ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF APPELLANT UNTIL FURTHER ORDER OF THIS COURT.

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CRI-2023-416-3
[2023] NZHC 1587

UNDER	Part 8 of the Extradition Act 1990
IN THE MATTER	of an appeal against the granting of a surrender order
BETWEEN	BW Appellant
AND	THE COMMONWEALTH OF AUSTRALIA Respondent

Hearing: 15 June 2023

Counsel: M J Lynch for Appellant
C R Stuart for Respondent

Judgment: 23 June 2023

JUDGMENT OF ELLIS J

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[1] These are my reasons for a results judgment delivered earlier this week.[1]

[2] BW lives in a small rural settlement in Tairawhiti where he is a valued member of a close whānau with a strong connection to that part of the country. He is embedded in the life of his whānau and the wider community there. He has a steady job and a

[1] *BW v Commonwealth of Australia* [2023] NZHC 1525.

new baby. He is the family breadwinner. As far as I am aware, he has no criminal convictions.

[3] But the question with which this judgment is concerned is whether the District Court was right to decide that he must, nonetheless, be extradited to Western Australia to face a criminal charge arising from a violent incident that took place in Perth in 2014. Although—unbeknownst to BW—a warrant for his arrest was issued in Australia in 2015, it has taken eight years for the extradition request to wend its way to New Zealand. There has been, and can be, no suggestion that BW has taken any steps to avoid a criminal process that he did not know about. Indeed, he returned to Australia several times during the eight-year period, without impediment or alert. As far as I am aware his whereabouts have always been readily ascertainable.

[4] Self-evidently, BW's extradition to Australia would see him taken almost 6000 kilometres away from his whanau and his community, would deprive his partner ("I") of their primary source of financial support, and separate his infant son from his father. Although he is presently on bail awaiting the outcome of these proceedings, it seems most unlikely that he would receive bail pending trial in Australia.

[5] The key question posed by the appeal is whether, because of the amount of time that has passed since the relevant offence is alleged to have been committed and having regard to all the circumstances of BW's case, it would be unjust or oppressive to surrender him.

How did it come to this?

[6] During 2014, BW was living in Perth. He was then aged 22 or 23. He has deposed that things did not end up going so well for him there; his mental health was not good and, after he broke up with his girlfriend, he decided to return to New Zealand in February 2015.

[7] At around the time of his departure from Australia, however, BW had been identified by the Western Australian Police as a suspect in a violent incident that had occurred in a public carpark, in November 2014. In May 2015 extradition documents were drafted and a warrant for BW's arrest was issued on 17 June of that year. Eight

days later, a report was submitted to the South Metropolitan District Office of the Western Australia Police Force seeking approval for extradition. A year later Police submitted the request to the Office of the Director of Public Prosecutions for Western Australia (the DPP).

[8] As I have already said, there is nothing to suggest that BW was aware that he was wanted in connection with the incident at the time he came home, or later. The conclusion that he did not is supported by subsequent events, and in particular his (unimpeded) return to Australia on several later occasions.

[9] It took almost another four years for the DPP to approve the extradition request.[2] In the evidence filed in the District Court a number of explanations were proffered for this delay, including the need for further investigations, legal issues about criminal visas, workload pressures, and the COVID-19 pandemic.

[10] New Zealand authorities finally received the extradition request from Australia on 25 February 2022, some seven years after BW had first left Australia.[3] Inquiries were made as to BW's location and documents were filed with the District Court in Napier to obtain an endorsed warrant, which was granted on 23 September 2022.[4] BW was arrested in October 2022, two months before his partner was due to give birth to their first child. His son was born on 18 December.

Relevant statutory provisions

[11] BW accepts that he is eligible for surrender in terms of s 45 of the Extradition Act 1999 (the Act) and so I do not need to set out that provision here. Rather, the main

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2 It was approved on 24 February 2020.

3 It is a matter of public record that the New Zealand borders were closed for non-citizens between 19 March 2020 and 12 April 2022. During that time the DPP granted an extension of the extradition approval due to the pandemic.

