ORDER PROHIBITING PUBLICATION OF THE IDENTITY OF THE COUNTRIES THAT HAVE PROVIDED DETAILS ABOUT THEIR DEALINGS WITH THE PEOPLE'S REPUBLIC OF CHINA (AT [58] AND [236] IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2015-485-1036
[2016] NZHC 1490

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	an application for discharge from detention pursuant to s 36 of the Extradition Act 1999
AND	of a request 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:	15 and 16 February 2016 Further submissions and evidence received on 26 February 2016, 2 and 11 March 2016
Appearances:	A J Ellis and G K Edgelet for the applicant A M Powell and A F Todd for the respondents
Judgment:	1 July 2016

JUDGMENT OF MALLON J
(Judicial review)

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Introduction

[1] Mr Kim is suspected by the authorities in the People's Republic of China (the PRC) of killing a young woman in Shanghai in December 2009. He is the subject of an extradition request by the PRC and the Minister has determined that he is to be surrendered to the PRC. Mr Kim seeks to quash the Minister's decision. He contends the Minister's decision was unlawfully reached. Although a broad range of judicial review grounds are relied on, his overall contention is that the Minister failed to come to grips with the realities of the Chinese legal system in which pre-trial torture is endemic, a fair trial is not possible and assurances about the treatment of Mr Kim and as to the death penalty cannot be relied on.

[2] The background to the Minister's decision is set out in my judgment delivered on the same date, on Mr Kim's related application for a discharge of the extradition proceedings.[1] This decision concerns the application for judicial review of the Minister's surrender decision.

Approach to judicial review

[3] The statement of claim contains a number of causes of action. These causes of action allege that the Minister made errors of law, undertook inadequate enquiries, took into account irrelevancies, and failed to take into account relevant considerations. It is also said that the Minister made errors of law, failed to provide adequate reasons on important aspects of her decision and reached an unreasonable decision. As is usual in a significant judicial review application, these grounds of review overlap (the errors alleged can be analysed under one or more of these grounds). Like counsel for Mr Kim, I will therefore consider the particular concerns

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1 *Kim v The Minister of Justice* [2016] NZHC 1491 [*discharge application*].

with the Minister's decisions by topic (torture, fair trial, the death penalty, mental health issues, and the assurances obtained) rather than by particular causes of action.[2]

[4] There are two discrete causes of action. One of these is that the Minister's decision was affected by apparent bias as a result of public statements made by the Prime Minister of New Zealand. That cause of action is considered separately. The other concerns Mr Kim's treatment in prison. This cause of action is not presently pursued because it involves substantial evidence which is in dispute. Counsel acknowledges that I am not in a position to consider this at this stage.

[5] I note at the outset that judicial review is concerned with the lawful exercise of a public power. In this case that public power was a statutory power of decision which conferred upon the Minister a significant discretion in a difficult area with important competing considerations at play. On the one hand Mr Kim is suspected of murder and New Zealand should play its role as an international citizen in the prosecution of serious criminal offending.[3] On the other hand the Minister was being asked to return a New Zealand resident to a country whose criminal justice system is different from our own, whose record on human rights is the subject of adverse international commentary and when it has not committed to the relevant international instruments in the way that we have.

[6] The substantial briefing paper officials provided to the Minister, and the detail traversed in this judgment, are indicative of the difficulties. The Law Commission has recommended reform in this difficult area.[4] Despite these difficulties the legislation required the Minister to make a speedy decision or risk the prospect of a successful discharge application. In contrast, counsel for Mr Kim urged upon me the need for care rather than speed. Counsel for the respondent did not press for urgency either.

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2 Throughout this judgment I refer to submissions made by Mr Kim. The submissions were advanced on his behalf by Dr Tony Ellis.

3 *Kim v Prison Manger Mount Eden Corrections Facility* [2012] NZSC 121, [2013] 2 NZLR 589 at [42]: "The overall purpose of the Extradition Act includes facilitation of the bringing to justice of those in New Zealand accused of serious crimes committed outside New Zealand." This is also recognised in the Law Commission's recent review of extradition law in "Extradition and Mutual Assistance in Criminal Matters" NZLC Issues Paper 37 (December 2014).

4 "Modernising New Zealand's Extradition and Mutual Assistance Laws" NZLC Report 137 (February 2016).

[7] 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.[5]

New evidence

[8] At the hearing counsel for Mr Kim sought leave to file additional evidence, being a further affidavit from Mr Kim and an affidavit of Clive Ansley.[6] The respondents opposed leave.

[9] The objection in respect of Mr Kim's affidavit was that it had been filed late and counsel for the respondents had not had the opportunity to consider it. The affidavit concerns Mr Kim's treatment in prison. At the hearing this was not advanced by Mr Kim's counsel in support of the judicial review. It has therefore not been necessary for me to rely on this affidavit in considering the judicial review application.

[10] The objection in respect of Mr Ansley's affidavit was also on the basis that it had been filed late and counsel for the respondents had not had the opportunity to

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5 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 the PRC. 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 the PRC would preserve the existing criminal justice system in Hong Kong.

6 At the time of the hearing the affidavit, which had only recently been prepared, was unsigned. After the hearing a signed version of the affidavit was filed.

consider it. It was also on the basis that it appeared to the respondents to be irrelevant. Counsel were given the opportunity to consider the affidavit and to make submissions as to its admissibility after the hearing.

[11] Mr Ansley's affidavit gives expert evidence on the Chinese judicial system. As counsel for Mr Kim explained, there were difficulties obtaining funding for the evidence from Mr Ansley and the judicial review proceeding had come up for hearing very quickly. The evidence was able to be obtained after a private benefactor provided assistance shortly before the hearing.

[12] There is no issue that Mr Ansley has significant expertise in the Chinese judicial system. To adopt the respondents' submission on this aspect, there can be no dispute that Mr Ansley is qualified by reason of his education, experience and scholarship to provide opinions on the Chinese criminal justice system, including in relation to the political structures in the PRC.

[13] The respondents also now accept that aspects of Mr Ansley's evidence are potentially relevant to the extent that Mr Kim contends the Minister failed to adequately investigate matters necessary to make her decision. The respondents say, however, that the Minister made inquiries which were "by a considerable margin more thorough than the law required of her" and that Mr Ansley's affidavit would not have materially contributed to the view the Minister reached. The respondents say Mr Ansley provides information on matters of which the Minister was already aware. They say the real issue in this case is the adequacy of the assurances provided by the PRC and Mr Ansley does not address this.

[14] The starting point in judicial review is to focus on the information that was before the decision maker.[7] However new evidence may in some circumstances be relevant to a ground of review. Here Mr Ansley's affidavit may be relevant to the extent it provides information the Minister did not have and which is material in the sense that it may have led to a different decision.[8] That may be on the basis that the

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7 Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at [17.2]. See also *Roussell Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 at 658.

8 Woolf, above n 5, at [11-053] referring to Denning JL in *Ladd v Marshall* [1954] 1 WLR 1489 at

information demonstrates the factual basis upon which the Minister made her decision was mistaken in a material way.[9] Such a mistake may have arisen because inadequate inquiries have been made.[10] Or it may go to the reasonableness of the Minister's decision.[11] The grounds overlap but the Minister's decision is susceptible to review where matters obviously material to her decision were not part of her direct consideration.[12] I will approach Mr Ansley's evidence on this basis.

[15] New evidence was also adduced by the respondents. This arose out of the reliance Mr Kim's counsel placed on an article in the Irish Times. This article reported on an apparent breach of an assurance given to Ireland by the PRC in respect of the death penalty. The respondents have filed an affidavit concerning enquiries which have been made with officials in Ireland about that report. I will discuss this evidence when discussing the Minister's assessment of the assurances obtained in this case.[13]

Extradition Act 1999

[16] The Minister's statutory power which is the subject of this review application is contained in the Extradition Act 1999. My judgment on the discharge application sets out in detail the extradition process under the Extradition Act.[14] For present purposes the key points are as follows.

1491: new evidence is permissible where it "should probably have had an important (though not necessarily decisive) influence on the result of the case".

9 Fordham, above n 7, at [17.2.5] citing *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044 at [68]: "Assuming the relevance of showing a mistake of fact in the … decision there may need to be evidence to prove it." *R v Criminal Injuries Compensation Board ex p A* [1999] AC 330, 334G-345C.

10 Fordham, above n 7, at [17.2.5] citing *R v Rochfield District Council, ex p Ferdinando* 8 September 1992 unrep and *R v Haringey London Borough Council ex p Norton* (1998) 1 CCLR 168.

11 Woolf, above n 5, at [11-056]: "Our view is that a material mistake or disregard of a material fact in and of itself renders a decision irrational or unreasonable".

12 Woolf, above n 5, at [11-056]: "The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of appeal of review by referring to the taking into account of an irrelevant consideration; or the failure to provide reasons which are adequate or intelligible, or the failure to base the decision upon any or adequate evidence."; see, for example, *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CIV-2008-485-2016, 23 February 2010 at [27].

13 Refer [238] to [239] below.

14 *Kim (discharge application)*, above n 1, at [17]-[37].

[17] First, New Zealand does not have a bilateral extradition treaty with the PRC. If a person's extradition from New Zealand to the PRC is to be considered under the Act, a request must be made to the Minister of Justice. The Minister is required to consider certain matters (the seriousness of the offence, the objects of the Extradition Act, any undertakings provided by the country and any other matters the Minister considers relevant) in deciding whether the request should be dealt with under the Act.[15] If the Minister decides that the request should be dealt with under the Act the standard procedure under the Act applies.

[18] Secondly, an order for surrender is the last stage of a process which involves:

(a) issuing a warrant and arresting the subject of the request;

(b) bringing the subject before the court as soon as possible;

(c) determining whether the subject is eligible for extradition; and

(d) deciding whether the subject should be surrendered to the extradition country and making any consequential surrender order.

[19] Thirdly, the specific power conferred on the Minister to determine whether to order surrender is as follows:[16]

> **30 Minister must determine whether person to be surrendered**
>
> (1) If the Court issues a warrant for the detention of a person under section 26(1)(a) … the Minister must determine in accordance with this section whether the person is to be surrendered.
>
> (2) The Minister must not determine that the person is to be surrendered—
>
> (a) if the Minister is satisfied that a mandatory restriction on the surrender of the person applies under section 7; or
>
> …

[15] Extradition Act 1999, s 60(3).

[16] Omitting parts of the section which do not assist the issues involved in this case.

(b) if it appears to the Minister that 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

…

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

(a) it appears to the Minister that the person may be or has been sentenced to death by the appropriate authority in the extradition country, and the extradition country is unable to sufficiently assure the Minister that—

(i) the person will not be sentenced to death; or

(ii) if that sentence is or has been imposed, it will not be carried out; or

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

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

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

(ii) if there is an Order in Council made under section 16 in relation to the extradition country, it does not preclude the surrender of New Zealand citizens; or

(iii) if there is no applicable treaty or Order in Council in relation to the extradition country, any undertakings or arrangement in relation to extradition between New Zealand and the extradition country do not preclude the surrender of New Zealand citizens—

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

(d) without limiting section 32(4), 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.[17]

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[17] The respondents accept that s 30(3)(e) is engaged if there is any reason to have concern about trial fairness in the extradition country.

(4) Subsection (3)(c) applies even if the person is a citizen of both New Zealand and the extradition country.

…

(6) 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.

[20] The power therefore confers both mandatory and discretionary grounds for declining surrender. For present purposes the relevant mandatory grounds are the restriction in respect of torture (s 30(2)(b)) and the following mandatory restriction in s 7:

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;

…

[21] For present purposes, the discretionary grounds in s 30(a), (d) and (e) are potentially relevant. The following discretionary ground in s 8 is also potentially relevant:

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.

…

[22] The discretionary ground in s 30(3)(c) does not directly apply because Mr Kim is not a citizen of New Zealand. However he is a resident of this country and has lived here since he was 14 years old. His family live here. His father and his

brother, and his two children are New Zealand citizens. His mother is a New Zealand resident. The matters the Minister might take into account in the interests of justice in respect of a New Zealand citizen might therefore be relevant when considering "any other reason" as to why Mr Kim should or should not be surrendered (s 30(3)(c)).

[23] It is also relevant to note that the discretionary ground in s 30(3)(b) is additional to a discretionary ground that applies under s 32. That section applies where the Minister has determined under s 30 that a person is to be surrendered but one of the following situations arises:

(a) First, where the request for extradition is in respect of an offence of which the person has been convicted in the extradition country but 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 (s 32(1)).

(b) Secondly, where in the Minister's opinion, compelling or extraordinary circumstances of the person make it unjust or oppressive to surrender the person before the expiration of a particular period (s 32(3)).

[24] In the first situation the Minister may make an order for surrender that is to come into effect after the person ceases to be liable to be detained in New Zealand or the Minister may decline to make a surrender order (s 32(2)). In the second situation the Minister may order that the surrender order is to take effect after a period of time and she may cancel the order (s 32(4) and (5)). These sections do not apply directly to Mr Kim. They do, however, enable a Minister to consider the time which a person has served in a New Zealand prison when deciding whether to order Mr Kim's surrender. Potentially that is relevant to Mr Kim when considering "any other reason" as to why Mr Kim should or should not be surrendered (s 30(3)(e)). Time since the offence is alleged to have been committed may also be relevant (s 8(1)(c)).

[25] Although there are discretionary grounds for refusal, that discretion is to be exercised consistently with New Zealand's international obligations and the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA).[18] As explained in *Zaoui v Attorney-General* (No 2):[19]

> Those provisions [sections 8 and 9 NZBORA] do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with arts 6.1 and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life. The focus is not on the responsibility of the state to which the person may be sent. Rather, it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.

[26] In *Zaoui* the Supreme Court was considering the removal process under the Immigration Act 1987 of a refugee in respect of whom the Director of Security had issued a security risk certificate. An issue arose as to the stage at which the Crown's obligations under the NZBORA and the international treaties were to be considered under that Act. The Court held that it arose under s 72 which provided that deportation "may" be ordered by the Governor-General, where the Minister certified the person's continued presence in New Zealand constituted a threat to national security. The Court said:[20]

> The power conferred by s 72 is to be interpreted and exercised consistently with the provisions of ss 8 and 9 of the Bill of Rights and with the closely related international obligations in the Covenant and the Convention Against Torture. Because the power can be so interpreted and applied, those provisions as a matter of law, prevent removal if their terms are satisfied even if the threat to national security is made out in terms of s 72 and art 33.2 [United Nations Convention Relating to the Status of Refugees 1951].

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[18] The respondents accept this position and the advice to the Minister proceeded on this basis. Compare with *Bujak v The Minister of Justice* [2009] NZCA 570 at [31] where, when there was a treaty between New Zealand and the country seeking extradition which did not refer to humanitarian considerations, the Court of Appeal commented that it was "a large topic" as to whether the values in the ICCPR and the NZBORA should apply. The Court of Appeal did not need to decide the issue in that case. The Supreme Court declined leave because, as the Court of Appeal had concluded, the humanitarian arguments would fail on the facts: *Bujak v The Minister of Justice* [2010] NZSC 8. In the present case there is no treaty with the PRC.

[19] *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289 at [79].

[20] At [91].

[27] Similarly, the discretion conferred on the Minister under s 30 can be interpreted consistently with the rights affirmed in the NZBORA and New Zealand's obligations under the relevant international treaties.[21] The Minister, in effect, therefore, where there are substantial grounds for believing that the receiving state will not comply with the fundamental rights affirmed in the NZBORA and New Zealand's international obligations under the relevant international instruments, should not order surrender.

The Minister's process

[28] The background to the extradition request and the various stages of the extradition process which eventually led to the Minister's decision to order Mr Kim's surrender is set out in detail in my judgment on the discharge application.[22] For present purposes the Minister's process by which she made her surrender decision is especially relevant. The Minister provided an affidavit on this aspect.

[29] The Minister received her warrant as Minister of Justice on 6 October 2014. She was briefed on this case upon assuming the office. She received a substantial briefing paper on 6 November 2014. This included the record of the District Court proceeding and submissions from Dr Ellis contending that Mr Kim should not be surrendered. The Minister determined at this stage to explore the seeking of further assurances from the PRC.

[30] On 7 July 2015, when the assurances had been finalised, the Minister wrote to Dr Ellis enclosing information on which her surrender decision would be made, advising she intended to make her decision by 12 August 2015, and seeking submissions by 29 July 2015. Dr Ellis made requests for further time. These were granted. The submission process concluded on 28 October 2015.

[31] On 3 November 2015 officials inquired with the PRC as to mental health treatment for Mr Kim if he was surrendered. A response was received on 6 November 2015.

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21 New Zealand Bill of Rights Act 1990 (NZBORA), s 6.

22 *Kim (discharge application)*, above n 1, at [38] to [61].

[32] The Minister received a briefing paper from the Ministry of Justice on 9 November 2015. That paper referred to a report by Human Rights Watch concerning police torture of criminal suspects in China.[23] The Minister sought further information about this, particularly as to the weight she should attribute to it and its relevance to the matters she needed to consider. The Ministry's supplementary briefing on this topic was incorporated into a final briefing paper dated 23 November 2015 (the briefing paper).[24]

[33] Accompanying the briefing paper were six volumes of material. These volumes enclosed Dr Ellis' submissions, the District Court file, reports on the PRC by the United Nations and international non-governmental organisations referred to in the briefing paper, relevant legislation and international conventions, and the assurances from the PRC.

[34] The Minister advises that she made her decision on the basis of the briefing paper and the accompanying materials. The Minister notified Mr Kim of her decision that he was to be surrendered and the reasons for that decision by letter dated 30 November 2015.

Torture

The Extradition Act

[35] As set out above, surrender must not be ordered if it appears to the Minister that there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the PRC (s 30(2)(b)). Further, the Minister may determine not to order the person's surrender if for any other reason the Minister considers the person should not be surrendered (s 30(3)(e)). Ill-treatment falling short of torture could potentially come within this discretionary ground.

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23 Human Rights Watch "Tiger Chairs and Cell Bosses – Police Torture of Criminal Suspects in China" (May 2015) <www.hrw.org> (last accessed 28 June 2016).

24 This was a substantial paper (476 paragraphs/88 pages).

International obligations

[36] Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[37] The First Optional Protocol to the ICCPR provides for the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of the rights set out in the ICCPR.

[38] New Zealand ratified the ICCPR in 1978 and the First Optional Protocol in 1989. The PRC has signed, but not ratified, the ICCPR. It has not signed or ratified the First Optional Protocol.

[39] Article 3 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (the Convention against Torture) provides:

> 1. No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

[40] Article 20 of the Convention against Torture provides for the Committee against Torture to investigate if it receives reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party. Findings are communicated to the State along with comments or suggestions. A summary of the result may be included in the Committee's annual report.

[41] Article 22 of the Convention against Torture provides for the Committee to receive individual complaints of violations by a State Party of the Convention's provisions and sets out a procedure for dealing with such complaints.

[42] The Optional Protocol to the Convention against Torture establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

[43] New Zealand ratified the Convention against Torture in 1989. It ratified the Optional Protocol in 2007. The PRC signed the Convention against Torture and ratified it in 1988. However, it has not agreed to arts 20 and 22. Nor has it signed the Optional Protocol. The PRC's position is that "the Chinese government believes that the promotion and protection of human rights is mainly realised through the efforts of countries themselves not through the means of visits to state parties".[25]

NZBORA

[44] Section 9 of the NZBORA provides:

> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

The briefing paper

[45] The briefing paper provided advice to the Minister under a number of headings.

