NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF ADDRESS REFERRED TO AT [7] REMAINS IN FORCE.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS REFERRED TO AT [6] PROHIBITED BY SS 139(1) AND 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA687/2018
[2020] NZCA 499

BETWEEN	PHILLIP JOHN SMITH Appellant
AND	THE QUEEN Respondent

Hearing:	18 August 2020
Court:	Kós P, French and Collins JJ
Counsel:	Appellant in person C G Tuck and T D A Harre as standby counsel F R J Sinclair and M J Lillico for Respondent
Judgment:	16 October 2020 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] The appellant, Phillip Smith, was convicted of murder, paedophile offending, aggravated burglary and kidnapping in 1996. He was sentenced to life imprisonment

with a minimum non-parole period of 13 years. He has sought, but been denied, parole.

[2] It is beyond doubt that in June 2013 he committed the act of obtaining a passport by false pretences,[1] and that in November 2014 he committed the further act of escaping from lawful custody while on short-term release,[2] flying to South America using the falsely-obtained passport.[3]

[3] He was apprehended by Brazilian authorities in mid-November 2014 and deported by that country later that month. Two and a half years later he faced trial for those further offences. As trials go, it took an unusual form. This is what his counsel said in opening to the jury:

> In the 30 plus years that I've practised at the bar I've never asked a Judge to direct a jury to bring in a guilty verdict but that's what I'm doing today, on Mr Smith's instructions. He wants you to find him guilty. …
>
> …
>
> So he's asking you to return a guilty verdict. All the facts that my friend read out we've agreed, there's no dispute, you come back with a guilty verdict …

Following conviction, the appellant was sentenced to a further 33 months' imprisonment, to be served concurrently with his life sentence.[4]

[4] Now he appeals to this Court. He says the two convictions, entered at his own invitation, should be set aside. Not because counsel erred. And not because he did not commit the offences. Rather, because the deportation by Brazil was unlawful, knowingly connived in by the New Zealand police, and that in consequence the prosecution was an abuse of process.

Background

[5] The essential background to the appeal may be set out reasonably succinctly.

---

1 Contrary to s 32(1)(a) of the Passports Act 1992.
2 Contrary to s 120(1)(a) of the Crimes Act 1961.
3 Commission of these offences was admitted in an agreed statement of facts read to the jury at his trial.
4 *R v Smith* [2016] NZDC 13828.

A murder in 1995

[6] In December 1995 the appellant was bailed on charges of sexual offending against a boy over a period of years. In breach of bail he travelled to the family home of the boy. He hid a rifle in a nearby property. Late at night, after the family had gone to sleep, he entered the house. He was masked and armed with a hunting knife. He disconnected the telephone line. Then he entered the room of the boy and attempted to stab him. The father, hearing the boy's cries, came to his aid. The appellant stabbed the father to death. The boy was then also stabbed. The appellant then retrieved the rifle and kidnapped the boy's mother and brother at gunpoint, preventing them from assisting the father as he lay dying. As Greig J observed:[5]

> All of that speaks of a cool, deliberate plan, either to retaliate against the accusations of sexual abuse that had been made or perhaps to prevent the proceeding against you.

The Judge noted that apart from whether the appellant had attempted to murder the boy (on which he was found not guilty), the facts had never really been in dispute. The sentence imposed was that noted at [1] above.

An abscondment in 2014

[7] By June 2013 the appellant was incarcerated at Paremoremo Prison. That month he made application to the Department of Internal Affairs for a passport, under his birth name of Phillip John Traynor. A home address was required in the application, and the appellant specified an address in Palmerston North. An identity referee was required. A former co-prisoner performed that function. The appellant asked him to tell the Department he had known him for a number of years and that the appellant lived at the specified address. This the referee did when contacted by the Department, adding that the appellant owned his own marketing business. In consequence the Department issued the appellant with a New Zealand passport in his birth name, which it couriered to the specified address in Palmerston North in July 2013.

---

5 *R v Smith* HC Wellington T23/96, 16 August 1996 at 2. The facts are set out in more detail in the appeal judgment: *Smith v R* CA315/96, 19 December 1996 at 2–3.