4 Australia is classified as a designated country under pt 4 of the Extradition Act and so a streamlined ("endorsed warrant") extradition procedure applies. Under this procedure, the Minister usually has no role. The extradition request is referred to the District Court. If the Court is satisfied that the person is an extraditable person and the offence is an extradition offence, in relation to the extradition country, the person is eligible for surrender, subject to the application of any discretionary restrictions.

question is whether there is, nonetheless, a discretionary restriction on surrender under s 8 of the Act that might affect that eligibility.[5] Section 8 provides:[6]

> **8 Discretionary restrictions on surrender**
>
> (1) A discretionary restriction on surrender exists if, because of
>
> (a) the trivial nature of the case or
>
> (b) if person accused of an offence, the fact that the accusation against the person was not made in good faith and the interests of justice, or
>
> (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.

[12] The other issue raised in the District Court, and on appeal was whether, instead of itself finally determining the question of surrender, the Court should refer the case to the Minister of Justice (the Minister), under s 48. It is only s 48(4) that is potentially relevant to this case and it provides:

> …
>
> (4) If—
>
> (a) it appears to the court in any proceedings under section 45 that that—
>
> (i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or
>
> (ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but
>
> (b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—

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5 Section 45(4) provides the Court may determine that a person is not eligible for surrender if that person satisfied the court that a discretionary restriction on surrender under s 8 applies.

6 The onus of establishing the s 8 requirements is on the person resisting extradition, on the balance of probabilities: *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621 [*Curtis*] at [44].

the court may refer the case to the Minister in accordance with subsection (5).[7]

…

[13] Lastly, it is relevant to note in the event of such a referral, s 49 states that the Minister must decide whether the person is to be surrendered in accordance with the grounds set out in s 30(2) to (4), of which subs (3) is relevant here. Subsection (3) provides:

> (3) The Minister may determine that the person is not to be surrendered if—
>
> …
>
> (b) it appears to the Minister that a discretionary restriction on the surrender of the person applies under section 8; or
>
> (c) the person is a New Zealand citizen and—
>
> (i) if there is a treaty in force between New Zealand and the extradition country, it does not preclude the surrender of New Zealand citizens; 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—
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> 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
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> (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.
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> …

[7] Subsection (5) is a procedural provision.

The District Court decision

[14] The extradition hearing was held in the Gisborne District Court on 21 March 2023. The judgment of the was delivered on 4 April 2023.[8]

[15] BW's position was that, in terms of s 8(1)(c), the amount of time that had passed since the offence is alleged to have been committed and having regard to all the circumstances of his case, it would be unjust and/or oppressive to surrender him.

[16] The Judge identified the relevant legal principles from previous cases in which reliance has been placed in s 8(l)(c). He discussed the distinction between unjustness and oppression in the following terms:[9]

> [19] The House of Lords decision in *Kakis v Governor of the Republic of Cypress* is often called upon to mark the general distinction between both limbs which have existed in extradition law for many years. In *Kakis,* Lord Diplock observed that "unjust" is directed primarily to risk of prejudice to the accused in the conduct of the trial itself. Whereas "oppressive" is directed to hardship to the accused resulting from changes in the circumstances that have occurred during the period to be taken into consideration. "But there is room for overlapping, and between them they would cover all cases where to return the accused would not be fair", said Lord Diplock.
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> [20] Here, the former is directed primarily to the risk of prejudice in the conduct of any trial in Australia. The latter to hardship resulting from changes in [BW]'s circumstances that have occurred during the period between the alleged offending and the application for extradition.
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> [21] Also, the focus of s 8(1)(c) is on whether injustice or oppression arises out of "all the circumstances of the case". Those words on their face have very broad application capturing everything to do with the person and the criminal proceedings. But there must be a clear nexus between personal circumstances relied upon and the delay factor. It is not necessary for [BW] to show this delay caused the change in his personal circumstances. Only that it allowed that change to occur. That is to say, the change in circumstances would not have happened but for the delay.
>
> [22] Legislative context is an important feature here. This extradition is governed by Part 4 of the Act. One of the legislative aims of the Act is to "provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia." The Part 4 procedure is less formal and more streamlined than the procedure under Part 3. The Part 4 procedure is commonly termed a "backed warrant procedure" with New Zealand asked to *back* the overseas warrant for arrest. This is because there is a *justified*

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[8] *Commonwealth of Australia v [BW]* [2023] NZDC 5941.

