ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF MR RADHI'S WIFE AND CHILDREN.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA84/2016
[2017] NZCA 157

BETWEEN	MAYTHEM KAMIL RADHI Appellant
AND	DISTRICT COURT AT MANUKAU First Respondent
	THE COMMONWEALTH OF AUSTRALIA Second Respondent

Hearing:	9 March 2017
Court:	Miller, Cooper and Asher JJ
Counsel:	L J Turner for Appellant N E Walker and K E Hogan for Second Respondent
Judgment:	3 May 2017 at 2.30pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

C There is no order as to costs.

D Order prohibiting publication of the names or identifying particulars of Mr Radhi's wife and children.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant Maythem Radhi is a refugee from Iraq who lives in New Zealand with his wife and three children. The second respondent, the Commonwealth of Australia, seeks his extradition. After a defended court hearing and appeals it obtained an order from the District Court that Mr Radhi was eligible for surrender. Following that Mr Radhi applied to the District Court for an order that his case be referred to the Minister of Justice because of compelling or extraordinary circumstances.[1] That application failed. He then applied for judicial review to the High Court, and the application was dismissed.[2] He now appeals that decision to this Court.

[2] The proceeding arises out of the wish of the Australian Federal Police to prosecute Mr Radhi for his alleged involvement in helping asylum seekers sail from Indonesia to Australia, in contravention of Australian law. Although we understand that he is not charged specifically in relation to any deaths, the boat used was leaky and sank, killing over 300 people. Two other alleged co-offenders have been tried and convicted in Egypt and Australia, and have been sentenced to terms of imprisonment. Mr Radhi denies any involvement.

[3] The key point in this appeal is whether the District Court, in considering the request for referral to the Minister, failed to place sufficient weight on the effects of Mr Radhi's extradition on his three children.

Background

[4] Mr Radhi is 40 years old. He was born into the Sabean community in Iraq, an ethno-religious minority that is widely recognised as suffering persecution. In early 2000 he escaped Iraq, and in late 2008 the United Nations High Commissioner for Refugees formally recognised him and his family as refugees, and nominated

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1 *Police v Radhi* [2015] NZDC 7576.
2 *Radhi v District Court at Manukau* [2015] NZHC 3347.

them for inclusion in New Zealand's annual refugee quota. In early 2009 Mr Radhi and his wife and two children were accepted for resettlement in New Zealand as part of its refugee quota. They moved here and their third child was born in New Zealand.

[5] In 2009 the Australian Federal Police became aware of Mr Radhi's presence in New Zealand, and in October 2010 an extradition request was submitted. Mr Radhi was arrested in July 2011, and there followed a defended extradition application which went as far as a leave application to the Supreme Court.[3] Mr Radhi's opposition was unsuccessful and there was an extradition order.

[6] Mr Radhi currently holds a resident visa and continues to be recognised in New Zealand as a refugee. His resident visa does not allow him to travel, and extradition would cause his visa to expire. This would mean that if he went overseas he would have no right to re-enter New Zealand.

[7] It is important to record that, even if extradited, there would be two ways in which Mr Radhi could seek permission for re-entry. First, before he left he could apply for a variation of his visa conditions to allow him to leave the country for a period not exceeding 24 months. Under the policy of Immigration New Zealand this application could not be declined. So if he is extradited, Mr Radhi will have two years in which to have his case determined without forfeiting his right to return to New Zealand.

[8] There is also provision under the policy for a further 12 month extension to the two year period. This is only allowed if the applicant has been present in New Zealand for a specified amount of time in the 24 months immediately preceding the application for a variation. The presence in New Zealand requirement can be dispensed with, but only at the absolute discretion of the decision maker.