[8] By June 2014, a year later, the appellant was incarcerated at Spring Hill Correctional Facility, south of Auckland. He was included in a reintegration programme for prisoners perceived to be close to being released on parole. This permitted short-term release under the control of authorised supervisors. Prisoners on short-term release remained under the lawful custody of the Department of Corrections throughout their release. While on short-term release in June 2014, the appellant rented a security vault box in Auckland. During a second short-term release in September 2014 the appellant made an online booking for a flight to Rio de Janeiro in Brazil, transiting through Chile. The flight date was 6 November 2014, and the ticket was purchased in the appellant's birth name.

[9] The appellant obtained a third short-term release approval beginning on the morning of 6 November 2014. On that day he took a room at an Auckland motel. He went to his bank and withdrew, first, USD 7,500 and then a further NZD 6,000 — most of which he converted into US currency and then loaded on a travel card. He then took a taxi to Auckland International Airport. He checked in to his flight and completed Customs clearance using his birth name and the new passport. He travelled on to Rio de Janeiro in Brazil, failing to return as required to Spring Hill.

[10] On 11 November 2014 the Auckland District Court issued a warrant to arrest the appellant for escaping lawful custody. A senior New Zealand police officer, Detective Superintendent Pannett, travelled to Rio de Janeiro. On this day or the next day, the appellant's new passport was cancelled. An Interpol Red Alert Notice was sent to Interpol Brazil requesting the provisional arrest of the appellant for the purposes of extradition.

The appellant is arrested in Rio

[11] The next day, 12 November 2014, the appellant was arrested by the Brazilian Federal Police at a hostel he was staying at in Rio de Janeiro.

The Brazilian Federal Police obtain a detention order preparatory to deportation

[12] On the same date Chief Maria Asmuz of the Federal Police applied to the Federal Court at Rio de Janeiro for the administrative detention of the appellant

"with the scope of effecting the compulsory measure of deportation" of the appellant. Again on the same day, Judge de Souza, a Federal Judge of the 3rd Federal Criminal Court, ordered the administrative arrest of the appellant "for the purpose of deportation, for a period of 60 days" pursuant to art 61 of the Statute of the Foreigner (Law No 6,815/1980, Brazil). It is not apparent on the record that the New Zealand authorities procured that decision or had any particular influence on the course taken by either the Brazilian Federal Police or the Federal Criminal Court.

[13] On 13 November 2014 Interpol Brasilia advised the New Zealand police that in its opinion the deportation of the appellant would not be possible and that instead extradition processes could be commenced. On the same day the Federal Public Defender's Office applied to the Court of Appeals of the 2nd region of Brazil for a writ of habeas corpus. Internal New Zealand police communications disclosed indicate that at around this point the police held the view that deportation was still a possibility, but that extradition was looking "increasingly likely". They began the process of preparing for extradition, although no formal extradition application was ever made by New Zealand.

The Brazilian Ministry of Justice seeks detention preparatory to extradition

[14] In the meantime, however, on 14 November 2014 the Minister of Justice in Brazil issued a notice in the Brazilian Federal Supreme Court "for examination and decision, the request for preventive detention for the purpose of extraditing" the appellant.

[15] No such order for examination or detention was ever made by that Court, however.

[16] Disclosed documents then show extensive communications between police, the Ministry of Foreign Affairs and Trade and the counterparts of each in Brazil. Our assessment of these documents is that the police remained hopeful of a deportation determination by the Brazilian Government. The decision of the Federal Supreme Court on the pre-extradition detention order was awaited. Det Supt Pannett, the New Zealand police officer in charge, noted on 20 November 2014 that New Zealand was "not in a position to put more pressure on the Judicial system than

both MFAT and [New Zealand police] currently are doing". And, "[w]hile we are still seeking Deportation as a primary option it is a decision for the court". As he put it, the next part of the case would be "played [out] in the courts and government agencies in Brasilia".

[17] During this period the New Zealand authorities received indications from a Mr de Almeida, a Senior Federal Prosecutor, that in his opinion deportation could not take place while the Federal Supreme Court was seized of an extradition file. He was not however certain whether the Federal Supreme Court was actually seized of such a file. No request for extradition had been made. The Brazilian Minister of Justice had however sought preventive detention preparatory to such a step being taken. Mr de Almeida also appeared to indicate that any deportation issue was an executive matter and not dealt with judicially. If that was his advice, it was not correct. In any case, he advised his office did not deal with deportation and he could not comment on it.