[9] Citations omitted, emphasis in original.

> *expectation* that a respondent's human rights, including right to a fair trial, will be met by Australia.

[17] In terms of the amount of time that had passed since the alleged offending, he reviewed the relevant chronology of events and considered the explanations for the delay offered by the Australian authorities. He concluded that the reasons given for it taking eight years to make the extradition request had not been adequately explained and that the delay was "inexcusably dilatory".[10]

[18] The Judge had before him three affidavits outlining BW's circumstances. He made an express finding that it had not been established that BW knew he was wanted as a suspect when he first left Australia in February 2015. The Judge noted his employment and travel history and considered his connections to the local community. When describing BW's family circumstances, the Judge said:

> [45] Significantly, he has been in a relationship with [I] for almost two years. They have one child together, a boy born on 18 December 2022, now aged three months. He says that now more than ever [I] and his son need his support and presence. And BW is concerned about what might occur if he is extradited and how that will impact on [I] and the baby. He recognises that the delay until trial could be months or even years and that long period "terrifies"' him. He says that since he has returned to Gisborne he has got his "life back on track". Part of that is not drinking alcohol anymore. He says he has "reconnected with [his] whanau", has a good job, a stable and loving relationship and has a young child to support.

[19] The Judge recorded I's evidence that she is on maternity leave and relies on BW's his income to support her and the baby and that his mother had also explained how BW provides emotional and financial support to her.

Unjustness

[20] Despite his finding that the prosecutorial delay was "inexcusably dilatory", the Judge determined that the delay would not make extradition "unjust" because there was nothing to suggest that the delay would make a fair trial unlikely in Australia.[11]

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10 At [36]. The phrase "inexcusably dilatory" was first coined by Lord Edmund-Davies in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 785.

11 At [53].

In any event, and in line with the authorities, he held any issues around that would better be dealt with by the Western Australian courts.[12]

Oppressiveness

[21] The key question was, therefore, one of oppressiveness. On this, it is convenient to set out the Judge's reasoning in full. He said:[13]

> [54] As noted earlier, the threshold for oppression is a high one. It must be linked with the prospect of extradition. Delay is relevant but only to the extent that it is "hooked" via (relevantly) oppression. I have already found that significant prosecutorial delay here was in one phase unexplained and in another phase "inexcusably dilatory", As accepted earlier this inaction is a relevant factor in determining whether extradition is oppressive here.
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> [55] As is the entire period of delay which is over eight years, That period rightly includes the impact of the COVID-19 Pandemic on the closure of the New Zealand border between 19 March 2020 and 12 April 2022. Afterall the period of delay required to be measured under s 8(1)(c) runs from the time that has passed since the offence is alleged to have been committed until the point [BW] is liable to surrender. The COVID-19 Pandemic did not suspend running of time here.
>
> [56] Having said all of this, a cautious approach is nevertheless called for. As a matter of comity, I am wary of reviewing the actions of the Australian authorities leading up to the request here. Because the Australian Court will be in a much better position to assess State-induced dilatoriness here and grant a remedy such as a stay for abuse of process if considered appropriate. Given those considerations the prosecutorial delay element here is "not [to] be overemphasised". And in the end, I do not consider this is a borderline case of oppressiveness where the element of prosecutorial delay might tip the balance in favour of [BW].
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> [57] Counsel for [BW] placed emphasis on the Court of Appeal decision in *Curtis v Commonwealth of Australia.* Mr Curtis succeeded in hiss 8(1)(c) case. But there are material distinctions between the *Curtis* case and this case.
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> [58] First points of comparison that favour [BW]. Like this case, there was a significant period of delay attributable to prosecutorial dilatoriness in *Curtis.* Also, like Mr Curtis, [BW] led and developed his life in New Zealand openly. And, unlike in *Curtis,* there has been no finding [BW] was aware he was a suspect when he first left Perth.
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> [59] Now the material distinctions. One of the significant features in *Curtis* was that the effect of delay deprived Mr Curtis of the real opportunity to be dealt with as a 14- or 15-year-old youth. Had he been dealt with then, his chances of avoiding a custodial outcome would have been better than as an adult eligible for surrender. Post-extradition he would have been sentenced as an adult albeit his culpability would be assessed taking into account the