[46] First it summarised the submissions for Mr Kim, namely that there were substantial grounds for believing that Mr Kim would be tortured on return to the PRC, and that this was because torture is endemic in the PRC, it is used to obtain confessions (which are important in the PRC system), and it is particularly common and severe in murder cases.

[47] Secondly, it provided advice as to the proper approach. This advice was that the Minister needed to ask herself whether there were substantial grounds for believing that Mr Kim would be in danger of being subjected to an act of torture, and danger meant more than a mere theory or suspicion but less than highly probable.[26] The Minister was to consider the general situation in the PRC regarding torture, and against that background consider whether Mr Kim was personally at risk. This meant it was necessary for the Minister to consider the nature and quality of the

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[25] Human Rights Council "Report of the Working Group on the Universal Periodic Review: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review" (27 February 2014) A/HRC/25/5/ Add.1.

[26] There is no challenge to this as being the correct approach.

assurances provided by the PRC and the particular circumstances and characteristics of Mr Kim's situation.

[48] Thirdly, it advised that the Minister's decision needed to be consistent with New Zealand's international obligations under the Convention against Torture and the ICCPR. It advised the Minister that the Act provided that she could not order Mr Kim's surrender if there were substantial grounds for believing he would be in danger or being subject to an act of torture in the PRC. It also advised the Minister what the PRC had and had not agreed to in respect of the Convention against Torture and the Optional Protocol.[27]

[49] Next the briefing paper discussed the general situation. Here it was noted that Chinese law enforcement's heavy reliance on confessions went back to imperial times; since 1979 it had been illegal to obtain confessions by torture in the PRC; and since 1996 the criminal procedural law contained an amendment to deemphasise the importance of confessions. However the "consensus of commentators and the UN is that there is overwhelming credible evidence of routine use of torture and ill-treatment in the PRC, particularly to extract confessions." Further "[c]ommentators and the UN note that torture and ill-treatment occurs in ordinary criminal cases, but the risk is especially high for political or religious dissidents, ethnic minorities, and human rights defenders".[28] And commentators and the UN state that, "with the exception of high profile cases or crackdowns, police officers are rarely held responsible for abuse, and receive light penalties if they are".[29]

[50] The briefing paper went on to set out in some detail the findings of the Special Rapporteur on Torture, who visited the PRC at the end of 2005 at the invitation of the PRC Government. This included information that many methods of torture had been used in the PRC, there was a growing willingness to acknowledge the problem and a number of positive developments to combat torture and ill-treatment had occurred at the legislative level and at the central and provincial level, and this had contributed to a steady decline in torture practices over recent years. There were, however, a number of problems with the effectiveness of efforts to

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27 In this section it did not refer to the PRC having signed by not ratified the ICCPR.
28 At [230].
29 At [232].

combat torture. These problems included that the definition of torture under Chinese law did not fully correspond to the international standard, there was a degree of localism inherent in policing and criminal procedure, essential procedural safeguards were absent (namely exclusion of evidence and the presumption of innocence), most suspects were interrogated without lawyers, there was no independent monitoring and police exercise wide discretion in matters of arrest and detention and are under great pressure to solve cases. The Special Rapporteur's view was that "torture, though on the decline particularly in urban areas, remained widespread in the PRC".[30]

[51] The briefing paper advised the Minister of the follow up report issued by the Special Rapporteur in 2010. He sought information from the PRC Government on implementation of the recommendations which had been made. The PRC did not provide any input. The Special Rapporteur's report was therefore based on NGO (non-governmental organisation) sources. The Special Rapporteur noted reports about the excessive use of pre-trial detention putting suspects at risk of torture and ill-treatment. The briefing paper set out the following observation of the Special Rapporteur:[31]

> … However, the Special Rapporteur regrets that China fails to take concrete steps in this regard, rejects to release concrete data about enforcement efforts and to increase transparency in the criminal justice system. Despite some efforts to improve the regulations criminalizing torture, the Special Rapporteur regrets that no further steps have been taken to bring the Chinese criminal law in line with the requirements of articles 1 and 4 of the [Convention against Torture]. The Special Rapporteur expresses concern about allegations of continuing use of confessions obtained through torture in judicial proceedings. Although welcoming the increased use of video and audio taping at interrogations, he regrets that such material is fully controlled by the police authorities making an effective and independent monitoring impossible. He is further concerned about the lack of investigations, prosecution and punishment of the perpetrators of torture. He reiterates that no independent mechanism mandated to monitor all places of detention has been created and thus strongly encourages the Government to ratify and implement the [Optional Protocol].

[52] The briefing paper also noted the Special Rapporteur had not been back to the PRC since 2005 as he had not received another invitation. The briefing paper went

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30 At [243].

31 At [245] citing Manfred Nowak "Report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment: Follow-up to the recommendations made by the Special Rapporteur" A/HRC/13/39/Add.6 (26 February 2010).

on to refer to new measures implemented in 2009 to improve practices in detention centres and 2012 amendments to the criminal procedural law including a requirement for interrogations to be recorded or videotaped if the alleged crime is punishable by life imprisonment or death.

[53] Next the briefing paper discussed a 2013 guidance note issued by the UK Home Office. This guidance concludes:[32]

> Prison conditions in China are described as harsh and often degrading, both for political prisoners and for criminal offenders, who are often housed together. There is objective evidence of security officials severely ill-treating prisoners and detainees, that the use of torture to extract forced confessions is widespread and the number of deaths in custody, some due to torture is a matter for concern. Evidence indicates that some of the worst treatment is extended to political dissidents, religious dissidents and human rights activists, although not exclusively. This treatment may include forced psychiatric incarceration/treatment, sexual, physical and psychological abuse.

[54] The briefing paper then went on to discuss in some detail information provided by Human Rights Watch in a May 2015 report which Mr Kim's submissions had referred to.[33] The briefing paper advised the Minister this report was "particularly relevant" because of its recency and subject matter (torture of 'ordinary' criminals, as well as well-known high-risk groups). The briefing paper provided information about the organisation, including that it had been subject to criticism by some, but also that its work had also been considered by international bodies and had been granted leave to intervene in the *Othman* case.[34] The briefing paper said the 2015 report to a large extent confirmed what was already known about the PRC and that was why it had been necessary to obtain specific assurances from the PRC. It then said:[35]

> The main point for you to take from the Report is that its conclusions support the view, expressed by other commentators and the UN, that 'ordinary' criminals (not only members of well known high-risk groups) have been subjected to torture in the PRC.

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32 At [256].
33 Human Rights Watch, above n 23.
34 *Othman (Abu Qatada) v The United Kingdom* (2012) 55 EHRR 1, [2012] ECHR 817.
35 Briefing paper, at [265]-[266].

> The Report also suggests that murder suspects are at a higher risk of torture than other 'ordinary' criminals. That suggestion is new and is discussed further below.

[55] The briefing paper noted the Human Rights Watch report was based on interviews with 48 detainees and analysis of verdicts on the internet. The briefing paper considered it was "not possible to draw any reliable conclusion" arising from the information obtained from the interviewees because they comprised a very small sample and no information was provided as to how these interviewees were selected. The briefing paper also considered it was "not possible to draw any definitive conclusions" from the analysis of verdicts. It included the following comments about torture of murder suspects in the briefing paper:[36]

> Of particular relevance to Mr Kim's case is Human Rights Watch's observation that a number of lawyers they interviewed (although the report only expressly cites one) said that torture is particularly common and severe in particular types of cases, including murder. It attributes this, at least in part, to the fact that the government has made a clear priority of murder cases in recent years, putting pressure on the police to solve them.
>
> Human Rights Watch's suggestion that murder suspects are at a higher risk than other 'ordinary' criminals is new. The Ministry has not identified reports by any other commentator or the UN that supports this view, so it is unclear how accurate it is. In particular, we note that the Special Rapporteur, in his 2006 report, did not identify murder suspects as a specific group from which he had received complaints of torture…

[56] The briefing paper also noted the Human Rights Watch's conclusions that judges often ignored requests to exclude evidence, expected defendants to prove that torture had taken place and often evaluated torture solely on the basis of evidence produced or controlled by the police, that there still remained an incentive for police to use torture or ill-treatment to obtain a confession, and that the police still held enormous power over the judiciary. The briefing paper concluded the discussion of this report with the following comment:[37]

> It is important to note that the Report does not suggest that all criminal suspects are likely to be tortured. In addition, it does not address the risk faced by a person in Mr Kim's particular situation, being a foreign national the subject of formal assurances and diplomatic monitoring.

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[36] At [272]-[273].
[37] At [285]-[286].

> The Ministry does not consider that anything in the Report suggests that further or different assurances need to be sought from the PRC in addition to those already provided.

[57] Next the briefing paper discussed the PRC's domestic law, including that it expressly prohibited torture to extract confessions. It also included a discussion of 2012 reforms which provided for videotaping or recording of pre-trial interrogations where the person is suspected of committing an offence punishable by life imprisonment or capital punishment.

[58] Lastly in respect of the general position regarding torture, the paper discussed the experience of New Zealand and some other countries concerning prison conditions in the PRC as follows:[38]

> MFAT has advised that there are currently nine NZ citizens detained in Chinese prisons or detention facilities. NZ provides active consular assistance, which includes monitoring of health and well-being, liaising with family members and ensuring access to legal advice. NZ officials also monitor detainees through visits, and by attending hearings at key times. In one case, a NZer made a complaint of mistreatment and forced labour to the media following release and return to NZ. A formal complaint was not made to consular officials.
>
> In respect of other countries, MFAT has advised that:[39]
>
> > [Country A] has on average 100 citizens in prison in the PRC. [Country A's] Embassy has not received any allegations of torture against [Country A's] citizens to date. [Country A] ensures that the PRC knows of its active interest in the welfare of its citizens, and conducts monthly visits.
> >
> > [Country B] said that it was not aware of any instances of torture against [Country B's] citizens in prisons in the PRC, although there had been allegations of physical violence, including beatings. [Country B's] Embassy conducted visits to check on the welfare of prisoners. [Country B's] officials considered that prisons in the main centres were the safest and that the main issues arose in pre-trial detention. Allegations of mistreatment after conviction were not considered common.
> >
> > [Country C] reported that, generally speaking, it finds Chinese prisons to be relatively safe. However, it noted a recent case where a

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38 At [318]-[320].

39 The respondent sought suppression of the identity of the countries that have provided information about their dealings with the PRC. This was on the basis that the information is diplomatically sensitive and disclosure of the information could affect the ability of New Zealand to obtain such information. A suppression order has been made on that basis which is subject to further order of the Court.

> [Country C] prisoner alleged intimidation and mistreatment from prison guards after he complained about prison conditions.
>
> [Country D] has 12 long-term prisoners in the PRC. [Country D's] Embassy visits these prisoners quarterly. There have been no complaints of mistreatment or torture; however, it was noted that all consular visits took place alongside prison staff and this would be a disincentive for a prisoner to make a complaint.
>
> Monitoring and consular visits may help protect foreign national prisoners against torture or other ill-treatment.

[59] The briefing paper then went on to discuss how the information about the general situation in the PRC related to Mr Kim. This section discussed the assurances, submissions made on behalf of Mr Kim and other matters the Ministry considered to be relevant. It then provided a summary of all of the above material. The relevant considerations in relation to Mr Kim were identified as being:

(a) Mr Kim was not a member of any well known high-risk group and was therefore an "ordinary criminal". Although the Human Rights Watch Report identified murder suspects as being at a higher risk, it was unclear how accurate this was.

(b) Mr Kim's situation is significantly different because of the extradition dimension. Assurances have been obtained from the PRC and his treatment will be monitored pursuant to those assurances.

(c) New Zealand and other countries have not expressed concerns about the systematic mistreatment of their citizens in Chinese prisons, although there have been some allegations of mistreatment in individual cases.

(d) Other relevant factors include:[40]

> Mr Kim is likely to be tried in Shanghai. Commentators and the UN state that torture appears to be on the decline in urban areas, such as Shanghai;
>
> Mr Kim's role in the alleged offending has already been investigated, meaning he may spend less time in pre-trial detention.

[40] At [349.1]-[349.3].

> Commentators and the UN consider that pre-trial detention is the time a suspect is most at risk of torture; and
>
> The *prima facie* case against Mr Kim appears to be relatively strong and includes scientific evidence which has been reviewed in NZ. This means that Mr Kim may be at a lesser risk of torture to extract a confession.

The Minister's decision

[60] The Minister's decision on this aspect was based on the Ministry's advice in the briefing paper. In determining that Mr Kim was to be surrendered the Minister advised, in a letter to Mr Kim, as follows:[41]

> I do not consider there are substantial grounds to believe you will be in danger of an act of torture in the PRC.
>
> While there is evidence that torture is still an issue in the PRC, I consider there are other significant factors which differentiate you from those likely to be at risk of torture:
>
> > The PRC has provided detailed and specific assurances about your treatment which also provide for monitoring of your treatment, including through visits by NZ consular officials with the option of independent medical examination. I am satisfied that the assurances given by the PRC can be relied on in this instance, having had regard to the factors set out in *Othman (Abu Qatada) v The United Kingdom*. In particular, I consider the provisions allowing for monitoring of your treatment will provide a significant deterrent to any act of torture. NZ and other countries have experience where assurances given by the PRC have been honoured.
> >
> > You are an 'ordinary' criminal suspect. You are not a member of a well-known high-risk group, such as political or religious dissidents, ethnic minorities, or human rights defenders. While Human Rights Watch has recently identified murder suspects as high risk, it is unclear how reliable that finding is, and I consider the presence of assurances and other differentiating factors in your circumstances that I have outlined mean you personally are not at a high risk;
> >
> > The *prima facie* case against you appears to be relatively strong and includes scientific evidence which has been reviewed in NZ. This means that you appear to be at a lesser risk of the use of torture to extract a confession;
> >
> > Your role in the alleged offending has already been investigated, meaning you may spend less time in pre-trial detention. Commentators and the UN consider that pre-trial detention is the time a suspect is at most risk of torture;

[41] At [29]-[30.5].

> You are to be tried in Shanghai, where commentators and the UN suggest incidences of torture are on the decline.

Mr Ansley's evidence

[61] Mr Ansley comments that the use of torture is endemic in Chinese criminal investigations. He says that, so routine is the practice, the assumption of torture must be the starting point in assessing any statements allegedly made to police interrogators. He says that because of this, "all accused persons in China belong to a group specially at risk of torture" and "it would be astonishing if a person accused of homicide were not subject to torture".[42] Moreover statements used in Chinese criminal trials and in foreign extradition proceedings are routinely obtained by torture, and also through threats made against families of the witnesses. This systemic and routine coercion of witnesses goes to the heart of assessing the reliability of testimony.[43]

[62] Mr Ansley further says, although there are many published statements in western countries that the government is committed to implementing human rights and the rule of law, the evidence provides no support for that premise. For example, despite the PRC being a signatory to the Convention against Torture and torture is an offence under the Criminal Code, it appears to have had no impact on the criminal investigation system. He refers to an interview with a prosecutor in 2015 who, in her first year in the role, was criticised for not meeting her quotas and was told by her superiors "if he has not confessed … fix it".[44] He notes that the Reasons for Judgment in a case will contain no reference to claims of torture made in the case, referring to an example of a case he is familiar with.

[63] Mr Ansley refers to an escalating campaign of terror against the criminal defence and human rights bar which has continued from July 2015 to the present.[45]

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42 Affidavit of Clive Ansley at [139].

43 Mr Ansley gives a specific example of this occurring in relation to a witness statement in relation to the extradition of *Lai Changxing* (the subject of the *Lai* case discussed below at [155] and n 114). That witness described having given her statement following two months of torture. Having provided testimony that she was subject to torture, she subsequently disappeared. See affidavit of Clive Ansley at [116](n).

44 At [87] and fn 10. It is unclear from the affidavit whether 2015 was the prosecutor's first year in that role or whether that was only a reference to the date when Mr Ansley conducted the interview.

45 At [104].

He does not know which commentators might have said that torture is in decline in urban areas. He says he is "very familiar with Shanghai and I have seen no evidence of this alleged decline in torture. On the contrary, I have been involved with several Shanghai cases in recent years in which we found clear evidence of torture."[46]

The submissions

[64] Mr Kim submits that the Minister failed to consider whether there was a risk of death by torture. He also submits the Minister failed to consider the types of torture which are used in the PRC. In my view there was no error in these respects. It is evident the Minister proceeded on the basis that torture remained an issue in China, but her view was that Mr Kim was not personally at risk of that for the reasons she stated. If he was not personally at risk of torture it follows that he was not personally at risk of death by torture or any of the particular kinds of torture that are used.

[65] Next Mr Kim submits the Minister asked herself whether Mr Kim was at a "high risk" of torture and this was the wrong test. I do not accept this submission. The test applied by the Minister was that set out in her conclusion: she did not consider there were substantial grounds to believe Mr Kim would be in danger of an act of torture in the PRC. In referring to "high risk" the Minister was explaining her view that Mr Kim was not in any group well-known as being at a high risk of torture, and although the Human Rights Watch had identified murder suspects at high risk of torture, Mr Kim was personally not at high risk. This was one reason for her conclusion. The other reasons were the assurances, the evidence already gathered and that Mr Kim was to be tried in Shanghai.

[66] Mr Kim submits the Minister failed to quantify the lowering of the risk due to the trial being held in Shanghai. The advice in the briefing paper was that "torture is on the decline in urban areas, such as Shanghai".[47] However the information to support that advice was quite general. The risk in Shanghai was not specifically discussed. The briefing paper referred to the Special Rapporteur's view that torture

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46 At [141].
47 At [25.1].

was "on the decline particularly in urban areas" but "remained widespread".[48] It also referred to information from Country B that the "main centres" were "safest".[49] This factor therefore could only provide limited support for the conclusion that Mr Kim's circumstances made him less likely to be at risk of torture.

[67] Mr Kim submits the Minister was wrong to conclude that Mr Kim's role had been investigated already and therefore his time in pre-trial detention might be reduced. He submits this is nothing more than speculation. The Chinese authorities have not yet interrogated Mr Kim (even though they could have sought to do so while he has been detained in New Zealand over the last five years). He says the available information indicates that 99 per cent of those facing criminal charges in the PRC confess and this assisted by torture.[50] He says it is misleading to say the scientific evidence has been reviewed in New Zealand, because the review has only been of the written material explaining how the DNA testing has been carried and the DNA itself has not been reviewed. The evidence of the Chinese witnesses has not been heard orally and cross examination has not been carried out. He says the reliability of their evidence is in doubt if they have been tortured or intimidated to provide it.[51]

[68] I agree it is somewhat speculative to conclude that Mr Kim is at less risk of torture because the strength of the evidence is such that he will spend less time in pre-charge detention. It does not address the key risk of torture, namely that Mr Kim has not confessed to the killing (indeed he denies it) and the PRC criminal justice system relies heavily on confessions.

[69] Mr Kim submits the Minister wrongly considered Mr Kim to be an "ordinary" criminal. He says this was wrong because the Human Rights Watch have recently identified murder suspects as high risk. I do not agree with this submission. Consistent with the advice the Minister received, she was describing Mr Kim as

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48 At [243]. See also Manfred Nowak "Report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment: Mission to China" E/CN.4/2006/6/Add.6A (10 March 2006) at [71]-[72].

