chinese

government had already decided that Mr Kim will be found guilty. It considered this was particularly so given the assurances and the diplomatic consequences of non-compliance with them.

[104] Counsel for Mr Kim submits it does not matter whether the statement was made by a government department spokesperson with no involvement. He notes the obligations of the Convention and the ICCPR apply to all actions of the State and says it is not an excuse that the statement was "off the cuff". He submits China has breached the presumption of innocence and the Minister did not consider the point at all. He also submits the Ministry and the Minister gave no consideration to the comment that Mr Kim and his lawyer were scheming to get away with the legal punishment. He says this is a form of intimidation and harassment and that the Chinese government is extending its unlawful sanctioning of Chinese lawyers by now criticising New Zealand lawyers. He submits this undermines China's assurance that it will comply with applicable international legal obligations and domestic requirements regarding fair trial.

[105] I do not accept that the Minister did not consider the comments the official was reported to have said. These comments were quoted in the advice the Ministry gave to the Minister. The Minister is not required to explicitly address all matters that have been the subject of submissions in her reasons. She said she had considered the advice received in the Ministry's briefings to her. The Minister accepted the advice she received that China would adhere to the assurances. This included Mr McCully's "clear view that Chinese Ministers and officials will give the very highest priority to living up to their assurances to [the Minister] in relation to the Kim case." It was reasonably open to the Minister to accept this advice, despite the comments made by the official after the first judicial review.

e) The period of pre-trial detention

[106] The concern about the period of Mr Kim's pre-trial detention was not developed in the submissions for Mr Kim. Professor Fu's advice addressed this. It was reasonably open to the Minister to accept this advice. The assurances would

protect Mr Kim's rights during this phase if they were adhered to. As discussed, it was reasonably open to the Minister to be satisfied they would be adhered to.

f) The right to have a lawyer present during pre-trial interrogations

[107] At the time of the first judicial review it was not clear whether Mr Kim would have the right to have a lawyer present during pre-trial interrogations. The further information obtained by the Minister clarifies that a lawyer will not be present during pre-trial interrogations. Article 14 does not, however, require a lawyer to be present during all pre-trial interrogations.[104] Rather:

(a) Article 14(3)(b) requires that a person have adequate time and facilities to prepare his defence and to communicate with counsel of his own choosing.

(b) Article 14(3)(d) requires that Mr Kim be tried in his presence, be able to defend himself with legal assistance of his own choosing, or if he does not have legal assistance, be informed of his right to have legal assistance where the interests of justice so require, and without payment if he does not have sufficient means to pay for it.

[108] The assurances address these matters. The Minister was advised by her officials that Mr Kim would be able to instruct a lawyer immediately on his return to China.[105] She was advised Mr Kim would know, as a result of the present proceedings, that there were no consequences in Chinese law if he refused to answer questions. She was advised that the absence of a lawyer during pre-trial interrogations meant that he would not have a lawyer reminding him of this during those interrogations. She was also advised about the likely period of pre-trial detention. It is clear from her process and the Minister's Reasons that she took into account all these matters.

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[104] See *Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial* General Comment 32 CCPR 19th Session CCPR/C/GC/32, 23 August 2007. See also Sarah Joseph and Melissa Castan above n 103 at [14.117] discussing *Gridin v Russian Federation* CCPR 770/1997, 20 July 2000. That was a case about police interrogation extending over five days despite the accused's respected requests that he be able to consult a lawyer. It was not about whether he could have a lawyer present with him while being interrogated.

[105] As he will be arrested on arrival and arrest is a compulsory measure for having a lawyer.

[109] Mr Kim submits that the assurance that New Zealand will receive recordings of interrogation within 48 hours is not sufficient. He refers to the Committee's 2015 report urging China to grant detainees the right to a lawyer during the initial police interrogation, its conclusion that China should guarantee that the complete audio-visual footage of an interrogation is made available to the defence and the court, and its concerns about human rights violations perpetrated against lawyers.[106] He submits that the assurances do not provide that Mr Kim's lawyer will receive the recordings, nor that any lawyer appointed will not be sanctioned, or tortured for raising matters on Mr Kim's behalf.