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[12] At [52].
[13] Citations omitted.

offending took place when he was a child. Also, since leaving Australia, Mr Curtis had gone from being a child to an adult. Relevantly he was also under parental control as to his movements to and from Australia until he reached adulthood. In the end, the Court considered that the relationships and career Mr Curtis had developed as he moved from childhood to adulthood would be materially disrupted, if not destroyed, by the extradition. And that this level of oppression would not be remedied if there were a stay hearing in Australia. The youth-driven analysis employed in *Curtis* has no relevance here.

> [60] This case falls well short of the high threshold required. Prosecutorial delay was substantial but cannot be overemphasised for the reasons given earlier. Given his personal circumstances which are "hooked" via delay, extradition here will bring real hardship for [BW]. And removing [BW] from his cultural connections is also weighed here. They must be because [BW's] tikanga rights form part of the law of New Zealand. Extradition will cause real hardship to him and his whanau under that heading also. But even taken collectively the circumstances relied upon do not reach the acute level of oppression. Nor is this a borderline case.

[22] The Judge therefore concluded that BW has not satisfied him that his extradition was likely to be "oppressive".[14] And because he considered that it was not a borderline case, he also declined to refer it to the Minister.[15]

Approach on appeal

[23] Section 68 of the Act provides that appeals against determinations of eligibility for surrender under either ss 24 or 25 of are limited to questions of law and sets out various procedural requirements. Section 72(1) provides that on such an appeal:

> (1) The High Court must hear and determine the question or questions of law arising on any case transmitted to it, and do 1 or more of the following things:
>
> (a) reverse, confirm, or amend the determination in respect of which the case has been stated:
>
> (b) remit the determination to the District Court for reconsideration together with the opinion of the High Court on the determination:
>
> (c) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard:
>
> (d) make any other order in relation to the determination that it thinks fit.

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14 At [61].
15 At [70].

[24] There is no dispute that among the options available to the High Court under s 72(1) is to make a referral to the Minister under s 48.

[25] Section 72(2)(a) provides that, in hearing and determining the question or questions of law arising on any case transmitted to it, the court must not have regard to any evidence of a fact or opinion that was not before the District Court when it made the determination appealed against.

The questions of law

[26] BW's appeal is advanced on the following grounds:

> a. The Learned Judge erred in law by applying the wrong legal test in relation to oppression in the Appellant's case, requiring a standard that was too high, and failed to properly consider the Appellant's circumstances in connection with the significant delay in bringing the extradition proceedings,
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> b. The Learned Judge erred in law by over-emphasising the importance of the distinction of the "youth factor" between the Appellant's case and that of the appellant in the case of *Curtis v Commonwealth of Australia,*
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> c. That the Learned Judge erred in law by rejecting submissions that a discretionary restriction on surrender existed under section 8(1)(c) (by finding that a discretionary restriction under s 8(1)(c) did not exist),
>
> d. The Learned Judge was plainly wrong in ordering the surrender of the Appellant, and
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> e. The Learned Judge erred in law by determining that the grounds under section 48(4)(a)(i) of the Act did not exist.