49 See [58] above.

50 The briefing paper at [371] refers to various sources citing the conviction rate as being 98-99 per cent.

51 The affidavit of Clive Ansley supports the possibility of witness statements being obtained by torture.

"ordinary" in the sense of not being in one of the groups she described as being well known to be at a high risk. The Minister was aware the Human Rights Watch had identified murder suspects as high risk (and had sought further information from the Ministry about that), but her conclusion was that Mr Kim was not personally at risk.

[70] Mr Kim submits it was also wrong to describe him as an "ordinary" criminal because in *Valetov v Kazakhstan* the Human Rights Committee required that no distinction was to be made of the type of criminal conduct.[52] However this takes the Committee's comments out of context. The Committee was commenting that the obligation on states not to expose individuals to the risk of torture was "not … subject to any balancing considerations with the type of criminal conduct an individual is accused or suspected of".[53] It does not mean that the type of crime the person is suspected or accused of committing may not be relevant to the risk of torture that person faces.

[71] Mr Kim submits it was also wrong to describe him as an "ordinary" criminal, given that he gave sworn evidence in the District Court eligibility hearing that his girlfriend, whose father was a high official in the Communist Party, was responsible for the killing.[54] Mr Kim submits that such a defence in the PRC would guarantee him a confession obtained by torture. I agree that this appears not to have been considered by the Minister and that it may be relevant to the assessment of his risk. However, the assurances are aimed at eliminating the risk of torture. If they are effective, the failure to consider this point is not material.

[72] Mr Kim submits the Minister failed to consider that Mr Kim was a member of an ethnic minority as a Korean. Related to this, Mr Kim submits the Minister failed to provide sufficient reasons as to why *Israil v Kazakhstan* did not apply.[55] In that case the UN Human Rights Committee held that an extradition from Kazakhstan to the PRC of a Chinese national of Uighur origins violated articles 6 and 7 of the ICCPR. In reaching that view, the Committee said:[56]

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52 *Valetov v Kazakhstan* CCPR/C/110/D/2104/2011, 28 April 2014.
53 At [14.2].
54 *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013 at [25].
55 *Israil v Kazakhstan* CCPR/C/103/D/2024/2011, 1 December 2011.
56 At [9.5].

> ... The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the author's extradition that there were widely noted and credible public reports that China resorted to use of torture against detainees and that the risk of such treatment was usually high in the case of detainees belonging to national minorities, including Uighurs, held for political and security reasons. ...

[73] The Minister's conclusion that Mr Kim was an "ordinary criminal" suspect was not wrong on the basis of *Israil*. Mr Kim was not a Uighur held for political and security reasons. The Minister's conclusion was in accordance with the briefing paper which advised that Mr Kim was not a member of a well-known high-risk group such as "political or religious dissidents, ethnic minorities, or human rights defenders".[57] This in turn appears to be based on the Special Rapporteur's 2006 report which did not refer to Koreans.[58] It is unclear if the Special Rapporteur regarded Koreans as within the group of "ethnic minorities" for whom the risk of torture is greater. If there was reliable information that all ethnic minorities, including Koreans, were at higher risk of torture than those of Chinese ethnicity then the Minister's conclusion would be based on a mistaken basis.[59] Mr Ansley's affidavit says all foreigners are at a disadvantage but he provides examples only in the civil context.

[74] Mr Kim submits the Minister took insufficient note of the Human Rights Watch report. I do not agree. It is apparent the Minister took into account that report because she specifically requested the Ministry to provide her with further information about that report. In accordance with that request, the final briefing paper discussed this organisation and the report in some detail. No particular error is identified in that discussion, nor in the Ministry's advice that the report did not address Mr Kim's particular situation as a foreign national the subject of formal assurances and diplomatic monitoring and that there was nothing in the report which suggested any further or different assurances should be sought.

[75] Mr Kim submits the domestic reforms are inadequate. He points out that complaints go to the Public Security Department, which is also the prosecution. This

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57 Letter to Mr Kim at [30.2].
58 Manfred Nowak, above n 48.
59 See affidavit of Clive Ansley at [138]. His evidence is that any foreigner is at a disadvantage in a Chinese court.

lacks independence and is contrary to the urgings of the Committee against Torture to take "necessary legislative and other measures to ensure complete separation between the functions of pre-trial investigation and detention" and to "establish an independent, effective and confidential mechanism to facilitate the submission of complaints by victims of torture and ill-treatment to the competent and independent authorities …".[60] Mr Kim's submission is concerned with the difficulties a person faces in complaining about torture. Torture is difficult to detect and is likely to be denied. A complaint to the state may lead to further mistreatment and the amendments to the criminal procedure are ineffective if no complaints are made or able to be proven.[61]

[76] The briefing paper addressed these aspects to some extent. For example, when addressing fair trial considerations, the Ministry advised that, notwithstanding substantial revisions of the law in 1996 and 2012, "commentators and the UN remain concerned that the judiciary is not independent, with the risk of interference by the Government or Communist Party".[62] The Ministry further advised that "aspects of the law are not strictly followed in practice, particularly in cases involving well known high-risk groups".[63] The political oversight of the criminal justice system was a point repeated later in the paper when providing an introduction to the PRC's criminal justice system.

[77] When discussing the assurances the Ministry also advised as follows:[64]

> While there have been significant improvements in recent years, the PRC does not have a system of protection against torture that would be considered effective by international standards. As discussed in the section on torture, it is not willing to cooperate with international monitoring mechanisms such as the Committee against Torture, and commentators state that perpetrators are rarely held to account. In addition, information about places of detention and torture is routinely withheld under the Law of the PRC on Guarding State Secrets (1988, revised 2010).

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60 Committee against Torture "Concluding Observations on the fifth periodic report of China" (3 February 2015) CAT/C/CHN/CO/5 at [21].

61 This difficulty can be seen in Clive Ansley's affidavit at [103]-[131] which shows the repercussions if any Chinese citizen was to oppose the government, particularly human rights lawyers.

62 At [430].

63 At [371].

64 At [151]-[153].

> While the PRC is party to the CAT, it is not party to its Optional Protocol (OPCAT). The OPCAT requires state parties to establish an independent monitoring body or bodies at the domestic level to ensure compliance with human rights in detention. It also requires states to cooperate with the international monitoring mechanism, the Subcommittee on Prevention of Torture.
>
> NZ is party to the OPCAT and has appointed specialised, independent agencies to undertake regular site visits to places of detention and work with detaining authorities to maintain a high standard. While a country may have an effective system of protection despite not being party to a relevant international treaty, the absence of ratification is one of a range of relevant factors that may be taken into account when considering the nature and efficacy of a country's framework for the protection of persons deprived of liberty.

[78] It cannot therefore be said that the Minister failed to consider these aspects. The Minister's decision proceeded on the basis that torture was still an issue but there were significant factors that differentiated Mr Kim's position. Key amongst those factors was the provision of detailed and specific assurances. What might be questioned is whether the Minister linked the Ministry's advice on these matters to whether the monitoring components of the assurances were likely to be effective. I will return to this issue when discussing assurances.

[79] Mr Kim submits the Minister failed to consider that if Mr Kim's mental health deteriorates it is likely he will be placed in solitary confinement. If he does not confess he is likely to be detained in solitary confinement for longer. In my view this submission is speculative. The Minister has received assurances concerning Mr Kim's treatment. The relevant issue in this respect is the reliance which can be placed on those assurances.

[80] Mr Kim submits the Minister failed to obtain the best up to date information as she should have done given the gravity of the issues. The UN Committee against Torture had last reported on the PRC in November 2008. On 9 December 2015, just nine days after the Minister's decision, the UN Committee against Torture issued its report on China. Mr Kim says that New Zealand officials would have been aware this report was to be issued. Mr Kim relies on the totality of the report which shows that torture is still endemic.

[81] The report included the following:[65]

> Notwithstanding the numerous legal and administrative provisions prohibiting the use of torture, the Committee remains seriously concerned over consistent reports indicating that 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. It also expresses concern over information that the majority of allegations of torture and ill-treatment take place during pre-trial and extra-legal detention and involve publicly security officers, who wield excessive power during the criminal investigation without effective control by procuratorates and judiciary. This overarching power is reportedly further intensified by the public security's joint responsibilities over the investigation and the administration of detention centres which, in the Committee's view, creates an incentive for the investigators to use detention as a means to compel detainees to confess (arts. 2, 12, 13 and 16).

[82] That the Minister could have waited for this report, but she was required to make a timely decision and the information already before her indicated that torture remained a significant issue in the PRC notwithstanding the reforms. For example, in 2010 the Special Rapporteur welcomed the increased use of video and audio taping at interrogations but regretted that "such material is fully controlled by the police authorities making an effective and independent monitoring impossible".[66] Similarly the 2013 UK Home Office guidance note referred to objective evidence that "the use of torture to extract forced confessions is widespread".[67] The particular relevance of the 2015 report is that it confirms that, notwithstanding the reforms and efforts to address the problem, "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".[68] The Minister proceeded on the basis that torture is an issue in the PRC but significant factors differentiated Mr Kim's position. In these circumstances it was not an error to have proceeded to make her decision without waiting for this report.

[83] Mr Kim submits the Minister failed to consider that torture and ill-treatment are deeply entrenched in the criminal justice system. I do not accept this submission for the reasons just stated. The question is whether the issues arising from a deeply

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65 Committee against Torture, above n 60, at [20].
66 Refer to the quote at [51] above.
67 Home Office "Operational Guidance Note: China" (October 2013) GOV.UK <gov.uk>.
68 Committee against Torture, above n 60, at [20].

entrenched practice of torture and ill-treatment were taken into account when considering the likely effectiveness of the assurances.

[84] In summary, on this aspect of the review, the information before the Minister appropriately alerted her to the general situation in the PRC. That situation meant that surrender properly could be ordered only if it was open to the Minister to conclude that significant factors differentiated Mr Kim's position. The Minister was not wrong to take into account that Mr Kim was not within a "well known high-risk group". The Minister's reliance on the apparent strength of the case and the stage at which the investigation was at, however, does not appear to have taken into account the heavy reliance the PRC's criminal justice system places on confessions. The Minister's reliance on Shanghai as the place where Mr Kim will be tried could not reasonably be given much weight given the limited information on which that factor was based. The key differentiating factor was the assurances. Accordingly surrender properly could be ordered only if there were sufficient grounds for concluding that those assurances were likely to be effective.

Fair Trial

The Extradition Act

[85] The Minister may determine not to order Mr Kim's surrender if "for any other reason" she considers he should not be determined (s 30(3)(e)). The respondents accept that this enables the Minister to decline to order surrender because of fair trial concerns.

International obligations

[86] Article 14 of the ICCPR provides:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him…everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. …
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> > a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> >
> > b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> >
> > c) To be tried without undue delay;
> >
> > d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance, assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
> >
> > e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> >
> > f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
> >
> > g) Not to be compelled to testify against himself or to confess guilt.
>
> …

[87] The First Optional Protocol provides for the Human Rights Committee to receive and consider complaints from individuals claiming to be victims of violations of the rights set out in the ICCPR.

[88] As noted above, New Zealand ratified the ICCPR in 1978 and the First Optional Protocol in 1989. The PRC has signed, but not ratified, the ICCPR. The PRC has not signed or ratified the First Optional Protocol to the ICCPR.

NZBORA

[89] Section 23 provides:

> **23 Rights of persons arrested or detained**
>
> (1) Everyone who is arrested or who is detained under any enactment—
>
> > (a) shall be informed at the time of the arrest or detention of the reason for it; and

(b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) arrested; or

(b) detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

[90] Section 24 provides:

24 Rights of persons charged

Everyone who is charged with an offence—

(a) shall be informed promptly and in detail of the nature and cause of the charge; and

(b) shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) shall have the right to consult and instruct a lawyer; and

(d) shall have the right to adequate time and facilities to prepare a defence; and

(e) shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and

(f) shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

[91] Section 25 provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
>
> (b) the right to be tried without undue delay:
>
> (c) the right to be presumed innocent until proved guilty according to law:
>
> (d) the right not to be compelled to be a witness or to confess guilt:
>
> (e) the right to be present at the trial and to present a defence:
>
> (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
>
> (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
>
> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
>
> (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

The briefing paper

[92] The briefing paper set out advice to the Minister under a number of headings. First it provided a summary of the submissions for Mr Kim. The submissions were that the PRC judicial system lacked independence such that it was impossible to get a fair trial. Further, the right to silence and the presumption of innocence did not exist and the PRC's 99 per cent conviction rate was evidence of the system's inherent unfairness.[69] And the assurances could not be relied upon as they would require an enormous philosophical change not least as to the independence of the judiciary.

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[69] At [352].

[93] Secondly, the briefing paper provided advice as to the proper approach. The advice was that the Minister was to consider the general situation regarding fair trial rights in the PRC. Against that background, she was to consider whether Mr Kim was "personally likely to receive a trial in the PRC that, to a reasonable extent, accords with the principles in article 14" of the ICCPR.[70] This meant it was necessary for the Minister to consider the nature and quality of the assurances provided by the PRC and the particular circumstances and characteristics of Mr Kim's situation.

[94] Thirdly, it advised that the Minister's decision needed to be consistent with New Zealand's international obligations under the ICCPR. It advised the Minister that if she considered Mr Kim would not receive a fair trial on return to the PRC, she "may determine that he should not be surrendered". This would be pursuant to the discretionary ground under s 30(3)(e) of the Act which was to be interpreted in a manner consistent with the NZBORA. The advice also discussed case law concerning how unfairness was assessed in the United Kingdom and the European Court of Human Rights (ECHR) and the approach the Minister should take to this question.

[95] The paper next noted that the PRC had signed the ICCPR in 1998 but had not ratified it. It also advised that the PRC had not signed or ratified the ICCPR's First Optional Protocol (which establishes an individual complaints mechanism).[71]

[96] Next the briefing paper set out the general situation in the PRC as follows:[72]

> The CPL [Criminal Procedure Law], as originally enacted in 1979, did not contain a number of internationally recognised fair trial protections contained in article 14 of the ICCPR, such as the right to be presumed innocent until proved guilty according to law and the right not to be compelled to testify or confess guilt.
>
> The revisions of the CPL in 1996 and 2012 have addressed most of the law's major fair trial deficiencies. However, there remain concerns that there is inadequate separation of powers and that the judiciary is not independent ...

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70 At [355].

71 It also noted that the PRC had not signed the Second Optional Protocol on the abolition of the death penalty.

72 At [369]-[372].

> There are also concerns that aspects of the law are not strictly followed in practice, particularly in cases involving high-risk groups. A recent example is the mass detention of some 230 human rights lawyers and associates earlier this year. This action has been strongly condemned by lawyers' organisations and other human rights monitoring agencies in an open letter to Chinese President Xi Jinping. This letter says the actions make it impossible to take President Xi Jinping's recent claims to be promoting the rule of law seriously, as they violate many international standards.
>
> Various sources cite the rate of conviction in the PRC as being 98 – 99%. While this appears startling, the following quote from a former judge may provide a partial explanation:
>
> > If the court really wants to acquit the defendant, the court's adjudication committee gets the police and the procuratorate together to get them psychologically prepared for what the court is thinking and why it thinks that way. If the police are okay with it, the procuratorate usually withdraws the prosecution and there wouldn't be a verdict. Because if there is an acquittal, it means acknowledging that the police wrongly arrested someone, that the procuratorate wrongly indicted someone, and that there will be a need for state compensation.

[97] Next the briefing paper discussed reforms in 2007 and 2012 which had made a number of significant changes in relation to fair trial rights. The paper then discussed the PRC's domestic law with reference to the relevant ICCPR and NZBORA provisions. In relation to a public hearing the paper advised that all cases at first instance are tried in open court, except for cases involving state secrets or personal privacy. If the case is tried in open court, the evidence is presented, read out or broadcast in the public and judgments are publicly pronounced. The briefing paper noted, however, that the expert instructed by Mr Kim's counsel had stated that "a 'public hearing' in the PRC is not public in the sense that it is open to anybody to attend" because "the authorities decide who can attend."[73]

[98] The briefing paper went on to note the following matters under the PRC's domestic law:

(a) There is no explicit provision in Chinese law that a defendant is to be presumed innocent until proved guilty.

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[73] At [379].

(b) There is no explicit requirement in Chinese law that a suspect be informed of the nature of the offence they are alleged to have committed.

(c) There are provisions as to the maximum time limit for holding a defendant in custody for investigation after arrest.

(d) Meetings between a suspect and his or her lawyer are not monitored. If a defendant's lawyer requests a meeting with a defendant in custody, the detention facility must arrange for the meeting to occur within 48 hours of the request. Where the defendant may be sentenced to life imprisonment or death, the legal aid agency must appoint a lawyer who has a certain number of years experience in criminal defence. A lawyer who believes that a public security organ, procuratorate, or court is hindering their performance can file a complaint to the procuratorate at the same or higher level.

(e) A defendant has the right to present a defence. However disclosure of all information held by the prosecution is a discretionary decision.

(f) The evidence of witnesses is usually produced by formal written statement. However the 2012 reforms provided for oral testimony where there were objections to the testimony, it has a material impact on the case and the court deemed it necessary to ask the witness to appear before the court.

(g) There is a right to appeal. The appeal involves a complete review of the facts. It can also consider whether there have been violations of litigation procedures.

[99] In respect of the right not to be compelled to testify or confess guilt, the briefing paper advised as follows:[74]

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[74] At [409]-[410].

> Article 50 of the CPL as amended in 2012 to provide that "Judges, procuratorial personnel and investigators … are strictly prohibited from … *forcing anyone to provide evidence proving his/her own guilt."* …
>
> However, Amnesty International and Human Rights Watch question the effectiveness of the new provision as article 118 of the CPL, which is unchanged, states that "[t]he criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case." It considers that the effect of article 118 is that a defendant cannot refuse to answer a relevant question about the case and must answer such questions truthfully. Chinese officials were specifically asked about this point during discussions in Beijing. They said that a defendant has the right to refuse to answer a question and that there are no adverse consequences if they do.

[100] The briefing paper went on to discuss how the information about the general situation in the PRC related to Mr Kim. This section discussed the assurances, submissions made on behalf of Mr Kim, and other matters the Ministry considered to be relevant. It then provided a summary of all the above material. The relevant considerations set out in relation to Mr Kim were that:

(a) he was an "ordinary criminal offender";

(b) he was suspected of murder which was identified as a high risk group by the Human Rights Watch. However the Ministry did not have any reports by other commentators or the UN that supported this view, so it was unclear how accurate this categorisation was or the extent to which it applied to fair trial rights;

(c) because of the extradition dimension, Mr Kim's situation was significantly different from that of most other suspects. That was because New Zealand would be monitoring Mr Kim's case. The PRC authorities would be aware of that. Any non-compliance with fair trial rights was more likely to be detected and would have repercussions for the bilateral relationship between the PRC and New Zealand (and potentially the PRC and South Korea), and the PRC's international reputation;

(d) the prima facie case against Mr Kim appeared to be relatively strong.

