IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001649
[2015] NZHC 3347

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	MAYTHEM KAMIL RADHI Applicant
AND	THE DISTRICT COURT AT MANUKAU First Respondent
	THE COMMONWEALTH OF AUSTRALIA Second Respondent

Hearing: 19 November 2015

Appearances: L J Turner and L G Mulder for Applicant
M J Lillico and R J Warren for Second Respondent

Judgment: 21 December 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 21 December 2015 at 12:00 p.m., pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Crown Law, Wellington

Counsel: R Mansfield, Auckland
LJ Turner, Auckland

Introduction

[1] Maythem Kamil Radhi is resisting extradition to Australia. The Australian Federal Police want to try Mr Radhi for people smuggling. It is alleged that, in 2001, he helped asylum seekers sail from Indonesia to Australia in a leaky boat, which sank and killed over 300 men, women and children. Mr Radhi denies the allegations. Mr Radhi was at the time living in Indonesia, having arrived there in March 2000. He was subsequently recognised as a refugee by the United Nations High Commissioner for Refugees (UNHCR) and put forward for inclusion in New Zealand's annual quota intake of refugees. New Zealand accepted Mr Radhi under the quota. He and his wife and two children arrived in New Zealand in March 2009. Upon arrival, he was granted a residence permit.

[2] In October 2010, the Australian authorities submitted an extradition request to New Zealand. Proceedings have been ongoing since then. Mr Radhi has been found eligible for surrender to Australia by the Courts. However, in a last ditch effort to avoid extradition, Mr Radhi applied to the District Court on 27 February 2015 for an order referring his case to the Minister of Justice. The Minister has a wide discretionary power, not available to the Courts, to refuse the Australian extradition request.

[3] In a judgment dated 3 July 2015, the District Court refused to refer Mr Radhi's case to the Minister. Mr Radhi now seeks judicial review of that decision. He says that the District Court made a number of errors of law, failed to take into account mandatory relevant considerations and breached procedural fairness. I heard argument on 19 November 2015 and reserved my judgment.

The law

[4] For present purposes, the key sections in the Extradition Act 1999 (the Act) are ss 7, 8 and 48. They relevantly provide:

> **7 Mandatory restrictions on surrender**
>
> A mandatory restriction on surrender exists if—
>
> ...
>
> (c) On surrender, the person may be prejudiced at his or her trial or punished, detained, or restricted in his or her personal

liberty by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions; or

…

8 **Discretionary restrictions on surrender**

(1) A discretionary restriction on surrender exists if, because of—

...

(c) The amount of time that has passed since the offence is 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.

48 Referral of case to Minister in certain circumstances

...

(4) If—

(a) It appear 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).

[5] Section 48 firstly permits a judge to refer a case to the Minister if any of the restrictions on the surrender of the person under ss 7 or 8 apply or may apply. Section 7 contains mandatory restrictions on surrender. In the District Court, counsel for Mr Radhi argued that the mandatory restriction in s 7(c) applied or may apply, in that on surrender Mr Radhi may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his status, which included his race, ethnic origin, religion or nationality, or by reason of his political opinions.

[6] Discretionary restrictions on surrender are contained in s 8. In the District Court, counsel for Mr Radhi argued that the discretionary restriction in s 8(1)(c) applied or may apply, in that the amount of time that had passed since the offending is alleged to have been committed (the boat sank in 2001) and all the circumstances of the case made it unjust or oppressive to surrender Mr Radhi.

[7] Section 48 secondly permits a judge to refer a case to the Minister if it would be unjust or oppressive to surrender Mr Radhi because of compelling or extraordinary circumstances of the person.

[8] The phrase "unjust or oppressive" is used in both s 8(1)(c) and s 48(4)(a)(ii). While s 8(1)(c) refers to the circumstances of the case, s 48(4)(a)(ii) focuses on the circumstances of the person. The interplay between s 8(1)(c) and s 48(4)(a)(ii) and the interpretation of the various terms contained within them is of crucial importance in this case.