[110] I do not accept this submission. The Minister was provided with the Committee's 2015 concluding report. The advice to her highlighted a number of the concerns raised in that report. While this advice did not include the view that detainees should have access to a lawyer during the initial interrogation, it is clear from the Minister's "on balance" conclusion that she gave careful consideration to this issue. Undoubtedly it would have been preferable if Mr Kim had the right to have his lawyer present during all interrogations as would be the case if he were interviewed in New Zealand.[107]

[111] However, it is not a question of what other assurances the Minister could have sought, but whether the Minister could be satisfied the assurances that have been obtained will protect Mr Kim's fair trial rights. Rather than insist on Mr Kim being entitled to have his lawyer present during all interrogations, at the Minister's request China has agreed to provide full and unedited recordings within 48 hours of each interrogation. The Minister has requested that officials plan to visit Mr Kim every 48 hours during the investigation phase and she has been advised by the Minister of Foreign Affairs, Mr McCully, that there will be a dedicated resource in Shanghai to carry this out. Mr Kim will have access to his lawyer and to New Zealand representatives before and after he is interrogated.

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106 Committee against Torture above n 44.

107 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act a Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at [20.7.7] which suggests the proper interpretation of s 23(1)(b) of NZBORA includes the right of an arrested or detained person to have a lawyer "throughout so much of the period of detention that the detainee desires, and to have the lawyer represent the detainee's position to the detainer for all or part of the detention". They note this is the position in the United States (*Miranda v Arizona* (1966) 384 US 436 (USSC)) but not Canada (*R v Sinclair* (2010) 30 BHRC 212 (SCC)).

Conclusion on fair trial rights

[112] In short, while it would have been preferable to insist on Mr Kim being able to have a lawyer present during interrogations the Minister was not required to do so. She took into account relevant considerations in deciding Mr Kim's fair trial rights would be protected despite the absence of a lawyer during interrogations. Whether the Minister could be satisfied Mr Kim would receive a fair trial (that is, a fair and public hearing by a competent, independent and impartial tribunal, the right to be presumed innocent until proved guilty by law, the right not to be compelled to be a witness or to confess guilt, the right to be tried without undue delay, the right to examine witnesses, and the right to a lawyer) depended on the reliance that could be place on the assurances. It was reasonably open to the Minister to conclude that the assurances, and proactive monitoring of them, together with China's agreement to provide full and unedited recordings of all police interrogations within 48 hours, would protect Mr Kim's fair trial rights. I am therefore not persuaded the Minister's Decision about this was wrong in a judicial review sense.

The death penalty

The restriction

[113] The Minister should not order Mr Kim's surrender if it appears to her that he may be sentenced to death and China is unable to sufficiently assure her that he will not be sentenced to death or any such sentence will not be carried out.[108]

The first judicial review

[114] When seeking Mr Kim's extradition, China provided a determination from the Supreme People's Court, that the death penalty or the death penalty with a two year reprieve would not be imposed on Mr Kim. This determination complied with Chinese law. Therefore this ground did not prevent the Minister from ordering Mr Kim's surrender providing China would adhere to the assurances. Relevant to China's likely adherence was whether New Zealand could disclose non-compliance with the assurances to third parties and whether New Zealand would proactively

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[108] Extradition Act, s 30(3)(a).

monitor compliance with the assurances. The Minister had not addressed these matters in determining to surrender Mr Kim. She was directed to reconsider her decision in light of these matters.

Further information obtained by the Minister

[115] As discussed above the Minister received further information about China's likely adherence to the assurances, New Zealand's ability to disclose a breach of the assurances to a third party and its intention to proactively monitor the assurances.

The Minister's Decision

[116] The Minister's Reasons referred to Dr Ellis' submission that China could not be trusted to comply with its assurances. The Minister was, however, satisfied that China would comply with its assurance and not impose the death penalty. She considered the assurance was reliable. She noted China had, in another case, honoured an assurance provided to New Zealand. She also noted that China was well aware of New Zealand's long standing opposition to the death penalty, New Zealand would be monitoring Mr Kim's case,[109] and non-compliance with the death penalty assurance would have repercussions for the bilateral relationship between China and New Zealand, and China's international reputation.