The Minister's decision

[101] The Minister relied on these matters in reaching her conclusion on this aspect. Her conclusion, as set out in her decision in the letter to Mr Kim, was as follows:[75]

> I am satisfied that you will receive a trial in the PRC that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14 of the ICCPR, and so the discretionary ground to refuse surrender in s 30(3)(e) is not made out.
>
> The standards in article 14 are applied differently in the PRC than in NZ. For example, the courts in the PRC do not appear to have the constitutional independence from the state that would be required by the doctrine of the separation of powers in NZ and other similar democracies. However, what I must determine is whether you will get a trial that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14, as opposed to one which mirrors NZ's application of those principles.
>
> In my view your trial will, to a reasonable extent, accord with those fundamental principles. I am satisfied the 1996 and 2012 reforms have addressed most of the CPL's fair trial deficiencies. While commentators and the UN remain concerned about lack of judicial independence and potential state interference, I do not consider those are risks in your case:
>
> > The PRC has provided detailed and specific assurances about matters relating to your trial. As for those relating to torture, I am satisfied that the assurances given by the PRC can be relied on in this instance, having had regard to the factors set out in *Othman (Abu Qatada) v The United Kingdom*. In particular, I consider NZ's monitoring of your trial will provide a significant deterrent to the PRC conducting a trial which does not accord with the fundamental principles in article 14. NZ and other countries have experience where assurances given by the PRC have been honoured;
> >
> > You are an 'ordinary' criminal suspect. You are not a member of a well-known high-risk group, such as political or religious dissidents, ethnic minorities, or human rights defenders. While Human Rights Watch has recently identified murder suspects as high risk, it is unclear how reliable that finding is, and I consider the presence of assurances and other differentiating factors in your circumstances that I have outlined mean you personally are not at a high risk of state interference or non-compliance with fair trial rights;
> >
> > The *prima facie* case against you appears to be relatively strong and includes scientific evidence which has been reviewed in NZ. The relative strength of the case against you appears to decrease the risk of non-compliance with fair trial rights or state intervention.

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[75] At [40]-[42.3].

Mr Ansley's evidence

[102] Mr Ansley comments that the legal system is entirely subservient to and controlled and directed by the Chinese Communist Party (CCP), to serve the ends of the CCP. Those who hear the case do not make the judgment; the trial is theatre which has no impact on the ultimate case; typically a tribunal of three judges will hear the case and then adjourn ostensibly to consider the judgment but who in fact make a recommendation to a Judicial Committee; the Judicial Committee (which is an invisible group of judges) issue the judgments; and this it to facilitate the control of the courts by the CCP and in an invisible way.[76]

[103] Mr Ansley says the process of proving a person's guilty is so flawed there is no way of knowing whether a convicted person is one of the guilty or whether he is an innocent victim of an unfair process. Under that process, virtually all accused parties are ultimately found guilty, the system is heavily dependent on confessions, torture to extract confessions is routinely employed, and a "not guilty" plea is interpreted as an insult to the state, the police, the prosecutors and the courts. Despite the provisions of the code of criminal procedure requiring viva voce evidence and cross examination, virtually all cases are decided on the basis of out of court hearsay evidence in the form of signed statements.

[104] Further, Mr Ansley says detained accused are not allowed access to a lawyer until the police and prosecutors have completed their investigation (by which time the accused has usually confessed). Once the investigation is completed police and prison guards defence lawyers are routinely denied access to clients (despite the law which permits access). If a meeting does take place, a police officer must be present, the meeting is monitored by video camera and, if the lawyer asks the accused anything about the facts of the case, the meeting is terminated as the lawyer is permitted only to inform the accused of the offence with which he is charged and to explain the elements of the offence to him. He says "[f]or many reasons it is impossible to monitor the treatment of a prisoner once that prisoner enters the system and disappears behind the walls of a prison".[77]

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[76] Affidavit of Clive Ansley at [81].
[77] At [140].

The approach to fair trial concerns

[105] There is a comparable provision to art 14 in the ICCPR in the European Convention on Human Rights (European Convention) at art 6. The ECHR has considered that article in a series of cases involving expulsion or extradition. The Court held the relevant question in these cases is whether the extradition or expulsion gives rise to a risk of a flagrant denial of justice in the requesting country.[78] This test is met if the breach of the principles guaranteed in art 6 is "so flagrant as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article".[79] It is a "stringent" test going beyond "mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of [the Article] if occurring within the Contracting State itself".[80]

[106] The ECHR has provided examples of when a flagrant denial of justice would occur. These are a conviction given in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge, a trial which is summary in nature and conducted with a total disregard for the rights of the defence, detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed, and deliberate and systemic refusal of access to a lawyer, especially for an individual detained in a foreign country.[81]

[107] In *Bujak v The Minister of Justice* the New Zealand Court of Appeal endorsed the need for a "stringent test" where humanitarian considerations were raised as grounds for resisting an extradition request.[82] This was in the context of an extradition request from Poland with whom we have an extradition treaty. It considered that if it were open under the treaty to take into account humanitarian considerations, such considerations must be "compelling". It considered:[83]

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78 Beginning with *Soering v The United Kingdom* (1989) 11 EHRR 439 (ECHR) at [113]. Applied, for example, in *Othman v The United Kingdom*, above n 34, at [258]-[285] and by the Supreme Court of the United Kingdom in *Kapri v Lord Advocate representing the Government of the Republic of Albania* [2013] UKSC 48; [2013] 1 WLR 2324 at [32].

79 *Othman v The United Kingdom*, above n 34, at [260]; *Kapri v Albania*, above n 78, at [32].

80 *Othman v The United Kingdom*, above n 34, at [260].

81 At [259].

82 *Bujak v Minister of Justice* [2009] NZCA 570; [2010] BCL 57 at [31] and [43].

83 At [43].

> [T]he Minister would not be entitled to deny the requesting state the ability to try a person for offences committed within its territory on the basis of human rights or humanitarian concerns unless they were sufficient to meet a very high standard, or, as the Canadian Supreme Court put it, unless the suspected offender's return would shock the conscience.

[108] However the Court noted that this was subject to the terms of the relevant extradition treaty, which might allow for a less rigorous standard or for more expansive grounds.[84] In the present case there is no extradition treaty. The request from the PRC has been accepted by the Minister on an individual case basis. The Extradition Act confers a power on the Minister which enables her to take into account the fundamental fair trial rights set out in the ICCPR and the NZBORA. It may therefore be that the Minister is not obliged to apply the same "very high standard" referred to by the Court in *Bujak.*

[109] This was the approach taken in the advice provided to the Minister in the briefing paper. Specifically it advised:[85]

> Crown Law has advised that it expects that the courts would apply the "flagrant denial of justice" test in the circumstances of Mr Kim's case. However, because there is no extradition treaty between NZ and the PRC, there is arguably less reason for NZ to accept a lower standard of procedural fairness on the basis of comity. Consequently Crown Law considers, and the Ministry and MFAT agree, that for present purposes the question you should ask yourself is:
>
> > Am I satisfied on all the information available, including the assurances provided by the PRC, that Mr Kim will receive a trial in the PRC that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14 of the ICCPR?
>
> In answering this question, you need not apply the standards in article 14 as they are applied in NZ. For example, the courts in the PRC do not appear to have the constitutional independence from the state that would be required by the doctrine of the separation of powers in NZ and other similar democracies. What you must determine is whether the differences are so significant that Mr Kim will not get a trial that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14.

[110] Mr Kim submits that the Minister erred in taking this approach. He submits that, logically, if a fair trial occurs only to a reasonable extent, that must mean that elements of the trial are not fair. I do not accept this submission. The use of the

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84 At [43].
85 At [366]-[367].

word "reasonable", in my view, allows for the possibility of some differences in approach and potentially some irregularities, providing that they do not render the trial unfair.[86] It is not necessary that the criminal justice system in the PRC protects the rights in art 14 in the same way as they are protected in New Zealand, provided that to a reasonable extent those rights are protected.[87]

[111] I consider the Minister accepted the advice she had received that, if she was satisfied there would be reasonable compliance with art 14, surrender could be ordered. Put the other way, if she was not satisfied there would be reasonable compliance with art 14 she could decline surrender.

[112] In not adopting the higher test of "flagrant denial of justice" she proceeded in a way that was beneficial to Mr Kim. If surrender was to be declined on the basis of compliance with art 14, there would need to be sufficient evidence that Mr Kim fair trial rights would not be reasonably protected. That is because the surrender power must be exercised in accordance with the purposes of the Act, which includes "the interests of all nations that suspected offenders who flee abroad should be brought to justice".[88] That was the approach the Minister took. There was no error in her approach in this respect.

No public, independent and impartial tribunal

[113] Mr Kim submits the Minister failed to explain how she could conclude that Mr Kim would receive a fair trial that to a reasonable extent accorded with art 14, when judges in the PRC are not independent because they are positioned below the

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86 The approach that has been taken in the criminal context in New Zealand is that the right to a fair trial is absolute, however, the threshold for establishing this is high and is based on the fairness of the trail as a whole. See *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78]; *E (CA113/2009/)(No 2) v R* [2010] NZCA 280 at [70]; and *Matenga v R* [2009] NZSC 18; [2009] 3 NZLR 145 at [31] and fn 41. An example is *Odgen v R* [2016] NZCA 214 at [35]-[38] where the Judge relied on a formal written statement, supporting the claimant's case that was on the court file but had not been admitted in evidence. The Court held the error was of such minor or peripheral effect that its inclusion in the Judge's reasoning could not be considered so gross, prejudicial or irremedial as to render the trail unfair.

87 For example, a Minister would not be justified in declining extradition to a country which does not have jury trials for offences punishable by more than two years' imprisonment (compare with s 24(c) NZBORA) providing they are tried before a fair and impartial tribunal (however it may be constituted).

88 *Bujak v Minister of Justice*, above n 82 at [33], quoting *Soering v United Kingdom*, above n 78 at [89].

Communist Party.[89] Article 14 requires that there be a "fair and public hearing by a competent, independent and impartial tribunal". Mr Kim says independence and impartiality are not possible in the PRC.

[114] Mr Kim further says the Minister failed to properly consider and apply *Kapri v Albania*.[90] This case involved the extradition of an Albanian national, from Scotland to Albania, on suspicion of murder. The suspect opposed extradition on the ground that extradition would not be compatible with his right to a fair trial (art 6 of the European Convention) because of systemic corruption in the Albanian judicial system. The Supreme Court of the United Kingdom referred the matter back to the Appeal Court for reconsideration. It did so because, in cases where systemic corruption is an issue, "it is not so obvious" that a "flagrant denial of justice" can only be shown by "pointing to particular facts or circumstances affecting the case of the particular individual".[91] It went on to explain:[92]

> The stark fact is that systemic corruption in a judicial system affects everyone who is subjected to it. No tribunal that operates within it can be relied upon to be independent and impartial. It is impossible to say that any individual who is returned to such a system will receive that most fundamental of all the rights provided for by art 6 of the convention, which is the right to a fair trial.

[115] The Court went on to say that the appellant's allegations were sufficiently serious for it to be necessary "to have a closer look at the material in order to determine how systemic or widespread the problem now is". The Appeal Court was directed to consider up-to-date information so that it could "reach a properly informed decision" on whether the flagrant denial of justice test was met because of systemic corruption.[93]

[116] I agree, therefore, that systemic issues may lead to the conclusion that extradition is incompatible with art 14 of the ICCPR regardless of the need to point to facts and circumstances in the particular case. However, as the Appeal Court in

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89 Citing Rongjie Lan "A False Promise of Fair Trials: A case study of China's Malleable Criminal Procedure Law" (2010) Pacific Basin Law Journal 27(2) at 171.

90 *Kapri v Albania*, above n 78.

91 At [32].

92 At [32].

93 At [33].

Kapri explained when considering this matter following the Supreme Court's decision:[94]

> … [The Supreme Court] must be asking this court to consider whether the general circumstances in Albania are so extreme as would inevitably lead to a violation in the appellant's and any other person's case. If that is correct, it would theoretically be sufficient for the appellant to demonstrate that the general situation in Albania, is in the 'most extreme' category, thus avoiding the need for any reference to the particular circumstances of the appellant's own case … However, conversely, presumably if it is positively demonstrated that a particular person will in fact receive a fair trial in Albania, the general situation in Albania cannot fall into the 'most extreme' category, since it would have been demonstrated that the extradition of the particular individual would not result in a violation. It must therefore follow, if that were demonstrated, that extraditions to Albania as a generality will not necessarily violate a Convention right.

[117] The Appeal Court went on to consider the evidence. It concluded that substantial progress in combating corruption in the Albanian judicial system had been made. Although there might well be elements of corruption, there was no proper evidential basis for concluding that there were substantial grounds for believing any person extradited to Albania would risk suffering a flagrant denial of their right to a fair trial. There was, however, cogent and compelling evidence that the particular appellant would obtain a fair trial upon his return to Albania.[95]

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94 *Kapri v Her Majesty's Advocate (for the Republic of Albania)* [2014] HCJAC 33 at [123].

95 At [141]. In reaching that conclusion the Appeal Court noted the following points (at [143]): "The appellant's re-trial will involve consideration of the evidence by three judges in accordance with a code of evidence and procedure which is subject to the over-arching principle of a fair trial, as enshrined in Article 6. ... If he wishes to object to a particular judge, he could do so and this would be determined by another judge and the decision would be open to an appeal. The appellant is entitled to choose his own lawyer or, if he is unable to afford one, a lawyer will be appointed by the court and paid for by the state. … The appellant will be provided with a copy of the evidence gathered by the prosecutor … and given an opportunity to consider it and prepare his defence. He will be allowed to challenge the evidence against him and to lead evidence from witnesses in his favour. The proceedings … will be in public and recorded electronically. In the event of a conviction, the appellant would be entitled to a reasoned decision, which he could appeal to a higher court, perhaps even the Constitutional Court, which has shown itself able to listen to, and sometimes to sustain, appeals based upon the Article 6 fair trial requirement. He could complain about any improper behaviour by a judge to either the MoJ or the HCJ and be assured that his complain would be investigated. Ultimately, he could take his case to the European Court and seek redress there, if any violation of his article 6 rights were demonstrable. Even if the appellant's case had not become the subject of particular media and state attention, these protections would exist and, even if they may not operate at all times as efficiently as they might, there is simply no scope on the evidence for an argument that the appellant's trial might not be fair. In this connection, it is worth repeating that no-one suggested that the outcome of an ordinary criminal trial in [Albania] for a serious crime would be compromised by any form of corruption or that, if it were, such corruption would influence the judges in favour of a conviction."

[118] I do not agree that the Minister failed to consider the issue of political interference in the Chinese criminal justice system. These matters were specifically addressed in the briefing paper when discussing the general situation in the PRC regarding fair trial rights.[96] Earlier the briefing paper provided an "introduction to the PRC's criminal justice system". Under this heading the briefing paper discussed the role of "the Procuratorates". This included their supervisory functions in all aspects of the prosecution of criminal cases. The paper also discussed the judiciary, noting that the Supreme People's Court (the PRC's highest court) is responsible to the National People's Congress. In respect of their independence the paper said:[97]

> *Political oversight*
>
> The Constitution of the PRC and the CPL state that procuratorates and the courts exercise their powers independently, without interference by any administrative organ, public organisation or individual. However, it is well known that there is political oversight in the PRC's criminal justice system. The US Department of State and David Matas state that the Communist Party's Law and Politics Committee has the authority to review and influence court operations, although is more likely to become involved in politically sensitive cases.

[119] The briefing paper advised the Minister that in considering these matters it was relevant that Mr Kim was not a member of any group that faced a "high risk of interference by the Government or Communist Party in the judicial proceedings".[98] The Minister was also advised that "the extradition dimension", which meant New Zealand would be monitoring Mr Kim's case, put Mr Kim in a different position from most other criminal suspects.

[120] It is clear that the Minister considered this advice. In her decision she concluded that Mr Kim's right to a fair trial would be protected because of the assurances, that he was an "ordinary" criminal and the prima facie case against him appeared to be strong.[99] The Minister has therefore explained why she concluded there would be compliance with Mr Kim's right to a "fair and public hearing by a competent, independent and impartial tribunal" notwithstanding the position of the judiciary in the PRC and the political oversight to which it is subject.

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96 See in particular the advice set out above at [96].
97 At [186].
98 At [426.1].
99 See [100]-[101] above.

[121] On the material before the Minister there was no evidential basis for concluding that state intervention was such that no criminal trial could be regarded as fair. Mr Ansley's evidence does not say that state intervention occurs in every case. His concern is that the system enables state intervention to occur. The Minister was not wrong to consider whether it would in fact occur in Mr Kim's case.

[122] However the lack of judicial independence and potential state interference is a systemic issue. The information before the Minister did not suggest it was only ever an issue in particular kinds of cases, such as political cases or where the case against an accused was not strong. Whether it was open to the Minister to conclude that Mr Kim's trial would comply with art 14, in that it would be a trial before an independent and impartial tribunal, therefore substantially depended on the reliance that could be placed on the assurances.

[123] One aspect of Mr Ansley's evidence appears to raise a new issue. This concerns Mr Ansley's evidence that the trial is essentially a theatre and it is the Judicial Committee (an invisible group of judges) who in fact make the judgment. Mr Kim refers to a decision of the Human Rights Committee in *Campos v Peru*.[100] That case concerned a Peruvian citizen who was convicted of "aggravated terrorism" by a "tribunal of faceless judges" established under special anti-terrorist legislation. The judges had covered their faces so as to guarantee their anonymity and prevent them from being targeted by terrorists. The Human Rights Committee considered this was incompatible with art 14 of the ICCPR. It considered that neither independence nor impartiality of the judges was guaranteed in a system of trial by anonymous judges: the judges, for example, might comprise members of the armed forces.

[124] Mr Ansley's evidence about the input of the Judicial Committee comes from an article he published in 2007.[101] It is unclear whether his comments are an accurate picture of the present situation. In any event, his concerns about the role of the Judicial Committee are distinguishable from the faceless judges in *Campos v Peru.* His evidence is that the Judicial Committee is a standing committee of

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100 *Campos v Peru* CCPR/C/61/D/577/1994 9 January 1998.

101 Clive Ansley "The Chinese 'Judicial System': A Fairy Tale of Beijing" *The Verdict, No 112* (March 2007).

between five and seven judges. As such I apprehend that it is possible for a defendant to determine who comprises the standing committee. Further, Mr Ansley's evidence is that the court which hears the case makes a recommendation to the Judicial Committee. Following the meeting of the Judicial Committee a judgment is issued. Accordingly, it appears that, whatever the input provided by the Judicial Committee behind closed doors, a public judgment results.

[125] I therefore do not regard Mr Ansley's evidence on this topic as likely to have led the Minister to reach a different conclusion about Mr Kim's right to a fair and public hearing before an independent and impartial tribunal.

Other procedural protections

[126] Mr Kim submits a fair trial is impossible because of the length of time for which he may be detained, and the prospect that he may be denied a lawyer and independent medical advice. These are matters which are raised as concerns in the Committee's 2015 report.[102] These concerns are all the subject of assurances so they will be discussed under that heading.