District Court decision

[9] At the outset, Judge Moses set out the issues for decision:

(a) Were there any mandatory restrictions, as set out in s 7 of the Act, which existed?

(b) Were there any discretionary restrictions, as set out in s 8 of the Act, which existed?

(c) Were there any compelling or extraordinary circumstances of the person, in terms of s 48(4)(a)(ii) of the Act, which would make it unjust or oppressive to surrender Mr Radhi?

Section 7 mandatory restrictions

[10] As to the mandatory restrictions set out in s 7, Judge Moses noted Mr Radhi's arguments:

(a) There was a risk of *refoulement* to Iraq if he was extradited; and

(b) There was a risk that Mr Radhi would not receive a fair trial in Australia due to widespread adverse media publicity surrounding his involvement in the sinking of the asylum-seeker boat and because of Australia's immigration policies in general.

[11] Judge Moses found that there was no evidence before him and he accordingly did not accept that, on surrender, Mr Radhi might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his status as a refugee in terms of s 7(c). Furthermore, he was satisfied that New Zealand courts could safely assume that Australia had a trial process which would prevent any breach of fair trial rights such as Mr Radhi feared in this case. Judge Moses was satisfied that the Australian criminal justice system was accustomed to considering and ensuring that fair trial rights are protected in the face of pre-trial publicity or other prior knowledge of jurors. Judge Moses was therefore satisfied that there was no risk that Mr Radhi would face an unfair trial because of this or any other grounds specified in s 7 of the Act.

Section 8 discretionary restrictions

[12] Judge Moses also noted Mr Radhi's argument that there was a discretionary restriction on his surrender, namely that under s 8(1)(c) of the Act, it would be unjust or oppressive to surrender the person because of the time which had passed since the offence was allegedly committed because:

(a) Fourteen years had passed since the alleged offence of people smuggling was committed by Mr Radhi in 2001.

(b) In that time, Mr Radhi and his family had been permitted to resettle and had built a new life for themselves in New Zealand.

(c) The Australian authorities had every opportunity to lay charges against Mr Radhi years ago, but delayed in doing so; and

(d) Mr Radhi's defence in relation to the charges now laid against him was likely to be significantly prejudiced as a result of the delay.

[13] Judge Moses stated that intervention by the Court under s 8 would be rare and that the personal circumstances of the alleged offender could come within "all the circumstances of the case" under s 8 only if there was a clear nexus between those personal circumstances and the issue of delay and good faith. As to the phrase

"unjust or oppressive" used in s 8, he adopted an interpretation of "unjust" as meaning prejudice to the defendant in presenting a defence to the charge, the prejudice being of a kind that could not safely be left to be dealt with by the trial court. Further, he stated that "oppressive" generally signified hardship to the defendant resulting from changes in his circumstances that had taken place during the period.[1]

[14] Judge Moses then looked closely at previous investigations into Mr Radhi's actions conducted by the Indonesian authorities, the UNHCR and the Australian authorities, as well the lengthy interview process with the New Zealand Immigration Service before he was accepted as a refugee.

[15] Judge Moses considered that the Australian authorities had been slow or sluggish to complete their investigation of Mr Radhi. However, he accepted that extradition was not possible while Mr Radhi was in Indonesia and that the request for extradition was made less than a year after the Australian authorities had learnt that Mr Radhi had arrived in New Zealand under its refugee quota.

[16] Judge Moses was of the view that Australia had not lulled Mr Radhi into any false sense of security and there had no bad faith on the part of Australia. The Judge considered there was insufficient evidence to show that Mr Radhi's fair trial rights would be jeopardised due to the unavailability of witnesses who might assist his defence as he had not pointed to any specific witnesses being unavailable. In addition, Judge Moses noted that Mr Radhi would have the opportunity to seek a stay of prosecution in Australia if enquiries established that essential witnesses were unavailable.