[9] There will also always be a general discretion to allow Mr Radhi to return. If Mr Radhi is unable to return to New Zealand within two years he could apply for a

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[3] *Police v Radhi* DC Manukau CRI-2011-092-011423, 19 March 2011; *Radhi v Police* [2013] NZHC 163; *Police v Radhi* [2014] NZCA 327; and *Radhi v Police* [2014] NZSC 135.

new visa. The allegations of the Australian Federal Police about his involvement with the charges and any convictions would be matters that could be considered by Immigration New Zealand in the exercise of its discretion. However, Immigration New Zealand would also consider Mr Radhi's character and his previous dealings with immigration officials. That would presumably entail consideration of Mr Radhi's initial entry into New Zealand with his family as part of New Zealand's refugee quota and the positive impression he made on immigration officials at that time. When Mr Radhi first entered New Zealand an immigration official noted that Mr Radhi and his family interacted well together and had good prospects for settlement. Mr Radhi and his family's successful life in New Zealand proves that to be true.

[10] Thus in summary Mr Radhi can be extradited to Australia and be required to remain there for up to two years and still be able to return to New Zealand. After two years away from New Zealand, however, the position becomes more difficult for him, and he would rely on Immigration New Zealand's discretion for permission to return. If he was convicted and sentenced to prison in Australia so that he could not return within two years, or if the proceedings were not determined in a manner that released him within two years, he would have to apply for a visa to return to New Zealand. If he is convicted, there would be a possibility that he would not be allowed to return to New Zealand.

[11] In this appeal Mr Radhi's counsel Mr Turner has not pursued various points that were argued in the District Court and High Court. He has instead focussed on the one issue we have referred to earlier. That issue, in more detail, is the meaning and application of s 48(4)(a)(ii) of the Extradition Act 1999 (the Act) and whether, interpreting that section correctly, there were before the District Court Judge compelling or extraordinary circumstances making Mr Radhi's surrender unjust or oppressive, warranting referral to the Minister. As we have said, of particular focus is the relevance of the effect of extradition on Mr Radhi's children, and their suffering if their father is extradited to Australia.

[12] In his affidavits prior to the hearing Mr Radhi deposed that if he was extradited his family would be torn apart because his wife and children could not

afford to come with him as he would be in custody and unable to support them financially. They would have to rely on social welfare and assistance from friends in Auckland to survive. If he were convicted in Australia, his family would not have the means to travel to that country to visit him while he served his sentence. He has a real fear he will not see his family again and worries how they will survive financially while he is in Australia.

[13] Mr Radhi is also seeking leave to file an affidavit of Dr Barry Eric Kirker. Dr Kirker is a clinical psychologist who has interviewed Mr Radhi's three children. In the affidavit Dr Kirker sets out his professional judgment on the likely impact on the various members of Mr Radhi's family of him being extradited to Australia. Dr Kirker interviewed the family on two occasions and formed the view that all members would be negatively impacted in the short and medium term by Mr Radhi's extradition. Some might not recover, depending on the circumstances. His two daughters are particularly vulnerable. We will refer to this affidavit later in this judgment.

Legislative context

[14] Before we turn to the submissions it is necessary to explain the legislative framework.

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

[16] Section 41 provides that a warrant issuing out of Australia can be endorsed by a District Court Judge in New Zealand. Once endorsed the warrant authorises the New Zealand police to arrest the persons sought to be extradited and to bring them to court to determine whether they are eligible for surrender under s 45 of the Act. If the eligibility criteria for surrender under s 45(2) of the Act are met and there are no mandatory or discretionary restrictions, then the court must immediately make a

surrender order. Section 7 of the Act sets out mandatory restrictions on surrender and s 8 sets out discretionary restrictions.

[17] The object of the Act is as follows:

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

[18] Under s 48 of the Act the court may, if it is satisfied that the grounds for making a surrender order otherwise exist, refer the case to the Minister in a range of circumstances:

> **48 Referral of case to Minister in certain circumstances**
>
> (1) If the court is satisfied that the grounds for making a surrender order otherwise exist but—
>
> (a) the person is a New Zealand citizen; or
>
> (b) it appears to the court that—
>
> (i) there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or
>
> (ii) the person has been sentenced to death or may be sentenced to death by the appropriate authority in the extradition country; or

(c) in the case of a person whose surrender is sought for an extradition offence of which the person has been convicted, the person is liable to be detained in a prison because of a sentence of imprisonment imposed for an offence against the law of New Zealand; or

(d) it appears to the court that another request has been made under this Act for the surrender of the person, and a final decision on the surrender of the person in relation to that request has not been made,—

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

…

(4) If—

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

(i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or

(ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but

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

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

…

[19] The relevant circumstance in this case is that set out in s 48(4)(a)(ii).