[127] Mr Kim submits the Minister failed to consider that 99 per cent of criminal charges resulted in guilty pleas, that the average criminal trial lasts only 29 minutes, and routinely witnesses are not summonsed.[103] I do not agree that the Minister failed to consider these issues. These matters were specifically addressed in the briefing paper.[104] The Minister was satisfied the 1996 and 2012 reforms have addressed most of the fair trial deficiencies.[105]

[128] Mr Ansley's evidence indicates that there may be a difference between what the criminal procedural law provides and what occurs in practice. Moreover, he refers to a "steadily escalating campaign of terror against the criminal defence and human rights bars in China". This evidence relates to the general situation in the PRC. The briefing paper advised the Minister to consider Mr Kim's specific

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102 Committee against Torture, above n 60.

103 Citing Rongjie Lan "A False Promise of Fair Trials: A case study of China's Malleable Criminal Procedure Law" (2010) Pacific Basin Law Journal 27(2) at 171.

104 See in particular the advice set out above at [96]. The 2012 reforms post-date the Lan article.

105 See [101] above.

situation.[106] The Minister considered that, in light of Mr Kim's specific circumstances, he would receive a fair trial that complied with art 14. As discussed under other headings, whether it was open to the Minister to reach that conclusion, in light of the general situation in the PRC, substantially depends on the scope and effectiveness of the assurances.

[129] There is one further aspect concerning Mr Kim's fair trial rights that needs to be considered. As the briefing paper noted, Amnesty International and Human Rights Watch question the effectiveness of a provision which prohibits Judges, procuratorial personnel and investigators from forcing anyone to provide evidence proving his or her own guilt. This question arises because art 118 of the CPL, which is unchanged, states that "[t]he criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case".

[130] As the briefing paper notes, the latter issue was a question which was specifically raised with Chinese officials during discussions in Beijing in connection with the assurances. Chinese officials advised that a defendant has the right to refuse to answer a question and that there are no adverse consequences if they do so. The right not to be compelled to testify against oneself is a fundamental right (art 14.2(g) of the ICCPR and s 25(d) of the NZBORA). The assurances, however, do not refer to this.

Death penalty

International obligations

[131] Article 6 of the ICCPR provides:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes …

[106] See [100] above.

[132] The Second Optional Protocol to the ICCPR is aimed at abolishing the death penalty. It provides that no one within the jurisdiction of a state party to the protocol shall be executed.

[133] As noted above, New Zealand ratified the ICCPR in 1978. The PRC has signed, but not ratified, the ICCPR.[107] New Zealand ratified the Second Optional Protocol in 1990. The PRC has not.

NZBORA

[134] Section 8 provides:

> **8 Right not to be deprived of life**
>
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

The briefing paper

[135] The briefing paper advised the Minister that:

(a) Under s 30(3)(a) of the Act she had a discretion whether to order surrender if it appeared to her that Mr Kim may be sentenced to death.

(b) Under Chinese law, intentional homicide was punishable by death or a lesser penalty.

(c) The Minister must consider whether the assurances provided by the PRC were sufficient to satisfy her that Mr Kim will not be sentenced to death.

(d) The Supreme People's Court had determined that the trial court would not impose the death penalty on Mr Kim, nor a death penalty with a two year reprieve. This was also included in the assurances provided to New Zealand. The assurances complied with the PRC's Extradition

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[107] See [38] above.

Law which permitted the Supreme People's Court to decide whether to give such an assurance.

(e) The submission for Mr Kim was that the PRC cannot be trusted to comply with the assurances it had given.

(f) New Zealand has previously received an assurance on the death penalty from the PRC which was honoured.

(g) Mr Kim was an "ordinary" criminal offender, it was unclear how reliable the Human Rights Watch report was, the PRC was well aware of New Zealand's long standing opposition to the death penalty, the PRC was aware New Zealand (and potentially South Korea) would be monitoring Mr Kim's case and non-compliance with the assurance would have repercussions for the bilateral relationship between the PRC and New Zealand (and potentially the PRC and South Korea) and the PRC's international reputation.

The Minister's decision

[136] The Minister's decision on this aspect was set out in the letter to Mr Kim as follows:[108]

> I am satisfied the PRC will not impose the death penalty given the assurance in relation to you and the previous experience of NZ with such an assurance, and so this discretionary ground is not made out.
>
> The PRC has given an assurance that the death penalty will not be imposed if you are found guilty, which appears to be in compliance with PRC law. I consider the assurance to be reliable, having had regard to the *Othman* principles and your particular case. NZ has previously received an assurance not to impose the death penalty from the PRC, which was honoured.
>
> The PRC is well aware of NZ's longstanding opposition to the death penalty. The PRC is aware that NZ (and potentially South Korea) will be monitoring your case and that non-compliance with the death penalty assurance will have repercussions for the bilateral relationship between the PRC and NZ (and potentially the PRC and South Korea), and the PRC's international reputation.

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[108] At [47]-[49].

The submissions

[137] Mr Kim submits the Minister failed to give adequate consideration to, or unreasonably found that, the PRC would honour the assurance concerning the death penalty. This is discussed under the assurances heading below.

Mental health

The briefing paper

[138] The briefing paper advised the Minister of the reports from a psychologist and a psychiatrist diagnosing Mr Kim with a severe major depressive disorder, with anxious distress and suicidal risk. It advised the Minister that the submissions made on behalf of Mr Kim were that he should not be surrendered at least in his current state and that he would not get adequate treatment for his mental health if he was surrendered to the PRC and jailed for a considerable time.

[139] The briefing paper noted that under s 30(3)(d) of the Act the Minister may determine Mr Kim is not to be surrendered if it appears to her that compelling or extraordinary circumstances relating to Mr Kim existed such that it would be unjust or oppressive to surrender him. This could include circumstances relating to his health.

[140] The briefing paper noted the PRC's law contained requirements regarding medical treatment for mental health in detention facilities and prisons. It advised the Minister of the assurance which had been received from the PRC permitting medical professionals to examine Mr Kim. It noted that when Mr Kim was assessed by the psychologist and psychiatrist he had not received treatment. He had since been prescribed medication. An email from the PRC had been received confirming that Mr Kim can receive appropriate medication free of charge in both pre-trial detention and in prison (if convicted).

[141] Lastly the briefing paper advised the Minister that Mr Kim's circumstances were arguably comparable to two cases, neither of which had been considered compelling or extraordinary by the courts.[109]

The Minister's decision

[142] The Minister's decision on this issue, as set out in her letter to Mr Kim, was as follows:[110]

> I do not consider the discretionary ground in s 30(3)(d) is made out in your circumstances.
>
> NZ courts have, in cases I consider similar to yours, held that the person's mental health issues are not sufficiently compelling or extraordinary to refuse surrender. You have provided no evidence that shows you are too unwell to travel.
>
> In regard to treatment, PRC law contains high level requirements regarding medical treatment and mental health in detention facilities and prisons. The PRC has confirmed that you can receive antidepressant medication and sleeping pills free of charge in both pre-trial detention and in prison (if convicted). In addition, the PRC has given an assurance allowing NZ to have you examined by qualified medical professionals, including a psychiatrist.

Submissions

[143] The issue raised on Mr Kim's behalf on this topic is, as it was in submissions to the Minister, whether the assurances from the PRC can be relied upon.

Assurances from the PRC

The use of assurances in principle

[144] Where there are concerns about a person's treatment in the requesting State, the sending State may seek assurances from the requesting State before deciding whether to grant the request. This practice is well established internationally in extradition and deportation cases.[111] The possibility of relying on assurances in this

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109 Referring her to *Bujak v Minister of Justice*, above n 82, and *Mailley v District Court at North Shore* [2013] NZCA 266.

110 At [53]-[55].

111 For example, in respect of the United Kingdom the Select Committee on Extradition Law "Extradition: UK Law and Practice" HL paper 126 (10 March 2015) at para [88] stating "We accept that assurances are an established part of the process …". See also *Babar Ahmad v The*

country is recognised in the Act which expressly permits the Minister to seek undertakings for the purpose of deciding whether to order the surrender of a person.[112] When a sending State seeks and obtains assurances, courts have accepted the assurances are a relevant consideration in determining whether granting the extradition request breaches international obligations. Courts have examined whether the assurances obtained provide sufficient protection of the person's rights.[113]

[145] There is, however, widespread concern within the international community about the practice of obtaining assurances. This view regards assurances in relation to torture as wrong in principle and ineffective in practice.[114] As to principle, the following comment from a Joint Report of the Human Rights Watch, Amnesty International and the International Commission of Jurists encapsulates the key aspects of the concerns:[115]

> As noted by the Council of Europe's Commissioner for Human Rights, "the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances there is clearly an acknowledged risk of torture and ill-treatment". The value of signing an "understanding" or accepting an "assurance" from a state that does not respect even legally-binding multi-lateral agreements prohibiting torture and other ill-treatment is necessarily cheap. Promises to take measures detailed in diplomatic assurances are mere repetitions – indeed, pale echoes – of treaty and other international obligations which receiving states have already promised but failed to respect in the past.
>
> The reliance on such non-binding agreements to enforce legally binding obligations may, in fact, undercut the credibility and integrity of universally binding legal norms and their system of enforcement. This is particularly the

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United Kingdom (2013) 56 EHRR 1, [2012] ECHR 609 at 168 holding that the question whether there is a real risk of treatment contrary to art 3 of the Convention cannot depend on the legal basis for their removal (that is, extradition or deportation).

112 Extradition Act 1999, s 30(6).

113 See, for example, *Othman v The United Kingdom*, above n 34.

114 See the discussion in *Othman v The United Kingdom*, above n 34, at [142]-[146], [175]-[179] and [186]. See also, for example, the United Nations Special Rapporteur on Torture's view that "in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systemic practice of torture, the principle of non-refoulment must be strictly observed and diplomatic assurances should not be resorted to" "Report submitted pursuant to General Assembly Resolution 58/164", A/59/324 cited in *Lai v Canada (Minister of Citizenship and Immigration)* [2007] FCJ No 476 at [136].

115 Amnesty International, Human Rights Watch and International Commission of Jurists "Reject rather than Regulate: Call on Council of Europe member States not to establish minimum standards for use of diplomatic assurances in transfers to risk of torture and other ill-treatment" (2 December 2005) ["Joint Report"], cited in *Lai v Canada*, above n 114, at [137]

> case if authorities in a country have persistently refused access to existing international mechanisms.

[146] The concern is also about practical difficulties, since it is essential that assurances are effective and meaningful. However "torture is practiced behind closed doors and is denied by the states where it occurs".[116] Moreover those engaged in torture "are usually skilled at preventing any visible manifestations and adept at ensuring, through threats, that no complaints will ever be made".[117] In contrast, assurances regarding the death penalty are viewed as more effective because potential breaches are usually able to be identified and addressed before the sentence is carried out.[118]

[147] This widespread concern raises the question of whether, notwithstanding, their acceptance in international law, it is appropriate for the Minister to seek assurances intended to protect Mr Kim from torture. Mr Kim submits it was not appropriate because they undermine the absolute prohibition on torture. Mr Kim submits that resorting to reliance on assurances is inadequate to meet New Zealand's commitment to the rights and principles of the Convention against Torture and the ICCPR, states must commit to binding international treaties and the use of non-binding agreements to enforce legally binding obligations may, in fact, undercut the credibility and integrity of universally binding legal norms and their system of enforcement.

[148] Related to this submission, Mr Kim submits that, by accepting a non-binding assurance, the Minister has facilitated a breach of the Rule of Law in that all persons should be treated equally before the law. All persons detained in prisons in the PRC on suspicion of crimes should have the protections which the assurances are intended to provide to Mr Kim. The right to equality before the courts is recognised in art 14 of the ICCPR and General Comment 32.

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116 *Lai v Canada*, above n 114, at [139].

117 At [139]. See also the *Joint Report*, above n 115, at 12. See also *Othman v The United Kingdom*, above n 34, at [176]-[179], where further difficulties are said to be a lack of independence if local monitors are relied upon and the lack of incentives by either Governments to reveal breaches.

118 *Joint Report*, above n 115, at 12.

[149] Whether the court should review the propriety of relying on assurances to protect against torture was considered in *Othman v The United Kingdom*.[119] This case concerned the deportation from the United Kingdom of a Jordanian national. The Jordanian national had earlier been granted refugee status in the United Kingdom. He was subsequently convicted in Jordan, in his absence, of involvement in terrorist activities. He was convicted on two sets of charges at two trials.[120] In each case the Jordanian court relied on confessions made by his co-defendants, who were in custody in Jordan, although there was evidence the confessions had been extracted by torture.[121] It was common ground that, if Mr Othman was to be extradited, his previous convictions would be set aside and he would face retrial.

[150] Following negotiations and meetings between (amongst others) the Prime Minister of the United Kingdom and the King of Jordan a Memorandum of Understanding (MOU) was entered into. This contained a series of assurances concerning compliance with human rights standards which would be adhered to when a person was returned to one State from the other. Although they contained a number of protections intended to protect the deportee from torture, they did not deal with the risk that, at Mr Othman's retrial, the Court would again rely on the confessions by his co-defendants.

[151] The day after the MOU was signed, the Secretary of State of the United Kingdom served Mr Othman with a notice of intention to deport him in the interests of national security. Mr Othman challenged this decision as being incompatible with the European Convention. The MOU was considered to protect Mr Othman from torture. However the United Kingdom courts took different views about whether the risk the Jordanian court would rely on evidence from Mr Othman's co-defendants (which had been obtained by torture) would constitute a flagrant denial of justice and would therefore breach art 6 of the European Convention (which provides that in the

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119 Above n 28.

120 The first charges involved bombings of an American school and a Jerusalem hotel. He was sentenced to life imprisonment with hard labour. There was evidence that his co-defendants, who were in custody in Jordan, had been tortured. The Jordanian court relied on these confessions because the defendants could not prove that they had been forced to confess things that were not true. The second charges involved allegations of terrorist activities involving plans to cause explosions at American and Israeli targets. He was sentenced to five years hard labour.

121 The Jordanian court relied on these confessions because the defendants could not prove that they had been forced to confess things that were not true.

determination of any criminal charge, everyone is entitled to a fair hearing by an independent and impartial tribunal established by law).[122]

[152] The matter was then brought before the ECHR. The ECHR found that Mr Othman's deportation to Jordan would be in violation of art 6 of the Convention. This violation was due to the real risk of the admission, at the retrial, of evidence obtained by torture of third persons. In all other respects the deportation would not violate the Convention. In reaching that view the Court placed reliance on the assurances set out in the MOU.

[153] In placing reliance on the assurances the ECHR considered "it is not for this Court to rule on the propriety of seeking assurances, or to assess the long term consequences of doing so".[123] It considered its only task was to examine whether the assurances obtained in the particular case were sufficient to remove any real risk of ill-treatment.

[154] This issue was also considered by the Federal Court of British Columbia in *Lai v Canada.*[124] This case involved judicial review of a decision to deport Chinese citizens to the PRC so they could face prosecution in respect of an alleged large scale smuggling and bribery operation.[125] The Federal Court Judge considered it would have been open to the decision maker to "distinguish between an international campaign discouraging states from relying on diplomatic assurances, on the one hand, and a personalised assessment of a forward-looking risk of torture in a

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122 The matter was first heard by the Special Immigration Appeals Commission (SIAC). It considered the Secretary of State's case, that deportation was in the interests of national security, to be "well proved". The SIAC considered there was a high probability that the past statements made to the public prosecutor which incriminated Mr Othman would be admitted and that these statements would be of considerable, perhaps decisive, importance against him. It nevertheless concluded that the overall nature of the retrial would not be a total denial of Mr Othman's rights. The Court of Appeal allowed the appeal. It accepted there was a real risk that Mr Othman would suffer a flagrant denial of justice because of the risk that statements obtained through torture would be admitted as evidence against Mr Othman in his retrial (at [62]). In reaching that view Lord Phillips stated that the prohibition on receiving evidence obtained by torture did not require the United Kingdom to retain to the detriment of national security a terrorist suspect unless it had a high degree of assurance that evidence obtained by torture would not be adduced against him in Jordan.

123 At [186].

124 *Lai v Canada*, above n 114.

125 *Lai v Canada*, above n 114.

particular case".[126] The Judge further accepted that "in the absence of clear legal rules, domestic or international, foreclosing the possibility of relying on diplomatic assurances" it was a policy decision, not reviewable by the courts, whether in any given case assurances should be sought.[127]

[155] The Extradition Act sets out the matters relevant to the Minister's decision. The mandatory restriction on torture is directed specifically to whether the person to be surrendered would be in danger of being subject to an act of torture in the extradition country.[128] Assurances, if provided, are relevant to this consideration. However the Minister is permitted to determine that a person is not to be surrendered "for any other reason the Minister considers that the person should not be surrendered".[129] The relevant considerations are therefore broad. How New Zealand's commitment to the absolute prohibition on torture should be given effect to in this case, in light of the significant commentary which opposes assurances on torture, are matters the Minister could take into account. While the statute permits the Minister to seek undertakings, it does not require her to do so.[130]

[156] The submissions advanced to the Minister on Mr Kim's behalf specifically raised this issue. For example the submissions provided to the Minister on 15 December 2014 referred to the United Nations High Commissioner for Human Rights having expressed grave concerns about the use of diplomatic assurances for reasons which included that "ad hoc agreements concluded outside the international human rights legal framework threaten to weaken this system and erode the human rights principles in which it is firmly grounded".[131] They also referred to the Report of the Special Rapporteur who said that diplomatic assurances in relation to torture are "nothing but attempts to circumvent the absolute prohibition of torture and refoulment and [States should] refrain from seeking and adopting such assurances with States with a proven record of torture."[132] Similarly the submissions provided

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126 At [135].
127 At [135].
128 Section 30(2)(a).
129 Section 30(3)(e).
130 Section 30(6).
131 Human Rights Council "Report of the United Nations High Commissioner on the Protection of Human Rights and Fundamental Freedoms while countering terrorism" (9 March 2007) A/HRC/4/88 at [8]-[12].
132 Manfred Nowak "Report of the Special Rapporteur on the Question of Torture" (23 December

to the Minister dated 9 September 2015 quoted from an Amnesty International Report which expresses the view that no system of post return monitoring of individuals renders assurances an acceptable alternative.[133]

[157] The briefing paper to the Minister mentions that there is much case law and commentary that weighs against relying on assurances regarding torture. It states that one of the reasons for this is the absolute prohibition on torture. However the advice proceeds on the basis that the Minister is able to rely on assurances but she must be satisfied that the assurances that have been provided are sufficient. The briefing paper does not suggest that the Minister should consider whether she wishes to accept assurances from the PRC at all, in light of New Zealand's commitment to the Convention against Torture and the ICCPR, nor that it would be open to her to decline to surrender Mr Kim until such time as the PRC ratifies the ICCPR and Optional Protocol (the position which Mr Kim advances as the time at which extradition requests to the PRC might be entertained).

[158] Consistent with the absence of advice to the Minister on this aspect, the Minister does not give reasons why non-binding diplomatic assurances were preferable to the protection arising from binding international human rights treaties and customary international law. Similarly, the Minister's statement that she has taken into account New Zealand's obligations under international law and under the NZBORA did not elaborate on this point.

[159] It is therefore not apparent that the Minister considered whether she might decline to rely on assurances in principle (in light of the widespread criticism of their use) when deciding to make a surrender order. The decision to seek assurances was made earlier. It was made on 11 November 2014 following a briefing she received on 6 November 2014 (shortly after she became the Minister of Justice). The briefing she received at that time is not before the Court. Consideration may also have been given to this issue when the Minister decided to proceed with the extradition request in May/June 2011 although I do not have any information about the reasons for that

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2005) E/CN.4/2006/6 at [32].