Mr Kim's submissions

[117] Counsel for Mr Kim submits the Minister acted unfairly, failed to consider relevant considerations, and failed to provide reasons in relying on the death penalty assurance. He submits the Minister had a duty to consider that China has the death penalty (not whether it will be imposed on Mr Kim) and that New Zealand is a world leader in trying to abolish the death penalty and regards the death penalty as abhorrent. He says it is strange that New Zealand is "so friendly with the world's most active taker of human life".

[118] In support of this submission he refers to Mr Ansley's evidence that:

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[109] The Minister also referred to the possibility that South Korea might monitor Mr Kim's case. As mentioned above, I do not take this into account in considering her reasons because it is unclear if this will in fact occur.

> It is perhaps appropriate to note that China is believed to execute more people each year than all other countries of the world combined. The exact number is difficult to pinpoint, because execution statistics are official State secrets. The last estimate I have from a ranking Chinese official was "even less than 10,000". Amnesty International has always reported substantially lower figures, but stresses that the real number is almost certainly substantially higher.
>
> But there is absolutely no credible source for this belief [reduction of numbers in recent years] and as stated above, there are no statistics. …
>
> In China, the casual and widespread imposition of death sentences, together with the hopelessly flawed nature of the entire "judicial" process ensures that significant numbers of innocents must be executed.

[119] Counsel for Mr Kim also submits the Minister failed to consider the Irish experience,[110] failed to undertake an extensive survey of other countries' attitudes to assurances from China, and acted unreasonably or unfairly because of this. Counsel refers to the Law Council of Australia's comments on assurances from China regarding the death penalty:[111]

> There is no consequence. What is Australia going to do? What is the reality? Is Australia going to try to haul China before the International Court of Justice? It is a joke. That is the reality of it. It is impossible to impose an effective sanction against a breach of the death penalty undertaking, other than as an executive act the Attorney-General may refuse future requests, and that requires the discretion of the Attorney in any particular case.

[120] Counsel for Mr Kim submits it is wrong to view assurances regarding the death penalty as more reliable because breaches can be detected (as a number of cases in other jurisdictions have done). He refers to Mr Ansley's affidavit that this has limitations because "deaths of previously healthy inmates from alleged natural causes occur with suspicious frequency in Chinese prisons and there is no way for any outside monitors to investigate". He says:

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110 *Kim (first judicial review)* above n 1 at [238]-[239]. The Irish experience refers to a Chinese man involved in an unlawful killing in Dublin. In seeking Irish assistance, China had assured that he would not be executed. He was, however, sentenced to death with a two year reprieve. This was subsequently commuted to a life sentence following a period of engagement over the case between Irish and Chinese officials.

111 These comments are from the Joint Standing Committee on Treaties report above n 91 at [3.20]. The proposed treaty between Australia and China provided that a request for extradition could be refused if the offence carried the death penalty and the requesting party did not provide an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. The report also refers to the Attorney-General Department's view that an undertaking of this nature is a deliberate and intentional government-to-government assurance that carries considerable weight.

> Typically, relatives are notified that the inmate has died suddenly of a heart attack and that cremation has already taken place. The family has no opportunity to view the body or have an autopsy performed.

[121] He says the situation is made worse by violation of the rights of human rights lawyers. Mr Ansley gives evidence that there are many documented instances of harm to Chinese human rights lawyers, including many who have died in custody. He says that the Special Rapporteur on Torture has previously been refused access to the sites he wished to visit and Chinese human rights lawyers who sought him out at the time were subsequently detained and persecuted.