[20] The referral power in s 48(1) is compulsory in the sense that if the circumstances outlined are established, the court "must" refer the case to the Minister. The power under s 48(4) is not expressed in such peremptory terms. The court "may" refer the case. However, first the required circumstances must be established.

[21] The power of the court under s 48 being to refer only, it is left to the Minister to determine if a person is to be surrendered if the case is referred:

> **49 Minister must determine if person to be surrendered if case referred**
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> (1) If a case is referred to the Minister under section 48(1)(a) or (b), or section 48(4), or section 53, the Minister must determine in accordance with the grounds set out in subsections (2) to (4) of section 30 whether the person is to be surrendered, as if the case had been referred to the Minister under section 26.
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> (2) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

[22] The Minister must act in accordance with s 30(3) which states that the Minister "may" determine that a person is not to be surrendered if it appears that various circumstances apply, including relevantly for the purposes of the issue before us:

> (d) without limiting section 32(4), it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person; or
>
> (e) for any other reason the Minister considers that the person should not be surrendered.

[23] Section 30, which sets out the Minister's broad discretionary powers, refers to powers to consider a wider range of factors than the court under s 48(4). In particular the Minister under s 30(3)(e) can consider "any other reason". This wide residual discretion is not given to the court in s 48. The discretion bestowed on the courts to refer in s 48(4)(a)(ii) is plainly limited to the court considering only whether surrender would be unjust or oppressive by reason of compelling or extraordinary circumstances of the person.

The decisions

[24] Judge Moses said:[4]

> I do not accept however, that the circumstances of the person for the purposes of s 48(4)(a)(ii) include hardship suffered by others such as

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4 *Police v Radhi*, above n 1, at [60].

> Mr Radhi's family, nor does the section permit me to take into account the trial process which I have taken into account in the assessment of issues raised under s 48(4)(a)(i) of the Act.

[25] The Judge went on to say that he did not accept that Mr Radhi's family circumstances would amount to compelling or extraordinary circumstances which would warrant the referral of the matter to the Minister.[5] He did not refer to New Zealand's international obligations.

[26] In the High Court on review, Woolford J found that he did not have to decide whether Judge Moses' interpretation of "circumstances of the person" was correct, because Judge Moses found that in any event Mr Radhi's family circumstances would not amount to compelling or extraordinary circumstances warranting referral.[6] He went on to say:

> [34] For what it is worth, I take a relatively broad view of the phrase "circumstances of the person". It seems somewhat artificial to separate the impact on Mr Radhi of separation from his wife and children from the impact on his wife and children of separation from Mr Radhi. There will undoubtedly be a loss of family life on the part of both Mr Radhi and his wife and children.

[27] He also accepted that the Act should be interpreted in a way that is consistent with New Zealand's obligations to observe the requirements of applicable international instruments.[7] In a statement which has been focussed on by Mr Turner, and which he submits is wrong, Woolford J stated:[8]

> I am of the view, however, that the rights of Mr Radhi's children are not directly engaged. Many decisions taken by courts of law affect children in one way or another. This does not mean that every decision taken by a court of law needs to incorporate a full and formal process of assessing and determining the best interests of the child.

[28] Woolford J was of the view that it was sufficient for Judge Moses to say that he did not accept that Mr Radhi's family circumstances met the test in s 48(4)(a)(ii).

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5 At [63].
6 *Radhi v District Court at Manukau*, above n 2, at [33].
7 At [35].
8 At [35].