[133] Mr Kim's submissions to the Minister dated 9 September 2015 citing Amnesty International "The State of the World's Human Rights" (May 2013) in Volume 3 tab 12 of the seven volumes supplied to Mr Kim on which the Minister was to base her decision.

decision.[134] Arguably these earlier stages in the process were an appropriate time to consider whether any extradition request from the PRC should be entertained in light of the likely need to rely on assurances in relation to torture.

[160] While the Minister could have responded to Mr Kim's submissions on this point, I consider she was not required to. Although there is substantial international concern about the use of assurances in relation to torture, that concern has not crystallised in international law.[135] Whether New Zealand's commitment to the international obligations is better served by seeking assurances and ensuring they are adhered to, or by not seeking bi-lateral assurances at all and declining an extradition until the PRC's commitment to the absolute prohibition on torture is demonstrated, is a political one. The Extradition Act permits the use of assurances (described as undertakings) and does not exclude them in respect of torture. No legal error arose because the Minister decided to seek assurances. The Minister having decided to proceed with the extradition request and to seek assurances, I consider that this Court's role is to determine whether the Minister's decision to order surrender was within her power under the Act in light of the assurances that were obtained.[136]

Is the general situation in the PRC disqualifying

[161] Notwithstanding that a decision whether to seek assurances is, in principle, a political one, there may be some circumstances where the general situation in a country is such that no reliance can be placed on assurances. Mr Kim submits this is the situation here. He refers to the international commentary concerning systemic torture in the PRC. He submits that no reliance can be placed on the PRC's assurance that he will not be subjected to torture when the PRC regularly breaches the Convention against Torture.

[162] In *Lai* the Federal Court Judge granted the application for review because the decision maker had not addressed the issue of whether it was appropriate to rely on the assurances at all when the practice of torture in the PRC was systemic and widespread. The Judge considered that if a country does not respect the Convention

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134 See *Kim (discharge application)* at [39]-[40]. The Minister at that time was not the present one.
135 *Lai v Canada*, above n 114, at [107].
136 As per the approach taken by the ECHR in *Othman v United Kingdom*, above n 34.

against Torture this raised the question of whether it would "respect a lower-level instrument such as diplomatic note, that is not binding in international law and not enforceable".[137] The Judge concluded:[138]

> The [decision maker] acknowledged numerous reports attesting to the fact that the use of torture in China is still widespread. She admitted… that the evidence speaks of the "troubling existence" of torture as a tool in China, despite being a signatory to the UN Convention Against Torture. However, the [the decision maker] nevertheless failed to assess whether it was appropriate to rely on diplomatic assurances at all from the Government of China. This analysis is simply not engaged. The officer moved from the overall pattern of torture in China to considering the Lais' particular case, without ever deciding whether it was at all appropriate to do so in light of the overall pattern. I agree with the Lais that this is, in itself, patently unreasonable.

[163] In remitting the matter back for reconsideration one of the issues to be considered was whether it was "appropriate to rely on assurances against torture in assessing the applicant's risk … when there are credible reports that torture prevails in the country" and "[i]f so, under what circumstances?"[139]

[164] Subsequently Canada negotiated further diplomatic assurances from the PRC, which amongst other things provided for life time monitoring of Mr Lai.[140] On this basis Mr Lai was ordered to be deported. A stay against deportation was refused by the Federal Court. In refusing the stay the Court said the decision maker had reasonably determined Mr Lai should be deported in reliance on the assurances. The Court noted the decision had been made based on an extensive review of the country condition documents, evidence relating specifically to Mr Lai, the diplomatic note and extraordinary written assurances provided from the Government of the PRC to the Government of Canada.

[165] This issue was also discussed in *Othman*. In response to the submission that Jordan could not be relied on to abide by non-binding bilateral assurances, when it did not abide by its legally binding multilateral international obligations not to torture, the ECHR said:[141]

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137 At [137].
138 At [138].
139 At [160] (Orders).
140 *Lai v Canada (Citizenship and Immigration)* [2013] 2 FCR 56 at [6] and [12].
141 At [193].

> … The Court does not consider that these general submissions are supported by its case-law on assurances... the Court has never laid down an absolute rule that a State which does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances; the extent to which a State has failed to comply with its multilateral obligations is, at most, a factor in determining whether its bilateral assurances are sufficient. Equally, there is no prohibition on seeking assurances when there is a systematic problem of torture and ill-treatment in the receiving State; otherwise, as Lord Phillips observed …, it would be paradoxical if the very fact of having to seek assurances meant one could not rely on them.

[166] The ECHR in *Othman* considered "it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances".[142] More commonly, the Court will assess first, the quality of the assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. This involves considering both the general human rights situation in that country and the particular characteristics of the person.

[167] In Mr Kim's case, this is how the briefing paper approached the assurances. The briefing paper advised the Minister that the Ministry "does not consider the human rights situation in the PRC is such that NZ is precluded from relying on assurances from the PRC in this case".[143] This was not, therefore, like the position in *Lai* where this issue was not considered at all.

[168] Having decided to seek assurances from the PRC the question is whether the assurances are sufficient to satisfy the Minister that Mr Kim is not in danger of being tortured.[144] The PRC's record of compliance with the absolute prohibition on torture is relevant to the weight that can be given to this bilateral assurance. Also relevant, however, are Mr Kim's personal circumstances, the monitoring mechanisms provided in the assurances, and the nature and quality of the assurances.

[169] The Minister was advised to consider the general situation regarding torture in the PRC and against that background to consider whether there were substantial grounds to believe that Mr Kim was personally at risk of torture. The Minister was advised that in reaching her conclusion it was necessary to consider the nature and quality of the assurances.

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142 At [188].
143 Briefing paper at [146].
144 The Act, s 30(2).

[170] It is apparent the Minister accepted this advice. Her decision, as advised to Mr Kim, stated that she had considered the general situation regarding torture in the PRC, and against that background she had considered Mr Kim's particular circumstances, including the nature and quality of the assurances. She concluded there were not substantial grounds to believe that Mr Kim was in danger of torture in the PRC.

[171] The question then is whether this conclusion was reasonably open to the Minister. In providing the advice, that the position in the PRC did not preclude placing reliance on the assurances, the Ministry referred to the international commentary on the use of torture and ill-treatment, but also referred to recent improvements in the human rights situation in the PRC as well as the experience of New Zealand and two other countries in relying on assurances from the PRC.

[172] Issue might be taken with the advice that there have been recent improvements in the human rights situation in the PRC. The evidence from Mr Ansley certainly does.[145] Moreover, the information set out in the briefing paper referred to "the consensus of commentators and the UN" that "there is overwhelming credible evidence of routine use of torture and ill-treatment in the PRC, particularly to extract confessions".[146] It also advised that "[c]ommentators and the UN note that torture occurs in ordinary criminal cases".[147] The 2010 report of the Special Rapporteur, although referring to improvements, also expressed regret about, for example, the video and audio taping of interrogations remaining fully controlled by the police authorities and the lack of investigations, prosecution and punishment of the perpetrators of torture.[148] The 2015 report of the Committee against Torture (although not before the Minister) confirms the practice remains deeply entrenched.[149]

[173] In these circumstances it might be said that the Minister's statement that "there is evidence that torture is still an issue in the PRC" somewhat understates the

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145 Refer [61]-[63] above.
146 Briefing paper at [230].
147 At [231].
148 United Nations Special Rapporteur, above n 31.
149 Refer [80] above.

position. It is crucial that, notwithstanding the cause for concern about the general situation in the PRC, the nature and quality of the assurances nevertheless provide sufficient assurance that Mr Kim is not personally at a real risk of torture if he is surrendered to the PRC.

Assessing the nature and quality of the assurances

[174] The need to scrutinise assurances is described by a recent United Kingdom House of Lords Select Committee on Extradition in this way:[150]

> We accept that assurances are an established part of the process and we believe the courts take their scrutiny of assurances seriously. However, assurances are only used where serious fears of human rights breaches have been demonstrated. We therefore believe that assurances should always be handled carefully and subjected to rigorous scrutiny, particularly to ensure that they are properly and precisely drafted, and comply fully with the Othman criteria. The importance of ensuring that they are genuine and effective cannot be overestimated. They must provide Requested People with real protection from human rights abuse. ….

[175] The *Othman* criteria referred to in that extract are a set of factors discussed in that case by which the nature and quality of the assurances may be assessed. Those factors are:[151]

(a) whether the terms have been disclosed to the Court;

(b) whether the assurances are specific or are general and vague;

(c) who has given the assurances and whether that person can bind the receiving State;

(d) if the assurances have been given by the central government, whether local authorities can be expected to abide by them;

(e) whether the assurances concern treatment which is legal or illegal in the receiving State;

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150 "Extradition: UK Law and Practice", above n 111, at [88].

151 *Othman v United Kingdom*, above n 34, at [189].

(f) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record of abiding by similar assurances;

(g) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the person's lawyer;

(h) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs) and whether it is willing to investigate allegations of torture and to punish those responsible;

(i) whether the person has previously been ill-treated in the receiving State; and

(j) whether the assurances have been examined by the domestic courts of the sending State.

[176] As discussed above,[152] the ECHR found that Mr Othman's deportation to Jordan would be in violation of art 6 of the European Convention. This was because of the real risk of the admission at the retrial of evidence obtained by torture of third persons. In all other respects the deportation was considered not to violate the European Convention. In reaching that view the Court placed reliance on the assurances set out in the MOU. The Court was of the view that the MOU was superior in both its detail and its formality to any assurances which the Court had previously examined.[153] It considered Jordan's compliance with the letter and spirit

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152 Refer [152] above.

153 The MOU contained a series of assurances concerning compliance with human rights standards which would be adhered to when a person was returned to one State from the other. The MOU also made provision for any person returned under it to contact and have prompt and regular visits from a representative of an independent body nominated jointly by the United Kingdom and Jordanian governments. Pursuant to the MOU a monitoring agreement with the Adaleh Centre for Human Rights Studies was entered into. The Adaleh Centre was required to have experts trained in detecting signs of physical and psychological torture and ill-treatment, and to have access to other independent experts as necessary. Such an expert was to accompany every person returned under the MOU on their journey from the sending State to the receiving State.

of the MOU was likely because the assurances were specific and comprehensive, they had been extensively reviewed by a tribunal (which heard expert evidence that was subject to cross examination) and there was a strong bilateral relationship between the United Kingdom and Jordan.

[177] Subsequent to this decision, and further proceedings for deportation, Mr Othman was returned to Jordan based on a further agreement between the United Kingdom and Jordan, which was ratified by a treaty, clarifying that the evidence obtained through torture would not be used at his two retrials. Despite the comprehensive nature of the assurances and that they dealt with the one aspect of concern identified by the ECHR, it is not clear that the Jordanian Court adhered to them on this particular issue. In the first retrial the Jordanian Court held that the admissibility of the relevant evidence was res judicata and in the second retrial no clear ruling on the admissibility of this evidence was given. The confessions alone were not, however, sufficient to convict him and Mr Othman was acquitted at the retrials.

[178] Whether the assurances were effective and meaningful was also at issue in *Lai*.[154] The Federal Court of British Columbia considered that the reliability of a diplomatic assurance was a question of fact, reviewable on the standard of patent unreasonableness.[155] The threshold question was whether there was a substantial risk that the Lais would be tortured or mistreated in China. To answer that question the decision maker had to take into account a number of factors, only one of those factors (though a critical one) was the assurances, and the presence or absence of monitoring mechanisms was itself one of the indicia to assess the reliability of the assurances given.

[179] The Court held the decision maker had erred in failing to determine whether the assurances met the essential requirements to make them meaningful and reliable.

For the first year after the person was returned, the expert was to contact him or her, either by telephone or in person, on a weekly basis. Where a returned person was taken into detention, the expert was to visit the detainee frequently and without notice. The monitoring body was also to provide regular frank reports to the sending State and was to contact the sending State immediately if its observations warranted it.

154 *Lai v Canada*, above n 114.

155 At [105].

The decision maker was satisfied with the assurances on the basis that the Lais' notoriety would protect them and there was no evidence that China had reneged on any previous assurances. The Court regarded this as insufficient. The latter reason rested on the evidence of one expert witness who said that of the 10 to 30 "notes" he had seen from the PRC during his career he was not aware of any that were violated.[156] But the Court knew "nothing of the nature of these notes, and whether they provided assurances of the nature here at stake".[157] Additionally, the notoriety of the Lais would not assist them if any failure to comply with the assurance against torture did not become public. There was no mechanism in the assurances for effective monitoring by an independent organisation (such as the International Committee of the Red Cross). For these reasons the Court considered the decision maker's view was a patently unreasonable one.[158] As noted above, Mr Lai was subsequently deported following the negotiation of further diplomatic assurances from the PRC.[159]

[180] The briefing paper advised the Minister that assurances are a diplomatic mechanism for states to agree an outcome or a process on a particular issue; they amount to moral obligations; and while it was expected that states would comply with them, they were not legally binding. It also advised the Minister that international case law suggested that reliance could be placed on assurances, but the weight that could be placed on them depended on the circumstances. The Minister was advised that it was for her to assess whether she considered that the PRC's assurances were sufficient.

[181] It advised the Minister that assurances regarding the death penalty were generally regarded as more reliable than assurance regarding torture. This was partly for practical reasons which made it easier to detect non-compliance with death penalty assurances. It was also because an assurance not to impose or carry out the death penalty is considered to be a lawful exercise of state power. Whereas, in relation to torture, "much of the existing international case law and commentary … weighs against the use of such assurances due to the absolute nature of the

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156 At [142].
157 At [142].
158 At [143].
159 Refer [164] above.

prohibition against torture, the obligation on states to prevent it, and the difficulty in monitoring and enforcing such assurances".

[182] The briefing paper provided an accurate summary of the *Lai* and *Othman* cases.[160] The Minister was advised that the principles set out in *Othman* provided a useful starting point for assessing the assurances provided in this case.[161] Advice was provided in respect of each of these principles as follows:[162]

> **The general characteristics of the person to be extradited and previous ill-treatment in the receiving state:** Mr Kim is an 'ordinary' criminal suspect. He is not a member of any well known high-risk groups in the PRC, such as political or religious dissidents, ethnic minorities, or human rights defenders. However, he is accused of murder, which Human Rights Watch has recently identified as another high risk group. The Ministry has not identified any reports by other commentators or the UN that support this view, so it is unclear how accurate it is. Mr Kim has not disclosed any previous ill-treatment in the PRC.
>
> **The general situation in the receiving state regarding the subject matter of the assurances:** The general situation in the PRC regarding torture, fair trial rights, the death penalty, and mental health is set out in the sections on those subjects.
>
> **The specificity of the assurances:** The Ministry considers that the assurances provided by the PRC are appropriately specific.
>
> **Whether the entities giving the assurances can bind the receiving state:** MFAT advises that the entities giving the assurances were mandated to do so by the PRC.
>
> **Whether local authorities can be expected to abide by the assurances:** MFAT advises that NZ can expect local authorities to abide by the assurances in this case and that there is a mechanism for any concerns to be raised with central authorities, who can instruct their local counterparts.
>
> **Whether the assurances concern treatment which is legal or illegal in the receiving state:** Assurances that relate to treatment that is legal are generally considered to be more reliable than those that relate to treatment that is illegal. The only assurances provided by the PRC that relate to treatment that is illegal are those relating to torture.
>
> **The Bilateral relationship between the sending and receiving states:** MFAT advises that NZ and the PRC have a long-standing diplomatic relationship and frequent contact between leaders, ministers and officials across the spectrum of government affairs, complemented by strong and fast growing people-to-people links.

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160 *Lai v Canada*, above n 114; *Othman v The United Kingdom*, above n 34.
161 *Othman v The United Kingdom*, above n 34, at [189].
162 At [175.1]-[175.8].

> **Whether compliance with the assurances can be objectively verified:** The assurances provided by the PRC allow NZ diplomatic and consular representatives to regularly visit Mr Kim, including provision to have him examined by independent medical professionals, and to have access to material relevant to his treatment and the proceedings against him.

[183] On the basis of this advice the Minister considered the assurances could be relied upon. She noted the assurances were detailed and specific and they included provision for monitoring. She considered this would have a significant deterrent effect, other countries had experience where assurances given by the PRC have been honoured, an assurance in respect of the death penalty given to New Zealand in the past had been honoured by the PRC, the PRC was well aware of New Zealand's long standing opposition to the death penalty, and non-compliance with the assurance in respect of the death penalty "would have repercussions for the bilateral relationship between the PRC and NZ (and potentially South Korea), and the PRC's international reputation".

[184] The approach taken to the assurances was correct. The question remains, however, whether the Minister had sufficient information on which to conclude, or whether it was reasonably open to the Minister to conclude, that the nature and quality of the assurances were sufficient to protect Mr Kim rights.

Scrutiny of the assurances that were obtained

[185] In respect of the death penalty, the request for Mr Kim's extradition included a decision from the Supreme People's Court of the PRC dated 28 January 2011 as follows:

> According to Article 50 of *Extradition Law of the People's Republic of China*, it is hereby decided that,
>
> When Kyungyup Kim is extradited from New Zealand to the People's Republic of China, if he is convicted after trial and the crime for which he is convicted is punishable by death penalty according to *Criminal Law*, the trial court will not impose the death penalty on him, including death penalty with a two-year reprieve.

[186] This assurance is specific. It is given by the body with the authority to provide it. The only issue raised by Mr Kim is whether the Minister had sufficient information on which to conclude it would be honoured.

[187] In addition to the death penalty assurance, the PRC provided 12 further assurances as conveyed by the Embassy of the PRC to MFAT.

[188] The first assurance is as follows:

> As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the People's Republic of China (PRC) will comply with the Convention to ensure Mr. Kim Kyung Yup will not be subject to torture or other cruel, inhuman and degrading treatment or punishment. The PRC side will honour the above assurances.

[189] Mr Kim submits this assurance is meaningless. It amounts to no more than the PRC saying it will honour the Convention, yet the PRC regularly breaches it. Moreover it provides no mechanism for a complaint to be made if the assurance is not honoured because the PRC has not ratified arts 20 and 22 of the Convention, nor the Optional Protocol, which provide for such mechanisms. As discussed above, the weight that can be placed on this assurance depends on the adequacy of the monitoring arrangements, the information as to whether the PRC has previously complied with assurances, and whether there are adequate grounds for believing that the PRC will honour assurances made to New Zealand.

[190] The second assurance is as follows:

> After surrender to the PRC from New Zealand, Mr. Kim Kyung Yup will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the People's Republic of China.

[191] Mr Kim refers to the Committee's 2015 report which called upon the PRC to reduce the 37 day maximum period of police custody and ensure that detained persons are promptly brought before a judge within a time period not exceeding 48 hours. [163] He submits that detention for 37 days or longer without a lawyer and judicial oversight, in a system entrenched with torture, virtually guarantees that a fair trial is impossible. He submits this assurance does not provide any real protection when it is unclear what would be regarded as undue delay in the PRC. Other assurances intended to monitor Mr Kim's treatment, however, ameliorate this concern to some extent. Whether they provide sufficient protection for Mr Kim depends upon their effectiveness.