My assessment

[122] Whether it was reasonably open to the Minister to accept an assurance from China about the death penalty was discussed in the first judicial review.[112] I accepted that it was open to her to do so, providing she could be satisfied the assurance would be honoured. New Zealand's abhorrence of, and leadership in abolishing, the death penalty do not alter that position. The Minister could have decided that no one from this country should be extradited to China while it retains the death penalty. But she did not have to. It was reasonably open to her to give effect to the public interest in prosecuting alleged serious criminal offending, where she has been assured that Mr Kim, if convicted, will not be subject to the death penalty and there is a proper basis on which she can be satisfied this assurance will be kept.

[123] Mr Ansley's comments concerning unexplained deaths of inmates are more relevant to the torture restriction on surrender than they are to the death penalty restriction. As I have discussed, it was reasonably open to the Minister to be satisfied that Mr Kim was not at risk of torture if he is surrendered because of the assurances and proactive monitoring of them.

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[112] *Kim (first judicial review)* above n 1 at [137] and [144]. The United Kingdom Supreme Court has recently confirmed the relevance of assurances in assessing whether there is a substantial risk that a person to be extradited would be incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms, saying "the court must assess not only the quality of the assurances given but also whether they can be relied on, having regard to the general situation in that country with regard to respect for human rights": *Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean* [2017] UKSC 44 at [25].

[124] The other matters raised on Mr Kim's behalf concern the reliability of the assurances. They are matters considered in the first judicial review. I considered the Irish experience was material information which had not been part of the Minister's consideration.[113] I also considered the information obtained from other countries about their experience was limited.[114] This was relevant to the weight the Minister could place on this information in deciding whether she could be satisfied that China would honour the assurances.[115] The Law Council of Australia's comments are another voice expressing concern about relying on assurances about the death penalty.

[125] These matters meant it was important the Minister had a proper basis for being satisfied that China would not impose the death penalty on Mr Kim if he was surrendered and ultimately convicted. The Minister based her decision on New Zealand's own direct experience of China honouring such an assurance, China's knowledge of New Zealand's long standing opposition to the death penalty, China's knowledge that New Zealand would be monitoring Mr Kim's case, and that non-compliance with the death penalty assurance would have repercussions for the bilateral relationship between China and New Zealand[116] and China's international reputation. That was a proper basis to reach the conclusion she did. Her decision was reasonably open to her.

Other discretionary restrictions

The restrictions

[126] The Minister may determine not to surrender a person if:

> (a) the person is a New Zealand citizen and, having regard to the circumstances of the case, it would not be in the interests of justice to surrender the person;[117]

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113 *Kim (first judicial review)* above n 1 at [238] to [240].
114 At [241].
115 At [241].
116 The advice from MFAT was that this relationship is constructive, wide-ranging and based on mutual trust.
117 Extradition Act, s 30(3)(c).

(b) it appears to the Minister there are compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, that would make it unjust or oppressive to surrender the person;[118]

(c) for any other reason the Minister considers the person should not be surrendered;[119] or

(d) because of the amount of time that has passed since the offence was alleged to have been committed or was committed, and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.[120]

[127] As noted in the first judicial review, the first of these does not apply to Mr Kim because he is not a New Zealand citizen. He is, however, a resident who has lived in this country from a young age. Members of his family are New Zealand citizens. In light of these connections to New Zealand, circumstances of the case, that would make it unjust to surrender a New Zealand citizen, potentially could be considered by the Minister under the "any other reason" ground.[121] No such matters particular to New Zealand citizens or those with comparable connections have been advanced.

[128] There are circumstances that potentially fall under one or more of the other grounds. When the Minister's Decision was given Mr Kim had spent over five years in custody. (He has since spent around 11 months on restrictive bail conditions.)[122] During his detention Mr Kim's mental health deteriorated. Reports from a psychologist and a psychiatrist in 2015, at a time when he had been in custody for four years and four months, diagnosed Mr Kim as having a severe major depressive disorder with anxious distress and suicidal risk.

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118 Section 30(3)(d).
119 Section 30(3)(e).
120 Section 8(1)(c).
121 *Kim (first judicial review)* above n 1 at [22].
122 *Kim (bail decision)* above n 3.