[17] Finally, Judge Moses noted that while Mr Radhi's family circumstances had changed and he was now settled in New Zealand with a third child born in New Zealand, he did not consider that those factors would make it oppressive or unjust to extradite him to Australia.

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1 Citing *Wolf v Federal Republic of Germany* [2001] NZAR 536 (HC) at [68].

Section 48(4)(a)(ii) compelling or extraordinary circumstances

[18] Judge Moses then turned to consider the factors submitted on Mr Radhi's behalf with regards to the test set out in s 48(4)(a)(ii) of the Act, which provides:

> **48 Referral of case to Minister in certain circumstances**
> …
> (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 factors submitted in favour of Mr Radhi were:

(a) Mr Radhi was granted refugee status and residence in New Zealand after thorough investigations by the UNHCR and New Zealand Immigration Service.

(b) He and his family had made a new life in New Zealand, and he had fathered a third child who was a New Zealand citizen.

(c) For all intents and purposes he and his family were now Kiwis and this New Zealand family would be torn asunder if extradition would be granted at this late stage.

(d) The hardship to Mr Radhi was extremely harsh as he would be ripped from his family and community, obliged to defend these charges in Australia years after the events in question on the Australian equivalent of legal aid, if available, while his family would have to fend for themselves as best as they were able in New Zealand.

[20] At the outset, considering whether Mr Radhi came within s 48(4)(a)(ii), Judge Moses said that he did not accept the submission made on behalf of Mr Radhi that he could consider the circumstances set out in ss 7 and 8 of the Act, when considering s 48(4)(a)(ii). He noted that s 48(4) clearly set out those matters for consideration under either ss (i) or ss (ii).

[21] Judge Moses accepted, however, that Mr Radhi's refugee status was an "extraordinary circumstance of the person" for the purposes of assessing s 48(4)(a)(ii). However, he did not accept that the "circumstances of the person", for the purposes of s 48(4)(a)(ii), included hardship suffered by others, such as Mr Radhi's family, nor did the section permit him to take into account the trial process which he had already considered under s 48(4)(a)(i).

[22] In relation to Mr Radhi's own circumstances, Judge Moses first discussed Mr Radhi's submission that, if convicted of the offence with which he is charged, he would be unable to remain in Australia on release, and there was no guarantee he would be repatriated to New Zealand. Mr Radhi submitted that it was highly likely he would be *refouled* to Iraq.

[23] Judge Moses referred to evidence about the process of removal from Australia, and noted that even if a person did not meet the requirements for a protection visa in order to remain in Australia, Australia would be bound by its *non-refoulement* obligations not to remove a person to a country where there were substantial grounds for believing that a natural and probable consequence of removal was a real risk the person would suffer significant harm.

[24] Judge Moses then set out the evidence as to Mr Radhi's refugee status in New Zealand. Mr Radhi would continue to be recognised as a refugee unless or until the New Zealand immigration authorities ceased to recognise him as a refugee or cancelled that recognition. While Mr Radhi was eligible to apply for a permanent residence visa, any application would have to be deferred on account of his arrest warrant and could be declined for that reason. Mr Radhi holds a resident visa, which does not allow him to travel. Any extradition would cause his visa to expire. He would then have no right to re-enter New Zealand. However, before extradition,

Mr Radhi could apply to have his visa conditions varied to allow him to return to New Zealand within 24 months of the variation. This could not be declined. He could also apply for a longer period of re-entry or for a further variance of the 24 month period, but neither of those conditions could be guaranteed. If Mr Radhi did not apply for a variation he would require a new visa to enter New Zealand. Re-admission would be discretionary and would require consideration of any criminal conviction.