[18] Anticipating that extradition might be the course taken by Brazil, the New Zealand police sought to amend the Red Notice so that instead of referring to escaping custody as an offence, reference instead would be made to the offending for which the appellant had been imprisoned in New Zealand in the first place. Mr Sinclair for the Crown accepts for the purpose of this hearing that Brazil did not have a counterpart offence of escaping custody, meaning that dual criminality requirements for extradition purposes could not be met if an extradition application relied on that offence.

The Brazilian Federal Prosecutor's Office seeks deportation

[19] At this juncture, on 21 November 2014, the Federal Prosecutor's Office of Brazil made an application to the 3rd Federal Criminal Court at Rio de Janeiro for an order to deport the appellant. The application noted the order made for administrative detention on 12 November 2014. It further noted that the New Zealand police were willing to send officers to Brazil in order to escort the appellant back to his country of origin and bear all costs associated with the appellant's return trip, lessening the burden on Brazilian authorities. The high risk of further offending and

the prospect of the appellant marrying a Brazilian citizen and having children in the national territory meant that prompt action was in the national interest. As we assess the record, the offer by the New Zealand authorities was material to the Brazilian authorities' decision to apply for deportation. There is no evidence of procurement beyond that, or of pressure being brought to bear. The Brazilian authorities would however have been under no illusion that the New Zealand police preferred deportation of the appellant (by Brazil) over extradition (at the request of New Zealand).

Judge de Souza orders deportation

[20] On the same date, 21 November 2014, Judge de Souza (who had made the earlier arrest order) accepted the application and ordered the summary deportation of the appellant within a maximum of 10 days. His decision refers to the offer of assistance by the New Zealand police. The Brazilian police were directed to notify the New Zealand police of the decision and an official letter was to be sent to the New Zealand diplomatic mission. The Brazilian Federal Police informed Det Supt Pannett of the decision, noting that the period of 10 days was "the time that New Zealand's Police have to bring here in Rio the escort team and provide the flying tickets and Phillips [emergency travel document] to make it real".

Response to judicial deportation order

[21] The decision was received favourably by the New Zealand police, although Det Supt Pannett was certainly conscious of potential jurisdictional conflict with the Federal Supreme Court process. He emailed Interpol Wellington and Assistant Commissioner Burgess on 22 November 2014 stating "[m]y gut feeling is that this may fly in the face of the Supreme Court process and subsequently may have inherent issues attached, it is however some form of progress". As we have noted, the Federal Supreme Court had before it an application by the Brazilian Ministry of Justice for arrest preparatory to extradition, but the Federal Supreme Court had taken no steps in relation to listing the application. The appellant was already in detention pursuant to Judge de Souza's order of 12 November 2014. Advice from the Ministry of Foreign Affairs and Trade to the police was to take the deportation order at "face value".

[22] Two days after the deportation order was made an unnamed Interpol official (in Brasilia) notified the New Zealand police that the deportation was "not authorised". Quite properly, the police stated they would await further authorisation. An email records Det Supt Pannett's view at the time being "that we should not be seen to be placing any pressure in relation to the [judgment]; we should leave it as a matter for the Brazilians to resolve". It also notes "[t]here are no guarantees and [Det Supt Pannett] doesn't want to push anyone".

[23] The prosecutor with conduct of the matter in Rio, Ms Pereira Duque Estrada, referred the Interpol communication to Judge de Souza on 24 November 2014. The Judge immediately wrote to the head of Interpol, Chief Luiz Navajas, querying the statement that the deportation was "not authorised", when the Court had ordered it. Chief Navajas responded immediately, advising that "normal extradition procedures" had been initiated after the appellant's arrest, but acknowledging "that it is not for [Interpol] … to instruct or decide on proceedings for compulsory measures other than extradition".

[24] The stand-off between the Federal Police in Rio and its Interpol agency in Brasilia abated. Immigration approval for New Zealand police officers to travel to Rio was granted, for deportation handover purposes.