The submission for Mr Radhi

[29] It was a key contention for Mr Radhi that s 48(4)(a)(ii), and in particular the words "circumstances of the person", must be interpreted in accordance with New Zealand's international obligations, including the United Nations Convention on the Rights of the Child (UNCROC).[9] Mr Turner submitted that the District Court Judge failed to take into account UNCROC and other relevant conventions. The international conventions were taken into account by Woolford J, but it was submitted that he nevertheless failed to place proper weight on the best interests of the children. Mr Turner identified the following international obligations as relevant to the interpretation of s 48(4)(a)(ii):

> (a) The UNCROC:
>
> (i) Article 3: the best interests of the child shall be a primary consideration in all actions concerning children; and
>
> (ii) Article 7: children have the right to know and be cared for by their parents.
>
> (b) The International Covenant on Civil and Political Rights:[10]
>
> (i) Article 23: the family is a fundamental group unit of society and is entitled to protection by society and the state.
>
> (c) The International Covenant on Economic, Social and Cultural Rights:[11]
>
> (i) Article 10: The widest possible protection and assistance should be given to the family which is the natural fundamental group unit of society.

[30] Mr Turner submitted that Judge Moses erred when he refused to consider the effect of Mr Radhi's extradition on his children. He submitted that it is artificial to separate Mr Radhi's circumstances from those of his children. He accepted that in ordinary circumstances a person could not resist extradition simply by referring to the impact on his or her family life. However, he argued that there was a compelling and extraordinary overlay in this case because of Mr Radhi's refugee status and the

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9 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

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

11 International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

potential loss of his New Zealand visa after extradition. There was therefore a real risk that, even if he was not convicted in any prosecution, he would be unable to return to his family in New Zealand. His family was particularly vulnerable and would suffer gravely.

Analysis of the section

[31] As we have set out, Mr Turner submits that Judge Moses was wrong when he said that Mr Radhi's family circumstances could not amount to compelling or extraordinary circumstances. Judge Moses considered them not to be circumstances of "the person", that is of Mr Radhi.

[32] In *Ye v Minister of Immigration* the Supreme Court observed that the Immigration Act 2009 should be interpreted in a way that is consistent with New Zealand's obligation to observe the requirements of applicable international instruments, in particular those in the UNCROC.[12] The Supreme Court went on to say:[13]

> The child's interests are always important; but what ultimate effect should be given to them is a matter of assessment against all the other relevant circumstances of the particular case and the specifics of any applicable statutory test.

[33] In relation to art 3 of the UNCROC, the Supreme Court observed that "[*a*] primary consideration does not mean *the* primary consideration".[14]

[34] There is a distinction between extradition and deportation. While both may involve the separation of parents from children, deportation is concerned with the implementation of domestic policy. In contrast, extradition involves international obligations owed by a requested state to a requesting state. There is a high public interest in sending those suspected of having committed offences overseas back to the relevant jurisdiction to face trial. Unlike deportation, extradition involves an element of international reciprocity of considerable public interest to New Zealand. As Woolford J observed, extradition is concerned with "international cooperation in

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12 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]–[25].
13 At [25].
14 At [24].

the prosecution of crime and the removal of safe havens for those who are suspected of having committed criminal offences overseas".[15] Thus, while the international covenants in relation to children are relevant in an extradition case, it is necessary to bear in mind that the issue is not whether it is in a child's interest to be separated from his or her parents. The issue is whether a parent should be extradited, with a consequence being that the parent and child may be separated.

[35] Mr Turner relied on *H(H) v Deputy Prosecutor of the Italian Republic, Genoa.*[16] In *H(H)* the United Kingdom Supreme Court dismissed the appeals of HH and her husband PH and ordered that they be surrendered to Italy to serve lengthy terms of imprisonment in relation to drug dealing offences. The issue arose as to how the interests of the three children of HH and PH should be considered in light of art 8 of the European Convention on Human Rights, which protects the right to private and family life.