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[163] Committee against Torture, above n 60.

[192] The third assurance is as follows:

> During all periods of Mr. Kim Kyung Yup's detention following his surrender, including pre-trial detention, New Zealand diplomatic or consular representatives will be informed in a timely manner of where Mr. Kim Kyung Yup is detained and of any changes to the place of his detention.

[193] Mr Kim submits that this assurance could have gone further. However he accepts that it is helpful that New Zealand representatives will know where he is detained and that they will be permitted to visit him (see the fifth assurance). This will enable them to make representations on his behalf if the conditions of detention are unsatisfactory or it is apparent that he is not being treated appropriately.

[194] The fourth assurance is as follows:

> During all periods of Mr. Kim Kyung Yup's detention following his surrender, including pre-trial detention, Mr. Kim Kyung Yup will be able to contact New Zealand diplomatic or consular representatives at all reasonable times, and PRC authorities will provide the facilities for him to do so. Such contact may be by facsimile, email or telephone, and will not be censored or edited in any way. Any such contact with New Zealand diplomatic or consular representatives under this paragraph will be used for the sole purpose of obtaining information on the treatment of Mr. Kim Kyung Yup and will not otherwise be disclosed to third parties.

[195] Mr Kim submits the main problem with this assurance is that any contact with him and any information obtained pursuant to such contact cannot be disclosed to third parties. If there is a breach of the Covenant against Torture or the ICCPR, New Zealand would not be able to make a complaint to an international body because it has agreed not to disclose the information. It would be a diplomatic issue only and that is not sufficient given New Zealand's obligations under these international conventions.

[196] The fifth assurance is as follows:

> During all periods of Mr. Kim Kyung Yup's detention following his surrender, including pre-trial detention, New Zealand diplomatic or consular representatives may visit Mr. Kim Kyung Yup at his place of detention and may be accompanied by one or more of the following people chosen by New Zealand diplomatic or consular representatives:
>
> (i) an interpreter;

(ii) a medical professional(s) (including physician, dentist, and psychiatric expert) qualified to practise in the PRC;

(iii) a legal expert licensed to practise law in the PRC.

Such visits will be on a regular basis and permitted once every fifteen days. The PRC authorities will arrange additional visits on request by New Zealand diplomatic or consular representatives. Such visits will include the opportunity:

(i) to interview Mr. Kim Kyung Yup. The interview will, on request by the New Zealand diplomatic or consular representatives, be in private and without being monitored. The PRC will provide safe facilities for such interviews to take place;

(ii) for Mr. Kim Kyung Yup, if he consents, to be examined by the medical professional(s) chosen by New Zealand diplomatic or consular representatives; such examination will be in private, although a medical professional chosen by the PRC authorities may be present at a physical examination;

(iii) to access the parts of the detention facility to which Mr. Kim Kyung Yup has access, including his living quarters.

New Zealand diplomatic or consular representatives will have the opportunity to meet with other persons in private including prison staff, procuratorate, medical professionals, and, with Mr. Kim Kyung Yup's consent, his lawyer.

New Zealand diplomatic or consular representatives will have the opportunity to access other information relevant to the treatment of Mr. Kim Kyung Yup as well as his conditions of detention.

New Zealand diplomatic or consular representatives will conduct such activities for the sole purpose of obtaining information on the treatment of Mr. Kim Kyung Yup and will not otherwise disclose the information to third parties.

[197] Mr Kim submits that the medical professionals should not be limited to those qualified to practice in the PRC. He submits there are not many torture experts and there is no reason to believe that medical professionals qualified in the PRC are independent of the PRC government. He says independent medical professionals, who can report to someone who can take action, are needed. The need for independent medical assessment is recognised in the Committee's 2007 General Comment.[164] There is the further problem that New Zealand representatives are not permitted to disclose the information to third parties. If there are concerns about Mr Kim's treatment it will be a diplomatic issue only.

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[164] Committee against Torture "Convention Against Torture and other Cruel, Inhumane, Degrading Treatment or Punishment" (23 November 2007) CAT/C/GC/2/CRP1/Rev 4.

[198] The sixth assurance is as follows:

> There will be no reprisal against persons who supply information regarding Mr. Kim Kyung Yup's treatment to New Zealand diplomatic or consular representatives, if the information is provided in good faith.

[199] Mr Kim submits this assurance is fine in theory, but in reality the chances of a whistle blower from someone in the PRC who has adverse information about the treatment of Mr Kim is remote. That may be so, and as a result it may not be given much weight. That said, the assurance is nevertheless helpful to the extent that, if reprisals are taken against someone who reports information to New Zealand representatives, and if New Zealand learns of such reprisals, New Zealand is not prevented from reporting this in any forum.

[200] The seventh assurance is as follows:

> Mr. Kim Kyung Yup will be entitled to retain a lawyer licensed to practise law in the PRC to defend him. He shall also have the right to dismiss that lawyer and retain another of his choosing. Mr. Kim Kyung Yup shall be entitled to meet with his lawyer in private without being monitored. In addition, he has the right to receive legal aid according to Chinese law.

[201] Mr Kim refers to the Committee's 2015 report urging the PRC to ensure, in law and in practice, that detainees are afforded all legal safeguards from the very outset of the detention. This report recommends amending the legislation and granting detainees the right to access a lawyer from the very outset, including during the initial interrogation by the police and ensuring that detainees are able to communicate with a lawyer in full confidentiality.[165]

[202] Mr Kim accepts this assurance goes some way to address these issues. He submits, however, that it does not go far enough because it does not, at least explicitly, permit Mr Kim to have a lawyer present during all pre-trial interrogations. He also submits that without systemic changes to the trial system there are limits to a lawyer being able to present a robust and meaningful defence.

[203] I agree this assurance goes some way toward addressing the concerns about access to a lawyer. It also addresses the Committee's concern that when a detained

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[165] Committee against Torture, above n 60.

person meets with a lawyer their discussion is not held in private. And it addresses Mr Ansley's evidence that the lawyer is not permitted to go beyond advising the person of the nature of the charge. However I also agree that this assurance does not, at least expressly, permit Mr Kim to have a lawyer present during pre-trial interrogations. As discussed above this diminishes the protection the assurances provide against pre-trial torture or ill-treatment to obtain a confession. It is also contrary to what is well established in our criminal justice system that an accused person may have their lawyer present for any police questioning if they wish to do so. This ensures an accused person understands their rights "chief among which is his right to silence".[166]

[204] The eighth assurance is as follows:

> New Zealand diplomatic or consular representatives will be informed of, and will be able to attend, any open court hearing relating to Mr. Kim Kyung Yup. If, pursuant to the Criminal Procedure Law of the People's Republic of China and the Criminal law of the PRC, the hearing is closed, those periods shall be as short as possible.

[205] Mr Kim submits it is unclear why there would be any closed hearing and there is no reason why New Zealand representatives should not be able to attend all of the hearing. However, it is not unusual in our criminal system for some parts of a criminal trial to be closed to the public. This assurance is helpful in protecting Mr Kim's fair trial rights by allowing New Zealand representatives to attend the open part of the hearing, and providing that the hearing will be closed only pursuant to the criminal law of the PRC and that any such closures will be as short as possible. It is not clear whether the PRC criminal court will be bound to observe the latter requirement.

[206] The ninth assurance is as follows:

> New Zealand diplomatic or consular representatives will be provided with information about the status of the case by the PRC authorities.

[207] Mr Kim does not take any particular issue with this assurance.

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[166] *R v Herbert* [1990] 2 SCR 151 at 176, cited with approval by Hardie Boys J in *R v Barlow* (1995) 14 CRNZ 9 (CA) at 43, and by Elias CJ in *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204 at [81].

[208] The tenth assurance is as follows:

> The PRC will, on request, provide New Zealand diplomatic or consular representatives with full and unedited recordings of all:
>
> (i) pre-trial interrogations of Mr. Kim Kyung Yup;
>
> (ii) court proceedings relating to Mr. Kim Kyung Yup, including recordings during any period when the hearing is closed.
>
> Any recordings provided under this paragraph to New Zealand diplomatic or consular representatives will be used for the sole purpose of obtaining information on the treatment of Mr. Kim Kyung Yup and in respect of paragraph 11, and will not otherwise be disclosed to third parties.

[209] The assurance that New Zealand representatives will receive full and unedited copies of interrogations and court proceedings is helpful, if the PRC does in fact honour that assurance. It is not clear, however, that New Zealand would have any means of determining whether it was honoured. Mr Kim submits a better assurance would have included that there be no unrecorded interrogations. He submits the purpose of this assurance should not be confined to the treatment of Mr Kim. He submits it should also apply to Mr Kim's fair trial rights. He also submits it is problematic that the information cannot be disclosed to third parties. I agree with those points.

[210] The eleventh assurance is as follows:

> The PRC will, in its dealings with Mr. Kim Kyung Yup, comply with applicable international legal obligations and domestic requirements regarding fair trial.

[211] Mr Kim submits this assurance is inadequate. It does not refer to the Convention against Torture, and it is meaningless in relation to the ICCPR because the PRC has not ratified it. He also submits it is meaningless in relation to domestic requirements regarding a fair trial when the PRC does not comply with its own laws in any event. For the reasons discussed above in relation to the first assurance, the weight that can be placed on this assurance depends on the adequacy of the monitoring arrangements, the information as to whether the PRC has previously complied with assurances, and whether there are adequate grounds for believing that the PRC will honour assurances made to New Zealand.

[212] The twelfth assurance is as follows:

> In the event of any issue arising in relation to the interpretation or application of these assurances, including any issue arising in relation to the treatment of Mr. Kim Kyung Yup, the PRC and New Zealand will immediately enter into consultations in order to resolve the issue in a manner satisfactory to both sides. The Department of Treaty and Law of the Ministry of Foreign Affairs of the PRC, and the New Zealand Embassy in the PRC will facilitate contact between New Zealand and the PRC for all issues related to the above assurances.

[213] Mr Kim's counsel's concern with this is that Mr Kim's rights are for diplomatic discussion whereas they should be for international complaint and scrutiny. I consider this assurance is helpful in that it provides a mechanism for enforcing the assurances. Whether that mechanism will be effective depends on a number of factors: whether New Zealand representatives will learn of issues regarding the treatment of Mr Kim; whether New Zealand's bilateral relationship with the PRC is sufficiently strong that the PRC will take appropriate action if concerns are raised; and the PRC's track record in respect of honouring assurances. I query, however, whether it extends to issues relating to Mr Kim's fair trial rights. This may come within the "application of these assurances" but it would be better if this was expressly stated.

[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 the PRC, 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.

[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.[167] 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.

[216] That said, the monitoring of Mr Kim's treatment and the protection of his fair trial rights might be regarded as deficient because they do not provide that Mr Kim has the right to have a lawyer, or New Zealand representatives, present during all pre-trial interrogations. They do provide for recordings of all such interrogations to be provided to New Zealand representatives in full and unedited. This provides a measure of protection. However, as the Special Rapporteur has said, "such materials are fully controlled by the police authorities making effective and independent monitoring impossible".[168] The assurances appear not to permit New Zealand representatives to disclose to third parties any information they learn from these visits. This means that, if discussions with the PRC do not resolve issues satisfactorily, New Zealand's hands may be tied. The Minister's decision does not specifically address these issues.

Practical arrangements for monitoring

[217] If assurances are to be effective, there must be practical arrangements for monitoring. This issue arose in *Valetov v Kazakhstan.* Mr Valetov, a Russian national suspected of murder, was extradited from Kazakhstan to Kyrgyzstan on the basis of assurances. Prior to his extradition he lodged a case to the Human Rights

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167 Compare with Mr Othman, who was charged with very serious terrorist activities in Jordan and where there was evidence that confessions from his co-defendants had been extracted by torture. In that case, the ECHR noted that the Adaleh Centre, which was to carry out the monitoring, does not have the same expertise or resources as leading international NGOs such as Amnesty International, Human Rights Watch or the International Committee of the Red Cross. Nor does it have the same reputation or status in Jordan as, for example, the Jordanian NCHR. The ECHR considered it was the very fact of monitoring visits which was important. The ECHR was persuaded that the capability of the Centre has significantly increased. It noted the evidence that showed the Adaleh Centre had been generously funded by the United Kingdom Government, which in itself provides a measure of independence for the Centre, at least from the Jordanian Government. Given the United Kingdom Government's broader interest in ensuring that the assurances are respected, the ECHR considered it could be expected that this funding will continue.

168 Refer above [51].

Committee alleging that he had been previously been tortured in Kyrgyzstan (from where he had escaped) and that if he was returned he would be subjected to further torture. The Human Rights Committee commented as follows:[169]

> The Committee recalls that, at the time of [Valetov's] extradition, it was known, or should have been known, to the State party's authorities that there were credible public reports of widespread use of torture against detainees in Kyrgyzstan. … The Committee notes that the State party procured assurances from … Kyrgyzstan to respect [Valetov's] rights. The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed. *The Committee reiterates, however, that, at the very minimum, the assurances procured should contain a monitoring mechanism and be safeguarded by practical arrangements* as would provide for their effective implementation by the sending and receiving States. …
>
> The Committee further notes allegations by [Valetov] that, after his extradition, he was subjected to treatment prohibited under article 7 of the Covenant and that, on 11 May 2012, in protest against the repeated use of torture, the lack of investigation of his torture allegations and numerous other violations of his human rights, [Valetov] started a hunger strike. *Representatives of the State party failed to visit [Valetov] in the detention facility, despite the request made by [Valetov] to the State party. Such a failure may be attributable to the absence of practical arrangements in the assurances procured or to a lack of sufficient efforts by the State party to ensure the implementation of the assurances*. Under those circumstances, the Committee concludes that the procurement of general assurances from the Prosecutor General of Kyrgyzstan cannot be considered an effective mechanism protecting [Valetov] from the risk of torture.
>
> … *The Committee further notes that the failure of the State party to subsequently visit [Valetov] and monitor conditions of his detention* indicates that the procurement of assurances from the Office of the Prosecutor General of Kyrgyzstan should not have been accepted by the State party as an effective safeguard against the risk of violation of the rights of [Valetov]. Therefore, the Committee concludes that [Valetov]'s extradition amounted to a violation of article 7 of the Covenant. (My emphasis.)

[218] In *Othman* the ECHR considered in some detail whether the arrangements made for monitoring were adequate. This included considering the expertise of the Adaleh Centre and evidence of the funding from the United Kingdom Government which would ensure the Adaleh Centre would be able to carry out the monitoring provided in the MOU. Nevertheless there are concerns in the United Kingdom about the adequacy of monitoring arrangements when assurances are relied on in

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169 *Valetov v Kazakhstan*, above n 52, at [14.5] to [14.7].

extradition and deportation cases. The 2015 UK Select Committee commented on this as follows:[170]

> With this in mind, we believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurance are not being breached, or that they can offer an effective remedy in the event of a breach.
>
> The UK has an obligation to avoid foreseeable risks of human rights breaches. Assurances help the UK to meet its obligation by addressing those risks demonstrated in court. *However, without an effective monitoring system* we cannot know whether assurances do in fact avoid the risks foreseen by the courts. Therefore, it is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations.
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> The Home Secretary told us that the Home Office and FCO were reviewing the issue of monitoring. *We welcome the Government's review of the monitoring of assurances as we are concerned that the current arrangements via consular services fall well below that is necessary*. (My emphasis.)

[219] In respect of the monitoring arrangements in Mr Kim's case, the briefing paper advised the Minister as follows:[171]

> *Can compliance with the assurances be objectively verified?*
>
> The assurances provided by the PRC allow NZ diplomatic and consular representatives to regularly visit Mr Kim, including provision to have him examined by independent medical professionals, and to have access to material relevant to his treatment and the proceedings against him.

[220] The briefing paper also advised that New Zealand already provides assistance to New Zealand citizens in PRC prisons. On this topic the report said:[172]

> MFAT has advised that there are currently nine NZ citizens detained in Chinese prisons or detention facilities. NZ provides active consular assistance, which includes monitoring of health and well-being, liaising with family members and ensuring access to legal advice. NZ officials also monitor detainees through visits, and by attending hearings at key times. In one case, a NZer made a complaint of mistreatment and forced labour to the media following release and return to NZ. A formal complaint was not made to consular officials.
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> …
>
> Monitoring and consular visits may help protect foreign national prisoners against torture or other ill-treatment.

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170 "Extradition: UK law and practise", above n 111, at [89]-[91].
171 At [158].
172 At [318]-[320].

[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 the PRC. 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.

[222] In Mr Kim's case the concern is that he will fear retribution if he does seek assistance. If that is so, then the effectiveness of the monitoring arrangements may depend in part upon New Zealand representatives proactively monitoring Mr Kim's treatment. It is not clear from the information before me what arrangements will be made by New Zealand officials to in fact carry out the monitoring permitted by the assurances. The briefing paper does not address this. It might be assumed that, having obtained the assurances and made a decision to surrender Mr Kim on the basis of them, the government will put in place arrangements to carry out the visits envisaged by the assurances. However it does not seem that in other cases (in other countries) this necessarily occurs. Apart from the example provided by *Valetov*, in respect of another high profile case involving extradition to the PRC the country advised New Zealand that it had not been active in monitoring or visiting.[173]

[223] It may be that the Minister has already ensured that the access arrangements permitted by the assurances will be carried out regularly and proactively, and that it is not intended the officials will simply wait to hear from Mr Kim or his family. This requires clarification given the importance of practical and effective monitoring if assurances are to be the basis of extradition.

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[173] Refer [237] below.

The strength of the bilateral relationship

[224] The strength of the bilateral relationship between the countries is an important aspect of whether assurances can be relied upon. In *Othman* the ECHR referred to the evidence as to the strength of the United Kingdom-Jordanian bilateral relationship, as well as the importance of the MOU to that relationship, concluding:[174]

> … the Court considers that there is sufficient evidence for it to conclude that the assurances were given in good faith by a Government whose bilateral relations with the United Kingdom have, historically, been very strong …

[225] Conversely, the absence of a strong bilateral relationship may point against the effectiveness of assurances to protect against torture. In *Agiza v Sweden* the Human Rights Committee considered the expulsion of an Egyptian national by Swedish authorities after receiving assurances from Egypt.[175] The complainant had been convicted in absentia (by an Egyptian court) of terrorist activity. He alleged he was tortured in Egypt following his deportation. The Committee concluded the expulsion breached the European Convention and said "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against [the] manifest risk".[176]

[226] In *Othman* the ECHR quotes the comments of the SIAC (the first instance tribunal in the United Kingdom) on *Agiza v Sweden* which were as follows:[177]

> The case of Agiza stands as a clear warning of the dangers of simple reliance on a form of words and diplomatic monitoring. … But we note what to us are the crucial differences: the strength, duration and depth of the bilateral relationship between the two countries by comparison with any that has been pointed to between Sweden and Egypt; … *The Swedes felt that to seek to see Agiza would betray a want of confidence in the Egyptians*, whereas there is no such feeling in either the UK, the [Adaleh] Centre or the Jordanian Government. Quite the reverse applies. … (My emphasis.)

[227] In Mr Kim's case the briefing paper advised the Minister as follows:[178]

> *Bilateral relationship*

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174 *Othman v The United Kingdom*, above n 34, at [195].
175 *Agiza v Sweden* CAT/C/34/D/233/2003 (20 May 2005).
176 *Othman v The United Kingdom*, above n 34, at [148].
177 At [29].
178 At [155]-[171].