[27] It will be observed that *express* reliance is no longer placed on the "unjust" limb of the s 8(1)(c) discretionary ground, although it is arguably implicit in grounds (b), (c) and (d).

[28] Mr Stuart did not seek to contend that these were not questions of law.

Discussion

[29] I do not propose to consider the grounds of appeal separately. I have concluded that the Judge did err in his "oppressiveness" analysis, and that is enough. I explain my reasons below.

[30] As the Judge recognised, the starting point is his finding that the delay here was "inexcusably dilatory".[16] As he also recognised, s 8(1)(c) requires that any finding of oppression must be caused by, or at least "hooked" to, the delay. Beyond that, however, the Judge's analysis of oppressiveness largely levers off the *Curtis* decision.[17]

[31] I acknowledge that *Curtis* can be regarded as a useful example, because it is one of the few cases in which surrender has been declined based on s 8(1)(c). But there is a danger in simply using at as a benchmark or looking at Mr Curtis' circumstances and then noting those that do or do not exist in BW's case. That approach makes it too easy to miss or minimise important matters that are unique to BW's case. That is what I think happened here.

Acknowledged (and positive) differences from Curtis

[32] Before considering the missed differences from, and similarities to, *Curtis* it is important to reiterate that, as the Judge correctly noted, BW's position is "better" than that of Mr Curtis because Mr Curtis was aware that he was wanted by the Australian authorities and BW was not. It can also be noted that the delay in BW's case was two years longer than it was in *Curtis*.

Missed (and positive) differences from Curtis: planned birth of the child and family commitments

[33] The Court of Appeal has accepted that children, as part of a person's family unit in New Zealand, can be a relevant circumstance of that person in an extradition context.[18] And in the broadly analogous deportation context it has been accepted by

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[16] Australia took no issue with that finding on appeal.

[17] *Curtis,* above n 6.

[18] *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 692 at [37]. See also *Mailley v District Court at North Shore* [2016] NZCA 83 at [50].

that Court that Art 3 of United Nations Convention on the Rights of the Child (which provides that "[i]n all actions concerning children … their best interests shall be a primary consideration") may be engaged.[19]

[34] Nonetheless the Court has also emphasised that "severe interruption to family life will usually be the consequence of extradition" and that typical disruption of this sort *on its own* does not take the matter out of the ordinary such that surrender should be refused.[20]

[35] In this case, the Judge implicitly acknowledged the significance of BW's newborn son in the passage I have set out at [18] above.[21] The part of the judgment in which that passage appears is, however, merely a narrative of the evidence about the relevant factual circumstances in BW's case. The interests of the child and his family do not feature at all in the analysis of oppressiveness later in the judgment.[22] It seems Mr Curtis did not have children.

[36] It is indisputable that BW's surrender would not be in the best interests of his infant son. As I have said, that is not determinative and there must (as the Judge recognised) also be a "hook" between the "circumstance" of BW's son and the delay by the Australian authorities. In my view, there is such a hook here, and it is a powerful one.

[37] As to that, there can be no reason to doubt his partner's evidence that she and BW would not have chosen to have a child at all had they had any idea that BW might be removed from their home, let alone from New Zealand, for an unknown period of time.[23] And in my view, making that decision (and then executing it) is a highly relevant, further, circumstance in terms of s 8(1)(c). The decision would not have been made, BW's son would not have been born and his son's best interests would not have

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19 *Chief Executive of the Ministry of Business, Innovation and Employment v Liu* [2014] NZCA 37, [2014] 2 NZLR 662 (CA). That case involved the deportation of a person who would leave behind a three year old child. The Court rejected the proposition advanced by the appellant in that case that Art 9 of the Convention (which provides that children shall not be separated from their parents against their will, except when it is in their best interests) was engaged.

20 *Radhi v District Court at Manukau,* above n 18 at [44].