[129] His detention has also meant his two teenage daughters have been separated from their father for a long time. His two daughters were at intermediate school when Mr Kim was first arrested. They are now finishing high school. They do not have a relationship with their mother (she left them in the care of Mr Kim and his family when they were very young). During the period of his detention Mr Kim missed them very much and they felt "empty" due to his absence from their daily life.[123] While he has been granted bail, there is inevitable stress due to the uncertainty of what may occur if Mr Kim is surrendered.

The first judicial review

[130] When the Minister made her first decision she specifically considered Mr Kim's mental health. She had before her the 2015 psychologist and psychiatrist reports. The Minister was satisfied Mr Kim was not too unwell to travel. Chinese officials advised New Zealand officials that Mr Kim could receive appropriate medication free of charge in both pre-trial detention and in prison (if convicted). The assurances enabled monitoring of Mr Kim's health. Therefore this ground did not prevent the Minister from ordering Mr Kim's surrender if she was properly able to be satisfied the assurances would be honoured.[124]

[131] It was not suggested to the Minister when she made her first decision that she should not surrender Mr Kim because of the consequences for his daughters. This was raised as an issue in the first judicial review. It was submitted the Minister should have considered their rights under arts 17 and 23 of the ICCPR and art 8 of the United Nations Convention on the Rights of the Child. I held that, if this was to be considered by the Minister, Mr Kim would need to provide evidence to support the submission.[125]

[132] The length of Mr Kim's detention was considered as part of Mr Kim's application for a discharge from the extradition.[126] That application was unsuccessful but an alternative application for bail was granted.[127]

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123 At [35].
124 *Kim (first judicial review)* above n 1 at [138]-[143].
125 At [246].
126 *Kim (discharge decision)* above n 3. The length of time at each stage of the extradition process was considered at [106] and the total time at [111].

Further information obtained by the Minister

[133] As discussed above the Minister received further information about whether China was likely to adhere to the assurances, New Zealand's ability to disclose a breach of the assurances to third parties and New Zealand's intention to proactively monitor the assurances. The Minister also had before her an affidavit from Mr Kim concerning the effect on his two daughters. No further information was put forward about Mr Kim's health or the effects on him of his extended detention.

The Minister's Decision

[134] As to Mr Kim's mental health, the Minister's Reasons noted the most recent report was provided in October 2015. Her view remained the same as when she made her first decision. She considered Mr Kim's mental health issues were not sufficiently compelling or extraordinary to refuse surrender. There was no evidence to show Mr Kim was too unwell to travel. Medication would be available to Mr Kim in detention. The assurance enabled New Zealand to have Mr Kim examined by medical professionals. For these reasons the Minister was satisfied Mr Kim's health did not render it unjust or oppressive to order his surrender.

[135] As to Mr Kim's family, the Minister's Reasons noted the following matters: Mr Kim's children were 16 and 17 years old and had been living with Mr Kim's extended family from a young age; the offence for which extradition was sought was serious; and the time between the alleged offending (December 2009) and when China sought extradition (May 2011) was short. In these circumstances the Minister considered the interference with the private and family lives of Mr Kim and his family was outweighed by the public interest in extradition.

[136] As to whether it would be unjust or oppressive to order Mr Kim's surrender having regard to all the circumstances of the case, the Minister's Reasons noted the following matters: the charge was not trivial; there was no reason to believe the charge was brought other than in good faith and in the interests of justice; while there has been a delay since the offending is alleged to have occurred, there is no evidence to suggest Mr Kim would be prejudiced by that delay. In these

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[127] *Kim (discharge decision)* above n 3, *Kim (bail decision)* above n 3.

circumstances the Minister considered it would not be unjust or oppressive to order Mr Kim's surrender.

Mr Kim's submissions

[137] Counsel for Mr Kim submits the Minister erred in law in her assessment of these matters. He submits Mr Kim's detention for more than five years, together with his depression and suicidal state made his surrender oppressive and unjust. He submits there is prejudice arising from delay because there is potentially relevant evidence (for example, CCTV footage of the apartment in Shanghai) which may not have been preserved. He says there is no reason why the police could not have interviewed Mr Kim while he was detained in New Zealand, when his lawyer could have been present.