The appellant is deported from Brazil to New Zealand

[25] On 24 November 2014 Det Sup Pannett returned to Rio. On the same day the Brazilian Minister of Justice advised the Federal Supreme Court that the 3rd Federal Criminal Court had ordered deportation three days earlier.

[26] An escort team from the New Zealand police arrived in Brazil on 27 November 2014. At about this point the appellant instructed his own Brazilian lawyer (having previously had the Public Defence Service acting for him).

[27] On the same day, 27 November 2014, the appellant was transported by the Brazilian Federal Police escort, together with a member of the New Zealand police, to the airport. It appears he was handed over to the New Zealand escort team after he boarded the plane and was seated. He then proceeded to New Zealand under escort

from the New Zealand police, via transit facilities (not clearing customs) in Santiago, Chile.

Subsequent events

[28] On 1 December 2014 the Federal Court of Appeal of the 2nd Region declined the appellant's habeas corpus application. On 12 December 2014 the Brazilian Federal Supreme Court held the application for preventive detention pending extradition was now moot.

[29] In New Zealand, the appellant had been charged on 11 November 2014, in absentia, with escaping lawful custody. Following his return, on 8 December 2014 he was charged with the Passports Act offence 1992 mentioned at [2] above.

A perverse process is adopted

[30] Progress thereafter was glacial. The delay, for which the appellant has to take much responsibility, became prejudicial to his interests. In particular, given he remained a serving prisoner for his 1995 offending, he did not get the benefit of time served against any sentence he received for his 2013 and 2014 offending. Thus, he faced the prospect of being eligible for parole on the 1995 offending, but remaining incarcerated for his 2013 and 2014 offending, the sentence for which would take effect only on conviction. This conundrum was exacerbated by the fact that while accepting the 2013 and 2014 offending had occurred, the appellant considered he ought not to be convicted for it because of the circumstances of his deportation.

[31] Accordingly, the appellant filed an application under s 147 of the Criminal Procedure Act 2011 for dismissal of the 2014 charges. In the ordinary course such an application would have been dealt with pre-trial, in the District Court. If this Court then had to deal with it, it would be on appeal rather than at first instance. But that is not what occurred.

[32] Dealing with this application in the District Court had become protracted. Disclosure applications were made. Translations from documents in Portuguese were sought and obtained. An application was made to cross-examine the Commissioner

of Police, and granted. We were advised from the Bar that the Crown issued judicial review proceedings in the High Court in connection with that. We were also told by Mr Sinclair, who had not appeared for the Crown below, that the appellant was having difficulty obtaining an opinion from a Brazilian expert on the legality of his deportation.

[33] On 12 November 2015 the s 147 application was scheduled for hearing in the District Court. Witnesses were ready to be cross-examined, and an AVL link had been set up to enable cross-examination of Det Supt Pannett, who was stationed in Washington DC. However, the defence had just obtained newly-translated material, including the habeas corpus decision referred to at [28] above. The appellant's counsel applied for an adjournment of one month. An indication was given that it was unlikely that a trial would be needed. Either a sentencing indication would be accepted or the stay application would proceed.

[34] Instead something else altogether occurred. Anxious to progress his prospects of early release, the s 147 application was not progressed further by the appellant. Instead the case went to trial, in the peculiar manner described at [3] above, with the appellant inviting the jury to find him guilty of the 2013 and 2014 offending. In taking this course, it is clear the Crown and the District Court Judge accepted that the s 147 grounds for dismissal, relating to the circumstances of deportation, could then be advanced as grounds of appeal against the now-inevitable conviction. This they should not have done.

[35] It was said by the appellant in submissions that this course was sanctioned by this Court in *R v Parangi*.[6] That is not correct. *Parangi* concerned the old process under the now-repealed s 380 of the Crimes Act in which a trial court could reserve a question of law arising at or after trial, for opinion by this Court. Mr Parangi sought to challenge the jurisdiction of the District Court on well-worn grounds relying on the Te Ture Whenua Māori Act 1993. Upon intimation by the Judge that such objection had been tried and failed before, Mr Parangi pleaded guilty. Seemingly at the request of the defendant, the Judge then sought to refer the jurisdiction question to

---

6 *R v Parangi* CA365/00, 20 February 2001.