[36] We are cautious about placing particular reliance on this decision because it was applying a European Convention as a member of the European Union in the context of an extradition request from another European nation. Therefore, there may have been particular regional factors at play. Nevertheless, it is to be noted that the UK Supreme Court recognised that the interests of the children were relevant to an extradition application. It is also to be noted that the Court emphasised the public interest in extradition and the need to eliminate safe havens for persons accused of criminal offending. It was observed that art 8 had never operated as a bar to extradition for offences approaching the gravity of those faced by some of the appellants, and would only do so in the rarest of cases. It was stated by Lord Wilson:[17]

> No doubt the constituency of defendants who provide the sole or main care to young children is relatively small. But in my view the principal driver behind such absence of authority is the high degree of public importance attached throughout (and no doubt beyond) Europe to the extradition of persons so that they may answer for serious crime.

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15 *Radhi v District Court at Manukau*, above n 2, at [37].

16 *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338.

17 At [169]. A similar approach was taken in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

[37] There is no reference to the person's child or children in s 48(4)(a)(ii). The reference is to compelling or extraordinary circumstances of "the person". Nonetheless, we have difficulty in seeing how, in considering the circumstances of a person, it is possible to exclude that person's family circumstances. A person's family is a fundamental and all-important circumstance of a person, just as that person's state of health, job, and relationships are relevant circumstances. Age or health are mentioned in s 48(4)(a)(ii) by way of example, "without limitation". We see no reason therefore why a person's children as part of his or her family unit in New Zealand cannot also be regarded as a circumstance of that person. If a parent has dependent children they are part of that parent's circumstances, and it will be a circumstance of Mr Radhi if one of his family is affected by something that happens to him. Thus we disagree with the District Court Judge's view that s 48(4)(a)(ii) does not permit a judge to take into account hardship suffered by those in the family of the person to be extradited.

[38] This approach is consistent with the observations of this Court in *Mailley v District Court at North Shore* where circumstances of the person were held to include a person's age, state of mental and physical health and family situation.[18] These are "matters that give necessary colour or perspective to those personal circumstances".[19]

[39] However, there are limitations. The focus in s 48(4)(a)(ii) is plainly on the person, in this case Mr Radhi, rather than his family. The position of his children and their well-being is a circumstance of relevance, but it is not the focus of the required consideration. This consideration was discussed by this Court in a deportation context in *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* where it was stated:[20]

> [I]it is necessary to bear in mind that the issue is not whether it is in a child's interests to be separated from its parents. The issue is whether a parent should be deported, with the consequence that parent and child may be separated.

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18 *Mailley v District Court at North Shore* [2016] NZCA 83 at [50].
19 At [50].
20 *Chief Executive of the Minister of Business, Innovation and Employment v Liu* [2014] NZCA 37, [2014] 2 NZLR 662 at [26].

[40] The Court stated earlier:

> [15] Article 3.1 [of the UNCROC] provides that in all actions by state agencies concerning children, "the best interests of the child shall be a primary consideration". "Best interests" is a broad concept which obviously extends to a child's interest in not being separated from its parents except for good cause. Under art 3 the child's interests are not "the" primary consideration, still less the paramount consideration as they would be in proceedings about care of children within the jurisdiction. In an immigration setting other considerations, such as the public interest, may be no less important. The purpose provision of the 2009 Act emphasises that point, providing that the Act is intended to manage immigration "in a way that balances the national interest, as determined by the Crown, and the rights of individuals."
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> (Footnotes omitted.)

[41] Similarly in *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* this Court found that an immigration officer's decision in an immigration context could not be impeached on the basis that he failed to elevate the considerations concerning the appellant's children above all others.[21] Ellen France P concluded, "the immigration officer was entitled to conclude the medical concerns for the children were outweighed by other considerations relating to the integrity of the immigration system".[22]

[42] Therefore while the effect of any decision on those who are close to and dependent on the person to be extradited may be taken into account, we agree with Woolford J that this does not mean that every decision taken by a court of law needs to incorporate a full and formal process of assessing and determining the best interests of the child.[23] This is not an action "concerning children" in terms of art 3 of the UNRCOC. The position of the family as a fundamental group unit of society is a relevant factor in assessing Mr Radhi's circumstances, but only one of the factors.