[25] Judge Moses also noted that there was no guarantee that Mr Radhi could legally reside in Australia once the criminal process was concluded if it took more than two years. Judge Moses was satisfied, however, that there could be confidence that Australia continued to guarantee the right of persons not to be *refouled* to countries if it would be unsafe to do so. This meant that he considered that whilst Mr Radhi's refugee status was an extraordinary circumstance of the person, it would be neither unjust nor oppressive to surrender him to Australia. Accordingly, there were no grounds to refer the case to the Minister.

Application for review

[26] In Mr Radhi's application for judicial review, the errors of law alleged are:

(a) The District Court failed to consider the purpose of the Minister's role, including the wider discretion available to the Minister and his power to seek undertakings from Australia.

(b) The incorrect exclusion from consideration within s 48(4)(a)(ii) of evidence which was relevant to both ss 48(4)(a)(i) and 48(4)(a)(ii).

(c) The incorrect exclusion of hardship suffered by others in interpreting the phrase "circumstances of the person" in s 48(4)(a)(ii).

(d) The application of the wrong legal test when the District Court stated "I am therefore satisfied that there are no restrictions under either s 7 or s 8 of the Act that apply which require me to refer the matter to the

Minister". The section actually states "apply or may apply", and is drafted in permissive, rather than mandatory terms.

(e) The misinterpretation of s 8(1)(c) when the Court focused on delay by the investigative agencies rather than the effect of the overall delay.

[27] The mandatory relevant factors which Mr Radhi alleges the District Court failed to take into account when considering s 48(4)(a)(ii) of the Act are:

(a) The amount of time that has passed since the alleged offence took place (which the District Court excluded due to one of the errors of law alleged);

(b) The hardship on Mr Radhi's family;

(c) New Zealand's international obligations; and

(d) The consequences of the decision on Mr Radhi's rights, including the possible cancellation of Mr Radhi's refugee status and his inability to rejoin his family in New Zealand following either his conviction and imprisonment or his acquittal.

[28] Finally, the breach of procedural fairness alleged is the denial of Mr Radhi's access to the Minister. The Minister's role is said to be an important step in the due process of an extradition case and a fundamental aspect of natural justice. Mr Radhi had a legitimate expectation of this additional process, due to the complexity of the circumstances of his case. The Ministerial role is designed to deal with such complex cases and the Minister is the only one with the authority to seek undertakings from the requesting state. In Mr Radhi's circumstances, various undertakings could be sought and given such as, if Mr Radhi was found guilty, allowing him to serve time in New Zealand near his family or that if Mr Radhi was found not guilty, the Australian Government would give him and his family a residency permit or that Mr Radhi would not, under any circumstances, be sent to Iraq or subject to indirect *refoulement* to a third party.

Discussion

[29] As to the first alleged error of law, that is, a failure to consider the purpose of the Minister's role, it seems to me that Parliament deliberately chose to limit the Minister's role in extraditions to Australia dealt with under Part 4 of the Act. In fact, one of the stated objects of the Act as set out in s 12(d) is to provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia, in which the Minister is not normally involved.

[30] In those circumstances, there is no statutory requirement for the District Court to consider the purpose of the Minister's role, including the wider discretion available to the Minister and his power to seek undertakings from Australia. I accept that there is a discretion conferred on the District Court to refer a case to the Minister if certain statutory tests are met, but the District Court has to be satisfied that those tests are met before considering whether to exercise its discretion. I am of the view that when considering whether to exercise its discretion, the District Court may then consider the Minister's role. However, in the present case, Judge Moses found that the statutory tests were not met. He was therefore not required to consider whether to exercise his discretion. In those circumstances, the lack of any reference by Judge Moses to the Minister's role is not an error of law.

[31] As to the second alleged error of law, I am of the view that s 48(4)(a) of the Act sets out two distinct statutory tests, either of which needs to be established before the District Court may refer a case to the Minister. These two separate statutory tests are set out in the separate subsections to s 48, ss (4)(a)(i) and (4)(a)(ii).[2] They are connected by the word "or". The use of the word "or" means that they are alternative. Purely as a matter of statutory interpretation, I am of the view that the words "circumstances of the person" contained in the second statutory test in ss 4(a)(ii) do not include the words "circumstances of the case", which are contained in s 8(1)(c) of the Act and which are directly imported into the first statutory test in ss 4(a)(i) when it refers to the application of mandatory restrictions on surrender in s 8.