[138] Counsel for Mr Kim also submits the Minister erred in law or failed to provide sufficient reasons when considering the interference to Mr Kim's family life from his surrender. He submits the Minister's consideration was perfunctory and Mr Kim's two children were not given primary consideration. He submits the length of Mr Kim's current detention was also relevant in determining the public interest in his extradition.

My assessment

[139] The Minister's Reasons expressly considered Mr Kim's health, the impact of the delay on his defence and the interference with his family life. However, the Minister's Reasons did not refer to the length of his detention in New Zealand in considering whether it would be unjust or oppressive to order his surrender. Nor did they refer to the fact that the Chinese police had not sought to interview Mr Kim while he was detained in New Zealand and could have had his lawyer present. Moreover, insofar as the Minister's Reasons considered some of the matters relevant to whether injustice or oppression arose, they were considered as stand-alone matters. The Minister's Reasons did not address whether the combination of these matters gave rise to unjustness or oppression.

[140] However, there is no doubt the Minister was aware of the length of Mr Kim's detention. This had led to his earlier (unsuccessful) application for discharge from extradition and his (successful) application for bail.[128] She had also received advice from her officials that Chinese police had not sought to interview Mr Kim while he was detained in New Zealand because of the advanced stage of the investigation. It is clear from the Minister's Reasons that, in considering the circumstances of the case and Mr Kim's circumstances, she gave weight to the serious nature of the alleged offending for which extradition was sought, that the delays were not the fault of the Chinese authorities (who had acted promptly in seeking Mr Kim's extradition), and Mr Kim had not pointed to any prejudice to his defence from the delays.

[141] There was no error in the Minister's assessment of the considerations to which she gave weight. There was nothing to suggest bad faith on the part of the Chinese authorities in not seeking to interview Mr Kim in New Zealand. Any prejudice to Mr Kim's defence from the delay is speculative. It is not known whether there was relevant CCTV footage and, if there was, whether and when it was destroyed. The alleged offence, intentional homicide, is at the upper end of seriousness in New Zealand as well as China.

[142] It would have been open to the Minister to weigh the various relevant circumstances of the case and Mr Kim differently. Others in the Minister's position may have done so. The fact is that Mr Kim has been detained for a long period, has been seriously unwell during his detention and his children have had limited contact with him over this period. His lengthy detention arises partly from the various court proceedings taken on his behalf to resist extradition. While it might be said he did not need to bring the various proceedings, it is to be remembered that they were taken because of his concerns about the Chinese criminal justice system. That there was a basis for those concerns is indicated by the need for the assurances.

[143] However, there is no one correct way to weighing the relevant competing factors. It was reasonably open to the Minister to reach the conclusion she did. Her decision was proportionate to the public interest served by surrendering Mr Kim to

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[128] *Kim (bail decision)* above n 3; and *Kim (discharge decision)* above n 3.

face trial, if that is the decision of the prosecuting authorities on completion of their investigations, given the serious nature of the alleged offending.

[144] This is, however, subject to one further factor arising from delay that the Minister's Reasons did not expressly discuss. At the hearing I asked whether the time Mr Kim has spent in custody in New Zealand would be taken into account during the sentencing process in China, if he was surrendered and convicted of intentional homicide. If it is not taken into account, it could potentially expose Mr Kim to a disproportionately severe punishment. In that case it would be unjust or oppressive to order his surrender.[129]

[145] Counsel for the respondents undertook to confirm the position by Chinese officials and provided an updating memorandum to the Court. Chinese officials provided the following advice:

> ...
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> There isn't any express provision in Chinese law, either to require, or permit, or prohibit a court to take into account time served in custody in another country, when imposing a sentence of imprisonment on a person who has been extradited to China.
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> ...
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> When imposing a sentence of imprisonment on a person who has been extradited to China, a court may take into account the time served in custody for the purpose of extradition in another country as a factor to give a lighter punishment.
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> In extradition treaties that China has concluded with other countries, there are provisions expressly requiring the Requested Party to inform the Requesting Party of the period of time for which the person to be extradited has been detained prior to the surrender. There are even specific provisions in some extradition treaties requiring the length of time served in custody by the person extradited on the territory of the Requested Party be deducted from the time of imprisonment in the Requesting Party.
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> ...
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> Whether Mr Kim will be eventually eligible for parole, it depends on the category of the convicted offence, the length of the imprisonment and the performance of Mr Kim while serving the sentence.