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21 *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* [2016] NZCA 248, [2016] NZAR 836 at [38].

22 *Radhi v District Court at Manukau*, above n 2, at [41].

23 At [35].

The circumstances of Mr Radhi

[43] In approaching a factual assessment under s 48(4)(a)(ii) there are two stages. First there is a consideration of whether there are compelling or extraordinary circumstances of the person. Second, the court considers whether those circumstances render it unjust or oppressive to surrender the person. Thus it was observed in *Mailley v District Court at North Shore*:[24]

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

[44] We bear in mind that a severe interruption to family life will usually be the consequence of extradition. However, in this case there is an extraordinary circumstance, namely that Mr Radhi is a refugee. That places him in an unusual position and in particular, as we have set out, puts him at risk of never being able to return to New Zealand, a risk that most persons who are extradited do not face.

[45] We apply the meaning of unjust and oppressive set out in the various *Mailley* decisions. "Unjust" means "not just, contrary to fairness or justice", and "oppressive" means "oppressing, harsh or cruel".[25]

[46] We make the following observations about the effect of the extradition order on Mr Radhi's children:

(a) While extradition will remove Mr Radhi from New Zealand, if he is found to be not guilty or the charges are withdrawn within two years, he will be able to return to his family in New Zealand, provided that he applies for a variation of his visa conditions before departing.

(b) It would be surprising, given he is the sole defendant and if Mr Radhi co-operates and works to have a prompt trial, if the case against him could not be heard within two years.

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[24] *Mailley v District Court at North Shore*, above n 18, at [51].

[25] *Commonwealth of Australia v Mailley* DC North Shore CRI-2008-44-1978, 20 June 2014; *Mailley v District Court at North Shore*, above n 18, at [58].

(c) While in Australia on remand, or if convicted and imprisoned in custody, his family will be able to visit him in custody (although there will be significant financial hurdles to overcome).

(d) If the case takes longer than two years but he is ultimately absolved, he will have the option of applying to Immigration New Zealand to return to New Zealand. Immigration New Zealand does not and cannot guarantee that this application would be successful, but we consider that it might well be, given that Mr Radhi will be in essentially the same position that he was in when he successfully applied for entry into New Zealand in 2009. Indeed, he might be in a stronger position, given that his immediate family are also now New Zealand citizens.

(e) If he is convicted, sentenced and imprisoned in Australia for more than two years, he will have the option of applying to Immigration New Zealand to return to New Zealand. His criminal conviction would be taken into account, along with the facts that Mr Radhi held refugee status and his immediate family are New Zealand citizens.

[47] Thus, in terms of Mr Radhi's children seeing less of their father, the position for the first two years would be no different from that of any family separation where a parent of New Zealand children will have to stand trial in Australia. If he is convicted and has to remain in Australia for more than two years, Mr Radhi's ability to return to New Zealand will be less certain, but it is not impossible. There is nothing unjust in that, given the conviction.

[48] We agree with Woolford J that the family circumstances of Mr Radhi do not make it unjust or oppressive for him to be surrendered. His refugee status is an extraordinary circumstance, and the fact that he might not be able to return to New Zealand after serving his sentence might be seen as part of that extraordinary circumstance. However, the second requirement before a referral can be made, of it being unjust and oppressive to surrender the person, is not made out. There are steps that Mr Radhi can take to protect his visa status and reduce the risk of him not being

able to re-enter New Zealand. Even if convicted and imprisoned in Australia, Mr Radhi will be able to apply for re-entry, which will be at the discretion of Immigration New Zealand. When weighed against the importance of New Zealand's extradition obligations, these circumstances are not sufficient to render it unjust or oppressive to surrender Mr Radhi.