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[2] See also Keane J's comments about the "two distinct bases" set out in s 48(4): *Mailley v District Court at North Shore* [2014] NZHC 2816; [2015] 2 NZLR 567.

[32] Judge Moses, therefore, did not make an error of law when he stated:

> [58] In considering s 48(a)(ii) [sic], I do not accept the submission made on behalf of Mr Radhi that the Court can consider the circumstances set out in ss 7 and 8 of the Act when considering s 48(4)(a)(ii). Section 48(4) clearly refers to those matters for consideration under subsection (i) **or** subsection (ii) (highlighting added).

[33] Mr Radhi further submits that a third error of law arose when Judge Moses concluded that the Act did not permit him to take into the hardship suffered by others when considering the "circumstances of the person" in s 48(4)(a)(ii). It is, however, not strictly necessary for me to decide this point, because Judge Moses went on to find that, in any event, he did not accept that Mr Radhi's family circumstances would amount to compelling or extraordinary circumstances which would warrant referral of his case to the Minister, a conclusion that was clearly open to him.

[34] For what it is worth, I take a relatively broad view of the phase "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.

[35] I also accept 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 and, in particular, in the present circumstances, those of the United Nations Convention on the Rights of the Child.[3] Article 3(1) of the Convention provides that in all actions concerning children undertaken by courts of law, the best interests of the child shall be a primary consideration. 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.

[36] I am of the view that it was sufficient for Judge Moses to say that he did not accept that Mr Radhi's family circumstances would amount to compelling or

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3 *Yee v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24].

extraordinary circumstances which would warrant the referral of his case to the Minister. Mr Radhi set out those family circumstances in paragraphs [30] – [34] of his affidavit dated 10 March 2015. Mr Radhi's children are well settled in New Zealand as part of the Iraqi community. They are doing well at school, speak fluent English and have made many friends. If Mr Radhi was to be extradited to Australia, his wife and children would remain together as a family unit, living in Auckland, but would have to rely for support on social welfare and assistance from friends. They would also not have the funds available to travel to Australia to visit Mr Radhi if he was convicted and imprisoned there. Further, Mr Radhi fears that he will be ineligible to enter New Zealand at the end of any sentence imposed in Australia. Similar considerations apply to anyone facing prosecution and possible imprisonment for a serious crime in New Zealand, but without the uncertainty of being able to return to New Zealand.

[37] The way in which family circumstances are weighed in the extradition context is illustrated by the UK decision of *H(H) v Deputy Prosecutor of the Italian Republic*.[4] The Supreme Court emphasised the "imperative" nature of extradition.[5] Unlike deportation, where the rights of children and the right to family life are also routinely considered, extradition is an obligation owed by the requested state to the requesting state in return for a similar obligation owed the other way round,[6] where there is a public interest in the extradition of those suspected of having committed offences overseas.[7] It is concerned with international cooperation in the prosecution of crime and the removal of safe havens for those who are suspected of having committed criminal offences overseas.[8] These considerations are absent from the immigration context where domestic policy decisions relating to the control of people unlawfully in the country are made.

[38] As to the fourth error of law alleged, Judge Moses stated at [56]:

> I am therefore satisfied that there are no restrictions under either s 7 or s 8 of the Act that apply which require me to refer the matter to the Minister.

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4 *H(H) v Deputy Prosecutor of the Italian Republic* (SC(E)) [2012] UKSC 25, [2013] 1 AC 338.
5 At [141].
6 At [31]
7 At [146].
8 At [121].

Counsel notes that the section actually states "apply or may apply" while the section is drafted in permissive, rather than mandatory terms.