this Court under s 380. This Court held he could not do so, because no trial had actually occurred.[7]

[36] The decision is not authority for the embedded proposition of the appellant that an extant stay application based on abuse of process may simply be left undetermined in the court of trial, notwithstanding the alleged abuse making trial an affront to justice. Nor does it sanction the perverse course of a defendant inviting conviction at the very trial he asserts is an abuse of process, and then advancing an appeal against the invited convictions on the basis of the alleged abuse. This de facto leapfrog procedure quite wrongly thrusts the role of first instance decision-maker upon the appellate court. The issue of abuse of process, where apprehended, should be dealt with before trial in the trial court.

[37] Deferring the stay application should not have occurred. Justice however demands that we now deal with the abuse of process argument, in effect at first instance. Formally we must deal with this as an appeal against conviction under s 232 of the Criminal Procedure Act. Relevantly, the appellant must show "a miscarriage of justice has occurred for any reason".[8] We treat the appellant's abuse of process arguments as meaning that, if made out, the trial was a nullity: without the alleged disguised extradition, the trial would not have commenced nor proceeded.[9]

Should the convictions be set aside for abuse of process?

[38] The essence of the case advanced by the appellant is that his return to New Zealand was in effect a rendition; "a disguised extradition process in the form of an illegal deportation that was requested or procured by senior New Zealand authorities, with the explicit purpose of avoiding an extradition procedure". The effect of doing so was to deny him human rights norms codified in the Extradition Act 1999 and under international law "including natural justice rights, and the requirements of dual criminality and speciality". It is then said by the appellant that such disguised extradition:

---

7 At [5].
8 Criminal Procedure Act 2011, s 232(2)(c).
9 Section 232(4)(b).

> … is an abuse of process that is of such a serious affront to the moral integrity and conscience of the Court that it should, in the interests of justice, grant the appeal and quash the escape and travel document convictions as a remedial measure to put the appellant in the position he would have been in had the extradition process been followed.

[39] There is a wrinkle in that submission, in as much as the fundamental argument made by the appellant is that had extradition procedures been applied, the Brazilian Government (applying principles of speciality) would have made extradition conditional on New Zealand agreeing to commute his life sentence for murder to a finite term of no more than 30 years, being the maximum permissible under Brazilian law. That would have the curious effect of a limitation to that sentence being engineered by the appellant's unlawful act of escaping custody. However, the appellant does not attempt to argue that that consequence should be ordered by this Court. He referred in submissions to the prospect of advancing such an argument at another time before the Supreme Court.

Abuse of process: legal principles

[40] We turn now to the legal principles concerning abuse of process, in the particular context of disguised extradition cases.

[41] Two of the leading cases concern men by the name of Bennett. Both were New Zealanders. In *R v Hartley* in 1977 this Court considered a plea of abuse of process on the basis that the co-appellant Mr Bennett had been unlawfully brought back to New Zealand.[10] No warrant for his extradition had been obtained; the New Zealand authorities had simply asked the Melbourne police to put the appellant on the next plane to New Zealand. This they had done. As Woodhouse J put it:[11]

> … on the present occasion all the essential statutory precautions were blithely disregarded by the police in both countries. Not a move was made to get lawful authority for what was contemplated. Indeed in the absence of any direct admission by Bennett before he had left for Melbourne it is probable that the police in New Zealand could not have obtained the warrant which alone could initiate any lawful proceedings for his extradition from Victoria. So a telephone call to Melbourne was used instead. And as a result the man was removed from his bed and bustled back to the New Zealand police on the next flight.

---

10 *R v Hartley* [1978] 2 NZLR 199 (CA).
11 At 214.

[42] The Court held that Mr Bennett had been lawfully arrested within New Zealand, and so the Court had formal jurisdiction to try him. But it said, "we do not think the matter can be left there".[12] Prospectively a discretionary discharge, on the basis of unlawful and improper dealings by the prosecuting authorities and the need for the court to prevent abuse of its own processes, might be directed.[13] However the matter had not been argued in that manner before the High Court, and the argument had only evolved in the course of submissions on appeal. The Court therefore said:[14]

> In that context we refrain from deciding whether the case should have been disposed of on the discretionary ground alone; and we turn to consider the points relating to the obtaining of evidence.