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[129] This could be considered under s 8(1)(c) or s 30(3)(e) of the Extradition Act. (I am not persuaded this applies only where there has been bad faith as the respondent submits. The period in custody is a circumstance of the case.)

> According to Chinese law, for a criminal who is sentenced to fixed-term imprisonment and has served more than half of the term of his/her sentence, or a criminal who is sentenced to life imprisonment and has served more than thirteen years of his term, parole may be granted if that person conscientiously observes prison regulations, accepts correctional education, shows true repentance and poses no risk of re-committing a crime. Parole shall not be granted for the criminals who are sentenced to fixed-term imprisonment of more than ten years or life imprisonment for intentional homicide.
>
> ...
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> According to Chinese law, the punishment of a criminal to public surveillance, criminal detention, fixed-term imprisonment or life imprisonment may be commuted if, while serving the sentence, that person conscientiously observes prison regulations, accepts correctional education and shows true repentance, or performs meritorious services; the punishment shall be commuted if a criminal performs a major meritorious service. Therefore, in the case of intentional homicide, commutation mechanism may be applied if the criminal meets the legal requirement of commutation.

[146] In summary, if convicted of intentional homicide Mr Kim may be sentenced to life imprisonment or a fixed term of imprisonment (given the assurance the death penalty will not be imposed). If life imprisonment is imposed, the time spent detained in New Zealand will not be relevant because there is no parole in China for intentional homicide. It may, however, be relevant to the choice between a determinate sentence and life imprisonment, or to the length of a determinate sentence if a determinate sentence is imposed. The respondents submit that, because Mr Kim's detention in New Zealand may be taken into account as a factor for imposing a lighter punishment, his time in custody in this country will not result in a disproportionately severe sentence.

[147] This issue was considered in *Lord Advocate v Dean*, a recent decision of the United Kingdom Supreme Court.[130] Mr Dean had been convicted in Taiwan of motor manslaughter and associated offences and was sentenced to four years imprisonment. He fled Taiwan and was arrested in Scotland. He was held in custody in Scotland for about three years while the extradition proceedings ran their course. Taiwan provided an assurance that all periods of detention in Scotland would be deducted from the total period of imprisonment which Mr Dean would serve in Taiwan. This did not, however, apply to calculating when he would be

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130 *Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean* above n 112 at [50].

eligible for parole. It was submitted that his imprisonment in Taiwan would be arbitrary (contrary to art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) because of this.

[148] The Court did not accept this submission. It said the European Convention did not require that foreign states have similar sentencing practices to the United Kingdom or a particular parole system. The European Convention would only be breached by the sentence imposed in the receiving state, where that sentence was grossly disproportionate. Mr Dean's inability to obtain credit towards parole for the time he had spent in custody in Scotland was a result of his flight from justice in Taiwan. It involved no injustice.

[149] Unlike in *Dean* Mr Kim did not unlawfully flee from China. He was not subject to any court order at the time he left the country. If he were convicted of intentional homicide in New Zealand, custody on remand would count towards his parole eligibility. Five years custody on remand would equate to a substantial credit towards his parole eligibility. Although it may be taken into account in sentencing Mr Kim, if he is surrendered to China and convicted, there is no guarantee that it will have an impact on the sentence he receives. This has most troubled me on this review. It might be said that Mr Kim need not have been in custody for five years had he not brought his numerous court applications. But, as I discussed in both the bail and discharge decisions, Mr Kim was entitled to bring those applications under New Zealand's existing legal framework for extradition, and bearing in mind the issues with China's criminal justice system which have meant that assurances are necessary if he is to be surrendered.[131]

[150] The Minister was not asked to consider this matter when she gave her decision. The issue was not advanced on Mr Kim's behalf and the Minister's Reasons do not refer to it. I have considered whether I should quash the Minister's Decision and direct that she specifically consider whether Mr Kim is at risk of receiving a disproportionate sentence and whether she should obtain an assurance that his time in custody in New Zealand will be deducted from any sentence imposed in China.