[39] I am of the view that Judge Moses' statement was a shorthand summary of the operation of s 48(4), and does not reflect any error in the consideration by Judge Moses of the section generally, which was quite comprehensive. Further, I am of the view that any misstatement of the statutory test was of no consequence, given the other findings of Judge Moses. Judge Moses made a number of emphatic findings, such as that there was no risk that Mr Radhi would face an unfair trial and Australia could be trusted to safeguard Mr Radhi's rights.

[40] Finally, the fifth error of law alleged is that Judge Moses misinterpreted s 8(1)(c) when he focused on delay by the investigative agencies, rather than the effect of the overall delay.

[41] I am, however, of the view that Judge Moses approached the issue in the correct manner, in that he accepted as a matter of law that if a fair trial was impossible in the requesting state then extradition must be unjust and oppressive. He also commented that there is cut-off point in time beyond which an unfair trial is inevitable. The conduct of the investigative authorities was clearly relevant. At the same time, Judge Moses did refer to Mr Radhi's submission that, due to the time that has now passed, many of his fellow refugees had now dispersed to far reaching countries and it would not be feasible to bring them to Australia for a trial. Mr Radhi mentioned two potential witnesses who had resettled in Sweden and Canada.

[42] Judge Moses also referred to Mr Radhi's submission that such witnesses may be unwilling to give evidence so many years after the events in question and, further, that their memories were likely to be dimmed by time in that they would now be unable to recall key events.

[43] Judge Moses noted, however, that no specific witnesses were identified by Mr Radhi as being unavailable. Judge Moses, therefore, found that he simply did not have enough information to determine that Mr Radhi's right to a fair trial would be jeopardised, let alone that it would be unjust to extradite him due to these factors.

[44] Judge Moses noted further that Mr Radhi would have the opportunity in Australia to seek a stay of prosecution on the basis of delay if enquiries were to establish that essential witnesses were unavailable and his right to a fair trial was in jeopardy. There was a high level of commonality between New Zealand and Australia's legal systems and thus Australia could be trusted to safeguard Mr Radhi's rights at trial.

[45] I am of the view that Judge Moses, accordingly, made no error of law in his consideration of delay issues, in that he considered both the conduct by the investigative authorities and any possible prejudice to Mr Radhi, while noting that delay could again be raised as an issue in Australia.

[46] Turning now to the mandatory relevant factors which Mr Radhi alleges the District Court failed to take into account when considering s 48(4)(a)(ii) of the Act, the first three factors are recast errors of law. The amount of time that has passed since the alleged offence took place is clearly at the forefront of a consideration of s 8(1)(c) of the Act, which is imported into the first statutory test in s 48(4)(a)(i). The effect of delay was fully considered by Judge Moses under this provision. Delay was clearly a circumstance of the case against which Judge Moses had to consider whether it would be unjust or oppressive to surrender Mr Radhi. However, I have already found that the tests in ss 48(4)(a)(i) and (ii) are alternative and therefore delay could only be relevant under s 48(4)(a)(ii) if there was a nexus between the delay and personal impact on Mr Radhi. In that regard, I agree with the approach taken by Judge Sinclair in *Commonwealth of Australia v Mailley.*[9] Delay is therefore not a mandatory relevant factor when considering s 48(4)(a)(ii) of the Act.

[47] Likewise, the second and third alleged mandatory relevant factors, that is, the hardship on Mr Radhi's family and New Zealand international obligations, are, again, simply recasted "errors of law," that I have already considered. I have already commented that in interpreting the phrase "circumstances of the person", a finding is not strictly necessary as Judge Moses did go on to consider, in an abbreviated fashion, the hardship on Mr Radhi's family, having regard by implication to New Zealand's international obligations. Judge Moses did not have to specifically refer to

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9 *Commonwealth of Australia v Mailley* DC North Shore CRI-2008-44-1978, 20 June 2014.

any particular international conventions, in particular, the United Nations Convention on the Rights of the Child. Crown counsel argued that New Zealand's international obligations to give due weight to the rights of children and to family life could be adequately taken into account by focusing on the impact upon the person to be extradited. This submission has some attraction in that the phrase "circumstances of the person" seems to be relatively narrowly defined. However, it is not strictly necessary for me to determine this issue as Judge Moses did consider the hardship on Mr Radhi's family, albeit in an abbreviated fashion.