21 The Judge began that passage with the word "Significantly".

22 Set out at [21] above.

23 Again, what I says about this is only mentioned the Judge's summary of the evidence set out at [18] above.

been affected had it not been for the delay. It is difficult to see how this does not begin to tip the scales of oppression against surrender.

[38] And there is a further, related, prejudice that is similarly hooked to the delay. As a result of the child's birth, BW's partner and their child are now financially dependent on him. Again, that would not have been the case were it not for the delay. Removing BW from New Zealand—and depriving him of any opportunity to continue to support his new family for the foreseeable future—builds on the oppression here.

Missed (and positive) similarities with Curtis

[39] As the Judge correctly noted, the most compelling factor in Mr Curtis' case was the fact that he had himself been legally a child when the relevant offences were allegedly committed by him in Australia.[24] The delay had meant that he had lost the important opportunity to be tried in the youth jurisdiction. The Judge said such a "youth-driven analysis" had no relevance in BW's case.

[40] I am unable entirely to agree with that proposition.

[41] I acknowledge that BW would not have been tried as a youth had he been arrested back in 2014 or 2015. But although BW was not a child when he left Perth, at 23 years old he was certainly still a "young person" as that term is now understood and applied by the Courts in New Zealand.[25] For example, if a 23 year old in Gisborne today were to be charged with offending of the kind at issue here, his case would be placed on and managed under the Young Adult List. The Young Adult List alters traditional court procedure to provide tailored support to those aged 18 to 25. It allows developmental factors to be considered at every part of the process, rather than only as a mitigating factor at sentencing. The existence of that list recognises that young people—and young men in particular—do not simply reach maturity at 18 when they cease to fall under the Youth Court's jurisdiction.

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24 There is some suggestion in the judgment that Mr Curtis himself had admitted the offending.

25 It is unknown the extent to which matters of that kind would be taken into account on sentencing in Western Australia.

[42] The point of this is not that the delay has caused BW to miss an opportunity to be tried in a different way. There is nothing to suggest that Western Australia had or has such a list and I do not know whether the Courts there have been as ready as the New Zealand Courts to acknowledge how the not yet fully developed brain can reduce culpability when sentencing young people. Rather, the point is a simple one: the Courts in New Zealand, at least, recognise that many 23-year-old men have not yet "grown up". And if that is so, the Judge's assessment of the change of circumstances in Mr Curtis' case (that he "had gone from being a child to an adult" and that "the relationships and career Mr Curtis had developed as he moved from childhood to adulthood would be materially disrupted, if not destroyed, by the extradition") could be applied almost equally to BW. BW has, in my view, very plainly "grown up" in the eight years since his departure from Perth; he is not the same person he was in November 2014. His growth during that period—manifested in his stable employment and his established family—would be materially disrupted, if not destroyed, by extradition. And as the Judge noted in relation to Mr Curtis "this level of oppression would not be remedied if there were a stay hearing in Australia".

Referral to Minister?

[43] I have given careful thought to whether this is an appropriate case for referral to the Minister. That course has some attractions; there are obvious political aspects to extradition matters and the relationship between New Zealand and Australia in the criminal justice arena has not been without recent difficulty.

[44] As well, there may be other things the Minister could take into account that I cannot. On my reading of the relevant statutory provision (s 30 of the Act) she is not confined simply to the question of whether unjustness and oppression can be "hooked" to delay. Under s 30(3)(e) the Minister has a broad discretion to decline surrender for "any other reason".

[45] In the end, however, and in light of my clear view that the effluxion of time would, in the combined circumstances of BW's case, make it oppressive to surrender him, I do not propose to make a reference to the Minister and I do not do so.

Result

[46] For the reasons given above, the appeal was allowed and the surrender order was quashed.

[47] Counsel are agreed that, in light of this result, BW can no longer be subject to bail and so that is to end today. Bail would, of course, fall to be reconsidered in the event of a further appeal.

[48] I ask that counsel confer and advise the Court as to the issue of continued suppression.

Rebecca Ellis J

Solicitors:
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