> MFAT advises that NZ and the PRC have a long-standing diplomatic relationship (since 1972) and frequent contact between leaders, ministers and officials across the spectrum of government affairs, complemented by strong and fast growing people-to-people links. NZ and the PRC have had a number of world 'first', including NZ being the first developed country to conclude a Free Trade Agreement with the PRC.
>
> In Mr Kim's case, there is also the additional dimension of Mr Kim being a South Korean citizen. MFAT advises that the bilateral relationship between the PRC and South Korea is currently strong in many respects, including leaders' level contact, a large and dynamic economic relationship and extensive people-to-people contacts. The PRC is a major strategic player on the Korean peninsula, and its bilateral relationship with South Korea is overtaking its long-standing political ties with the North in many areas.
>
> However, there are some sensitivities, including the PRC's past willingness to overlook North Korean provocations against the South. The PRC's execution of at least two South Koreans last year for serious drug offences ignored appeals from the South Korean government for leniency. It does not appear that there were any assurances in regard to these people, as they were apprehended in the PRC, not extradited from South Korea or another country.

[228] Mr Kim submits this is an inadequate basis for the Minister to conclude that the strength of the bilateral relationship between New Zealand and the PRC will help ensure the assurances are honoured. He refers to New Zealand's size and economy relative to that of the PRC, and New Zealand's dependence on access to the PRC market. He says this distinguishes the position from that in *Othman*.

[229] I note in respect of torture and fair trial concerns the Minister appears not to have placed particular weight on the strength of the bilateral relationship in deciding she was satisfied the assurances would be honoured. She referred to the *Othman* criteria generally, but placed particular emphasis on the monitoring arrangements and the experience New Zealand and other countries had with PRC honouring assurances it had given. The Minister referred specifically to the repercussions for the bilateral relationship that any non-compliance with the death penalty assurance would have. However, as the Minister said, that was premised on the PRC's knowledge of New Zealand's long standing opposition to the death penalty. It is not unreasonable to consider that a failure by the PRC to ensure this assurance was kept (something which, unlike torture, is easily detected) would be viewed very seriously by New Zealand and would have repercussions for the bilateral relationship.

[230] It is also relevant that repercussions in the bilateral relationship with New Zealand are not the only consideration. There are potential repercussions for the PRC internationally were it to become known that the assurances with New Zealand were not honoured. The Minister referred to this in her reasons for being satisfied that the death penalty assurance would be honoured. A failure to comply with a death penalty assurance would likely become known. The assurances do not expressly prohibit New Zealand from disclosing this.

[231] Evidence has been filed by John Adank, a senior official at MFAT with experience in diplomatic processes and communications, in connection with the assurances obtained in this case. He says it is a fundamental principle that states conduct their dealings with each other in good faith. Failure to observe diplomatic assurances give rise to serious reputational and diplomatic risk, which can affect both the immediate bilateral relationship and a country's relationships with other members of the international community. A country's ability to advance its domestic and foreign policy priorities at the international level depends, among other things, on the strength of its relationship with other countries and its reputation. Mr Adank concludes that "[t]o regard diplomatic assurances as ineffectual, therefore, overlooks the realities of the diplomatic and political circumstances in which they are conducted". I accept this evidence, although note that in the present case the assurances appear not to permit New Zealand to disclose any information on Mr Kim's treatment to other countries.

[232] In any event, relative size and economic strength are not the only measure of the strength of bilateral relationship. I note, for example, the comment from the Bar from Mr Kim's counsel about reports that the PRC wishes to seek extradition of Chinese nationals living in this country on various charges. This, and many other factors, may be relevant when considering whether the PRC will wish to ensure assurances with New Zealand are honoured. The Government is better placed than I am to assess the strength of the relationship between New Zealand and the PRC in light of all the relevant factors. Deference is appropriate.

New Zealand's experience with assurances

[233] Mr Adank says New Zealand has never extradited anyone to the PRC and nor has it previously sought formal assurances regarding torture or fair trial rights from any country. He says New Zealand has previously received an assurance from the PRC not to apply the death penalty. That concerned a Chinese citizen accused of murder in New Zealand, who fled to the PRC and was subsequently tried for murder in that country. The PRC abided by this assurance.

[234] The briefing paper advised the Minister of this:

> *NZs experience with assurances from the PRC*
>
> MFAT advises that NZ has never extradited anyone to the PRC. However, NZ has previously received an assurance on the death penalty from the PRC in the case of Xiao Zhen.
>
> Mr Xiao, a Chinese citizen, was charged with the murder of a taxi driver in Auckland. In 2011, the PRC tried and convicted Mr Xiao (who had fled to the PRC) for murder, using evidence gathered with the cooperation of the NZ Police (PRC law allows PRC citizens to be tried in the PRC for crimes committed in other jurisdictions).
>
> An assurance not to apply the death penalty was observed, and Mr Xiao was sentenced to fifteen years' imprisonment. A subsequent prison visit by Embassy staff in 2013 did not reveal any concerns regarding his treatment.

[235] This information was relevant to whether the Minister could be satisfied that the PRC would honour the death penalty assurance. However, as it was limited to one instance and concerned the death penalty only, it could not be given much weight in determining whether the assurances would be honoured, particularly the assurances in relation to torture and fair trial.

Information received from other countries

[236] As noted above, the briefing paper contained information from four countries about their experience with how their citizens are treated in prisons in the PRC. In contrast, in advising the Minister of the information obtained from other countries as to their experience with assurances obtained from the PRC, the briefing paper set out information received from just two countries. Specifically it advised:[179]

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[179] Refer [58] above.

Experience of other countries with assurances from the PRC

MFAT obtained information in confidence from other Embassies to the PRC about their experiences with assurance from the PRC. It received the following information.

[Country B]

The [Country B] Embassy provided information about its practical experience regarding the deportation of [X].

[X's] trial finished in [date] and he was sentenced to life imprisonment in compliance with the assurance not to impose the death penalty.

Since [X's] detention, the Embassy has not been active in monitoring or visiting. The Embassy, however, observed that it had not had any representations from [X] or his family regarding ill-treatment.

With regard to the assurances, the Embassy considered that, on the whole, they had been observed "very scrupulously", and suggested that in high profile cases, especially with an international dimension, the PRC would be very careful to observe any undertakings agreed to.

[Country A]

[Country A] does not have an extradition treaty with the PRC, but referred to the [date] case of [Y].

[Y] was a party to [criminal offending]. The perpetrators, including [Y], fled to [country A].

[Y] accepted a plea bargain and returned to the PRC where he was convicted of [the offending]. [Country A] received assurances from the PRC regarding the death penalty, torture, treatment in accordance with international agreements to which the PRC was a party, and consular-type visits from time to time.

[Y] has subsequently been released. [Country A] considers that the PRC observed its assurances and had "no issues" regarding the way [Y] had been treated.

[237] Mr Kim submits that this information is inadequate. It comes from only two countries which each refer to only one example. It is not known whether other countries were contacted but declined to reply or whether they replied with information indicating assurances were not honoured. One these countries in particular is significantly more powerful internationally than New Zealand and so its experience may not provide much assurance as to the likely New Zealand experience. Country B's information cannot provide much assurance as no active monitoring or visiting took place. Complaints from the person's family could not be expected as this could lead to repercussions for them.

[238] To illustrate the inadequacies of the enquiries made of other countries, Mr Kim provided a report from the Irish Times dated 7 April 2015 entitled "China to execute man over Dublin murder". The article reports on an unlawful killing in Dublin 13 years ago. The PRC had sought Irish assistance in bringing the perpetrators, believed to be a group of Chinese men, to justice. Assurances were provided that if assistance was provided, none of the convicted would be executed. Chinese authorities subsequently advised that six of the seven men had been "brought to justice" with one of the men to be sentenced to death with a two year reprieve." The report continued as follows:

> … Chinese officials are now reportedly seeking the help of Irish authorities in extraditing the remaining suspect. The suspect is now an Irish citizen and the Department of Foreign Affairs are reported to be unwilling to extradite him.
>
> The Chinese authorities have continued to pressure the Department of Foreign Affairs to extradite the man, while ignoring queries about the reason for breaking the previous promise that no extradited suspect would be executed.
>
> A senior government source told the Mail: This has caused a major diplomatic crisis. Essentially a man is to be executed because of a Garda investigation in Dublin.
>
> "The Chinese gave assurances they would not impose the death penalty and then they broke that agreement."
>
> "Despite being asked on a number of occasions why and how this happened, they will simply not discuss that matter any further."
>
> The man is set to face execution by lethal injection in March.

[239] Following the hearing before me, an affidavit was provided by Michael Roger, a policy officer in the China unit of the North Asia Division at MFAT. He made enquires via the New Zealand High Commission in London and received a response from the Irish Department of Foreign Affairs (DFA). The DFA confirmed the above report was accurate at the time it was published. Since then the sentence had been officially reprieved and commuted to a life sentence. This happened in November 2015, following a period of engagement over the case between Irish officials and the Chinese Embassy in Dublin.

[240] This information is potentially materially relevant to the Minister's decision. It does suggest that relying on information from just two countries about their

experience with assurances from the PRC may be a misleading indicator of whether the assurances will be honoured in this case. It shows the importance of taking active steps to ensure the assurances are being kept. It also provides a concrete example of problems being able to be resolved bi-laterally, albeit in this instance only, following a refusal by Ireland to extradite a person to the PRC following the failure to honour the earlier assurance.

[241] As the respondents submit, officials made enquiries of, and received information from, four countries regarding their experience with the treatment of their citizens in the PRC. It can be inferred that two of those countries did not provide any relevant information as to their experience with the PRC honouring assurances. It would have been preferable if this was explicit,[180] but there is no reason to think that unfavourable information was received and not disclosed. The fact remains that the information obtained about other countries experience was limited. This is relevant to the weight the Minister could place on this information in being satisfied that the PRC would honour the assurances.

Convention on the Rights of the Child

[242] Mr Kim has two teenage children. They are New Zealand citizens. Their mother no longer lives in New Zealand. Prior to being remanded in prison, while awaiting the extradition process, Mr Kim was the principal caregiver of the children.

[243] Mr Kim submits that no consideration was given to arts 17 and 23 of the ICCPR and art 8 of the United Nations Convention on the Rights of the Child. Article 17 provides that "No one shall be subjected to arbitrary or unlawful interference with his …family". Article 23 provides "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 8 provides that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

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[180] Refer *Lai v Canada*, above n 114, at [142] (holding it was insufficient to rely on the "notes" when nothing was disclosed about them).

[244] The respondents referred to *H (H) v Deputy Prosecutor of the Italian Republic, Genoa,* a decision of the Supreme Court of the United Kingdom, where this issue was raised.[181] The Supreme Court held that it was necessary to examine the way in which extradition would interfere with family life. The question was whether the interference with the private and family lives of the extraditee and members of his family was outweighed by the public interest in extradition. There was a strong public interest that the United Kingdom should honour its international treaty obligations, that those accused of crime should be brought to trial and those convicted should serve their sentence and that safe havens for fugitive offenders should be eradicated. The weight to be given to those factors depended, however, on the circumstances of the particular case. In any case where a child's rights were involved, the child's best interests were a primary consideration, even though they might be outweighed by countervailing considerations in the particular case.

[245] That decision involved more than one appeal. The Supreme Court allowed one of the appeals. In doing so the Court considered the consequences for the children, the period of time between the alleged offences and the bringing of prosecutions, the conduct of the person during that time, the seriousness of the offences and the public interest in extraditing the person. It dismissed the appeal in the other case because the public interest in extradition prevailed over the other considerations.

[246] In this case Mr Kim did not submit to the Minister that she should not surrender him because of the severe consequences for his children. Evidence would be needed about this before this issue could be given proper consideration. The issue may be advanced on a reconsideration by the Minister. It also may be relevant to a bail application.

Improper influence

[247] Mr Kim contends that the Minister was improperly influenced by comments made by the Prime Minister, or that there is an appearance that she was. This

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

contention arises out of two reports of comments made by the Prime Minister in the New Zealand Herald.

[248] The first of these was a report in the NZ Herald on 17 August 2015 as follows:

> The Chinese authorities are pressing New Zealand to extradite a non-Chinese resident from New Zealand to face unknown charges in China, Prime Minister John Key revealed today at his post-Cabinet press conference …
>
> Mr Key said New Zealand was not having any such issues and had not sent anyone back to China, but added "there is an individual they want extradited but it is not for reasons around finance".
>
> "It is not a money issue. It is in relation to criminal activity and the person is not Chinese. It is in relation to a case that took place in China."

[249] Mr Kim submits that the Prime Minister has assumed Mr Kim is guilty because he has referred to "criminal activity" rather than "alleged criminal activity". He submits this may have unconsciously influenced the Minister into thinking that Mr Kim was guilty. I do not accept this submission. The statement is correct. The PRC is seeking Mr Kim's extradition and the request does relate to criminal activity. The way in which the victim was found and the results of the autopsy strongly support the conclusion that she was unlawfully killed. Whether Mr Kim is the person who is guilty of the criminal activity is not commented upon by the Prime Minister. Moreover, it is not credible to think that the Minister would be influenced by these (neutral and accurate) comments from the Prime Minister. The Minister had considerable information on which to base her decision. This included the District Court file which assessed whether there was a prima facie case against Mr Kim.

[250] The second report in the New Zealand Herald was on 18 November 2015 (12 days before the Minister made her decision to order Mr Kim's surrender to the PRC). This reported on the Prime Minister's comments, while attending the APEC summit in Manila, as follows:

> The Chinese Government wants New Zealand to deport a murder suspect back to China to face charges and Prime Minister John Key says it's possible, if the death penalty is ruled out.
>
> It was a decision to be made by Justice Minister Amy Adams.

> Speaking with reporters last night in Manila, Mr Key revealed more details about the case ahead of his meeting today with China's president Xi Jinping at the Apec summit.
>
> The case is that of Kyung Yup Kim, a Korean-born New Zealand resident who is facing charges in China over the death of a woman in Shanghai in December 2009.
>
> He returned to New Zealand in June 2011 and has been held in custody since then, making several unsuccessful legal challenges to extradition.
>
> He revealed in August that the Government wanted the return of a person to face trial. That person was not a Chinese national.
>
> Yesterday Mr Key said the suspect was accused of killing another person.
>
> "It's a long and complicated case."

[251] Mr Kim contends the comment "… the Government wanted the return of a person …" is ambiguous, but a tenable and more obvious meaning is that the New Zealand Government wants Mr Kim returned to the PRC. I do not agree. It is the PRC that is seeking Mr Kim's extradition, and it is therefore the country referred to that wants his return. New Zealand is the party considering that request. I therefore reject that this comment indicates improper political interference in the decision to be made by the Minister.

[252] The Minister says in her affidavit that she kept her senior colleagues including the Prime Minister informed of developments during the above process. By way of example she notes that on 6 July 2015 she advised Cabinet that she had received final assurances from the PRC, the relevant material was to be provided to Mr Kim through his lawyer for his comment, the decision was for her to make and she expected to make it in a few weeks, and media coverage was a possibility. The matter was not discussed at Cabinet and nor did she intend it to be. She says she was not influenced by any other Minister in making her decision and nor did any other Minister seek to influence her decision in any way. There is no reason for any doubt about this.

Summary of conclusions

[253] The PRC has not committed to the relevant international instruments on fundamental human rights in the way that New Zealand has. This includes it not

having agreed to the process provided in those instruments by which complaints of alleged violations of the international obligations can be considered, nor to the system of visits by independent bodies intended as a mechanism to prevent persons being subject to torture. It also retains the death penalty.

[254] The information before the Minister was that "the consensus of commentators and the UN is that there is overwhelming credible evidence of routine use of torture and ill-treatment in the PRC, particularly to extract confessions" and, despite recent efforts at reform, torture in the PRC remained widespread. The latest report from the UN Committee against Torture (which the Minister did not have) advises that torture "is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for convictions". It is accepted that if Mr Kim is to be extradited, assurances from the PRC about Mr Kim's treatment and fair trial rights are necessary. There is limited information about whether the PRC has honoured assurances in the past, and this is the first occasion on which New Zealand has been asked to extradite a person to the PRC and the first occasion on which New Zealand has negotiated assurances. Mr Kim's extradition takes place against this backdrop.

[255] Mr Kim has not confessed to the killing. He denies it and in the District Court eligibility hearing he raised the possibility that his girlfriend, whose father is said to be a high ranking official in the Communist Party, may be responsible. The PRC system relies heavily on confessions. The apparent strength of the case against Mr Kim (at least as it can be assessed in this country on the information provided) therefore appears not to materially reduce his risk of ill-treatment in pre-trial detention when interrogated by the police. There is some information, though very limited, that murder suspects are more at risk of torture or ill-treatment than those accused of some other crimes. The Minister did not have adequate information (at least as it is disclosed in this proceeding) on which to conclude that Mr Kim's likely detention in Shanghai would materially reduce his risk. For all these reasons Mr Kim is therefore potentially at personal risk, although his risk is not at the highest level, and the critical issue was whether assurances would adequately protect Mr Kim.

[256] The Minister's process was thorough and considerable work has been undertaken to seek to ensure Mr Kim's rights will be protected if he is surrendered to the PRC. It is apparent also that the Minister has come to a considered view on the basis of that work. I nevertheless consider the Minister's decision to order Mr Kim's surrender must be reconsidered. I have reached the conclusion that this is necessary despite the care that has gone into seeking to ensure that Mr Kim's rights will be protected if he is surrendered and despite the considerable time that has passed since Mr Kim was first remanded in prison as a result of the extradition request.

[257] I note and adopt, however, the following comment of Lord Hope, in directing a reconsideration of a decision concerning extradition to Albania in *Kapri v Lord Advocate*:[182]

> The further delay that will result in the resolution of these proceedings is regrettable. But it is of the highest importance that due process be observed in matters of this kind. It is always tempting to resort to short cuts. But where a person's liberty and his right to a fair trial is at issue that temptation must be resisted. It is plain that the matter must be properly investigated before a decision is taken as to whether the appellant's extradition … should go ahead.

[258] I also note that this is the first occasion on which this country has been asked to extradite a person to the PRC and the first occasion on which assurances have been sought and obtained. It is important to ensure this is done properly to protect Mr Kim's rights and potentially others for whom his case may form a precedent. The respondents acknowledge the real issue in this case is the adequacy of the assurances.

[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 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 the PRC and the limited information from other countries about their experience

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182 At [34].

with the PRC honouring assurances, this may be inadequate to protect Mr Kim's rights. I consider this requires explicit consideration by the Minister.

[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.

[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).

Result

[262] The application to review the order to surrender Mr Kim is granted. The Minister is directed to reconsider whether Mr Kim is to be surrendered in light of this judgment, and in particular the matters referred to in [259] and [261] above. At the hearing I did not hear submissions on the appropriate orders if I were to grant the

application for review. I seek memoranda within seven days (or longer if necessary) as to whether it is appropriate to quash the existing surrender order or whether it should be stayed, and whether any other consequential orders should be made. I am uncertain if costs are in issue. That too may be the subject of memoranda. Mr Kim's counsel is also to advise whether the cause of action in respect of Mr Kim's treatment is pursued, in which case timetabling directions will be necessary.

Mallon J