[48] The final mandatory factor which Mr Radhi alleges the District Court failed to take into account when considering s 48(4)(a)(ii) of the Act was the consequence of the decision on Mr Radhi's rights, including the possible cancellation of Mr Radhi's refugee status, and his inability to rejoin his family in New Zealand following either his conviction and imprisonment or his acquittal. In this regard, Judge Moses gave anxious scrutiny to Mr Radhi's position in determining whether he may be *refouled* to Iraq. There was a significant amount of evidence before Judge Moses regarding the process in Australia of refugee status assessment and protection against *refoulement.* Judge Moses found that Australia meets its *non-refoulement* obligations through various provisions in the Australian Migration Act, such as the protection visa process or the Minister's personal powers to grant visas. Asylum seekers will not be removed in breach of any *non-refoulement* obligations identified in any of these processes.

[49] On the other hand, there was no concrete evidence about how New Zealand might deal with Mr Radhi's refugee status because of real uncertainty as to what may happen in Australia. The evidence was that New Zealand could not refuse re-entry to Mr Radhi within 24 months of extradition. Mr Radhi could also make an application for residence at any time, although it was a matter of discretion and subject to character requirements. At the hearing before Judge Moses, a New Zealand Immigration Service witness disagreed when it was suggested to her that it was "not all that likely" Mr Radhi would return to New Zealand. The evidence from the New Zealand Immigration Service was that matters would be dealt with on a case by case basis. Although no reassurance could be given about whether Mr Radhi could return to New Zealand, that uncertainty did not of itself make it unjust or

oppressive to surrender Mr Radhi to Australia. Judge Moses found, however, that there was no danger of his *refoulement* to Iraq where he might face persecution. Judge Moses therefore did give real consideration to the consequences of his decision on Mr Radhi's rights as a refugee.

[50] Finally, the breach of procedural fairness alleged is the denial of Mr Radhi's access to the Minister. However, Mr Radhi is unable to point to anything that would give rise to a legitimate expectation on his part of a referral to the Minister.

[51] In *Talley Fisheries Ltd v Cullen* the High Court summarised the relevant principles of legitimate expectation and the process of determining its existence in a particular matter.[10] There are four categories of expectation, including (relevantly) that a procedure not required by law will be held. Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice, which the claimant can reasonably expect to continue. The representation must be clear, unambiguous and unqualified and, finally, the expectation must be reasonable.

[52] In this case, Mr Radhi has not identified any promise or practice on which his expectation is based. Any expectation held by Mr Radhi that his case would be referred to the Minister is therefore unreasonable. As stated in *Te Heu Heu v Attorney-General*, a legitimate expectation cannot be founded on a hope or unsubstantiated belief of the person asserting it.[11] Mr Radhi's asserted legitimate expectation is also not compatible with the Act. The wording of s 48 together with the objects of the Act, make it clear that there can be no expectation of referral to the Minister in cases of extradition to Australia.

Conclusion

[53] Mr Radhi has been unable to identify any error of law in Judge Moses' decision. Nor has he been able to point to a relevant mandatory factor that Judge Moses failed to take into account. Finally, Mr Radhi does not have a legitimate

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10 *Talleys Fisheries Ltd v Cullen* HC Wellington CP 287/00, 31 January 2002 at 48.
11 *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 at [127].

expectation that his case would be referred to the Minister. The application for judicial review is accordingly dismissed.

[54] If the parties cannot agree on costs, leave is reserved for memoranda to be filed by 31 January 2016.

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Woolford J