[49] Mr Turner submitted that referral to the Minister is appropriate in this case because the Minister has the ability to take steps to protect Mr Radhi's visa status, such as seeking undertakings from Immigration New Zealand, and the ability to arrange with Australian authorities for Mr Radhi to serve his sentence (if any) in New Zealand. However, the fact that referral to the Minister may be advantageous to Mr Radhi is not part of the statutory criteria. Section 48(4)(a)(ii) is clear that referral is only appropriate where there are compelling or extraordinary circumstances making it unjust or oppressive to surrender the person. The court has a gatekeeper or screening role.[26] Cases that do not meet those criteria should not be referred. As we have discussed above, we do not consider that the requirement of it being unjust or oppressive to surrender Mr Radhi is met.

Conclusion

[50] We accept that the effect on the children may be severe. However, that severe effect is not in the short term remarkably different from that of any New Zealand family where a father stands trial in Australia. It may, as we set out, be no different in the long term; and if it is, it will be because his trial has been extraordinarily delayed or because he has been convicted.

[51] We consider that Judge Moses was incorrect when he said that the circumstances of the person referred to in s 48(4)(a)(ii) did not include the hardship that could be suffered by a person's family. Mr Radhi's family and its well-being are part of his circumstances. However, the hardship to the children is not the primary issue. It is one of the relevant circumstances to be assessed while considering all other relevant factors, including the public importance of a functioning extradition system.

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[26] *Mailley v District Court at North Shore*, above n 18, at [45].

[52] While Mr Radhi's children are vulnerable, such vulnerability of children may arise in a myriad of circumstances where a parent faces prosecution. While the children's position is relevant, we are not persuaded that Mr Radhi's extradition is, in the circumstances, unjust or oppressive. Like Woolford J, we consider that the end decision reached by Judge Moses was plainly correct.

Application to adduce further evidence

[53] We return to the application to adduce the evidence of Dr Barry Kirker. He sets out the severe effects that will be suffered by the children should they be separated from their father. He concludes that Mr Radhi's daughters and his wife are psychologically vulnerable and of risk to their mental health if Mr Radhi is extradited. The son is at risk of relapse of "past problems" and distress, and all members will be likely to be negatively impacted in the short to medium term, and some potentially may not recover.

[54] For further evidence to be admitted on appeal, it must be fresh, credible and cogent.[27] It would not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial.[28]

[55] We are unable to regard this evidence as fresh. It could have been produced at the hearing before Judge Moses. While we accept that the focus of the hearing has changed somewhat, the issue of the impact on the family was raised before Judge Moses, and this evidence could have been produced before him.

[56] Dr Kirker's report is thorough, and his report particularly on the two daughters does provide a persuasive picture of them both being psychologically vulnerable. However some of the assertions appear to lack persuasive foundation, for instance the assertion that the daughters and mother would be at risk of "significant decomposition in their mental health". While the evidence is credible in the sense that it consists of comments by an expert on areas within his expertise, it does rely to a considerable extent on self-reporting by Mr Radhi's family members.

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27 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

28 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

[57] Cogency requires a genuine likelihood that the evidence will affect the result.[29] We do not think it likely that Dr Kirker's evidence would have affected the result in the District Court. Even if the Judge had given weight to the children's position as part of his assessment of the circumstances of Mr Radhi, Dr Kirker's evidence did no more than show that some of the family are particularly vulnerable and need their father's presence and support. Regrettably this is frequently the case when persons must serve prison sentences or be extradited. The proposed evidence as outlined, while it may have been admissible at the hearing, is not sufficiently cogent to warrant leave being granted to adduce it on appeal.

[58] We conclude therefore that the evidence is neither fresh nor cogent and should not be admitted.

Result

[59] The application to adduce further evidence is declined.

[60] The appeal is dismissed.

[61] Mr Radhi is on legal aid. We make no order as to costs.

[62] We make an order prohibiting publication of the names or identifying particulars of Mr Radhi's wife and children.

Solicitors:
Crown Solicitor, Manukau for Second Respondent

[29] *Hodgson v Hodgson* [2015] NZCA 404, [2015] NZFLR 979 at [53].