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[131] *Kim (bail decision)* above n 3 at [32]; and *Kim (discharge decision)* above n 3 at [125].

[151] However, the question is not what assurances the Minister could obtain but did not. Rather the question is whether surrender would be unjust or oppressive in the circumstances of the case or the person taking into account the assurances that have been obtained. MFAT has committed to monitoring Mr Kim's case. In providing this commitment, the Minister was advised that consular assistance to New Zealand citizens imprisoned overseas, including in China, is a core part of its responsibilities, and its experience and capability will be drawn on in monitoring Mr Kim's case.

[152] Accordingly, the New Zealand consular and diplomatic staff monitoring Mr Kim's case will be in a position to ensure that, if Mr Kim is convicted of the offence, the period of his detention in New Zealand is before the Court. That may lead to a lesser sentence. If that occurs his period of detention in New Zealand will not have led to a grossly disproportionate sentence. Moreover, it can be expected that, New Zealand (by the Minister's Decision) having ordered Mr Kim's surrender, New Zealand consular and diplomatic staff will continue to pro-actively monitor Mr Kim's case to its conclusion. If the ultimate outcome is that Mr Kim is tried, convicted, and sentenced to imprisonment in China, New Zealand consular and diplomatic staff monitoring would extend to seeing that the authorities appropriately consider parole or commutation of his sentence at the earliest opportunity.

[153] I have therefore concluded that the Minister's Decision to order Mr Kim's surrender is not unlawful, unreasonable or disproportionate on account of the period of time Mr Kim has already spent detained in New Zealand.

Summary of outcome and result

[154] In the first judicial review the Minister of Justice was directed to reconsider her decision to surrender Mr Kim to China. This was in light of three specific matters which had not been addressed when her first decision was made. In reconsidering the matter the Minister sought further information and advice. This included advice from Professor Fu, a professor of law in Hong Kong, information from the Minister of Foreign Affairs and his officials, and confirmation from Chinese

officials about when New Zealand officials would have access to recordings of police questioning of Mr Kim.

[155] The information obtained by the Minister comprehensively addressed the three matters of concern in the first judicial review. Professor Fu has addressed the confusion over aspects of the Chinese criminal law provisions and expressed the view that Mr Kim will receive a fair trial. The Minister of Foreign Affairs has advised that his view is that China will adhere to the assurances. He is confident New Zealand has the capability and resources to carry out the necessary monitoring of the assurances. In accordance with the Minister of Justice's request, he has instructed that the monitoring take place no less than every 48 hours during the investigation phase (and daily if that is needed) and no less than once every 15 days until the trial. Through the comprehensive assurances and these measures it was reasonably open to the Minister to determine that Mr Kim's rights will be protected when surrendered to China.

[156] None of the further matters raised on Mr Kim's behalf alter this. Of most concern now is the period of Mr Kim's detention in this country and the further period he has spent on restrictive bail conditions. However these matters are potentially relevant to the type of sentence imposed on Mr Kim if the ultimate outcome of his surrender is that he is tried and convicted of an offence. In that event New Zealand's monitoring should include ensuring the length of his detention is before the Court so that it can be taken into account in any sentence imposed. Monitoring should also continue to the conclusion of the matter including, if necessary, ensuring that Mr Kim is considered for release at the first appropriate opportunity. If the outcome is that Mr Kim is not required to stand trial or he is found not guilty, it can be expected that New Zealand will ensure his early return.

[157] For these reasons I am satisfied the Minister's Decision to order Mr Kim's surrender was a lawful exercise of her discretionary power. Accordingly this application for judicial review is dismissed. If there are any issues concerning costs arising, (brief) memoranda may be filed within one month of today's decision.

Mallon J