[43] *R v Horseferry Road Magistrates' Court, ex parte Bennett*[15] is said to be the "beating heart of the modern law of abuse of process".[16] In *Bennett* a rather similar expedient was taken to that involving the other Mr Bennett, the relevant appellant in *Hartley*. The later Mr Bennett, also a New Zealander, had been arrested in South Africa but was wanted in England in relation to false pretences charges. No extradition treaty lay between the United Kingdom and South Africa. No extradition proceedings were initiated. Instead, as Lord Griffiths relates, he was simply placed on an aeroplane by South African police in Johannesburg ostensibly to be deported to New Zealand via Taipei.[17] But when he attempted to disembark at Taipei he was there restrained by two men identifying themselves as South African police officers who said they had orders to return him to South Africa and then to the United Kingdom. He was thus returned to South Africa, held in custody and then placed, handcuffed to his seat, on a flight from Johannesburg to Heathrow. There he was arrested by Scotland Yard officers. It appears that at least the second flight was made in defiance of an order of the Supreme Court of South Africa. The Scotland Yard officers denied any involvement in the process that had been adopted by the South

---

12 At 215.
13 At 216, referring to *Connolly v Director of Public Prosecutions* [1964] AC 1254 (HL).
14 At 217. The appellant's conviction ultimately was quashed on those evidential grounds.
15 *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL).
16 David Young, Mark Summers and David Corker *Abuse of Process in Criminal Proceedings* (4th ed, Bloomsbury, West Sussex, 2014) at [5.32].
17 *R v Horseferry Road Magistrates' Court, ex parte Bennett*, above n 15, at 51.

African police. They said simply that they had made inquiries as to whether he might be returned to them.

[44] The question in *Bennett* was jurisdictional rather than dispositive. It was whether the High Court had the power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused. The House of Lords (by majority) determined that it did. Lord Bridge put it in these terms:[18]

> When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.

Lord Bridge went on to note that since the prosecution in that case could never have been brought if the defendant had not been illegally abducted, the whole proceeding was thereby tainted. In reaching his views, Lord Bridge relied expressly on the judgment of Woodhouse J in *Hartley*.[19] Lord Lowry expressed similar views to those of Lord Bridge.[20]

[45] In *R v Bow Street Magistrates, ex parte Mackeson*, a case decided between the two Messrs Bennett decisions, the Court of Appeal of England and Wales was dealing with a clear case of disguised extradition.[21] In that case Sir Rupert Mackeson, finding the climate in England too hot after his business affairs came unstuck, chose instead to relocate to Zimbabwe-Rhodesia — at the time in a state of rebellion. Extradition therefrom to England had become impossible. The Metropolitan Police, wanting Mr Mackeson, communicated their desire for his return to their counterparts in Zimbabwe-Rhodesia. An executive deportation order was made. Mr Mackeson successfully challenged it in a Zimbabwe-Rhodesia court, but an appellate court

---

18 At 67.
19 At 66–67.
20 At 73–76.
21 *R v Bow Street Magistrates, ex parte Mackeson* (1982) 75 Cr App R 24 (CA).

overturned that decision. However, as Lord Lane CJ noted, the reversal left intact the adverse factual finding that the order was intended to effect extradition, being responsive to a request for Mr Mackeson's return.[22] At that point the Zimbabwean-Rhodesian authorities placed him on a plane and took him under close escort by air to England. Relying in part on the decision of this Court in *Hartley*, the Court of Appeal of England and Wales granted an application for prohibition and discharged the applicant on the theft charges he was then facing in England.[23] Lord Lane CJ described it as being "clear to me that the object of this exercise was simply to achieve extradition by the back door".[24]

[46] In *R v Latif*, the House of Lords was concerned with an allegation that an agent provocateur employed by the United States Drug Enforcement Administration had lured the defendants into England to collect a supply of heroin at a hotel room.[25] The facts continue:[26]

> A man, who pretended to have possession of the heroin on behalf of [the agent provocateur], then arrived. He was in fact a customs officer carrying six bags of Horlicks, got up so as to resemble the original bags of heroin.

The argument about luring to the jurisdiction fell away in argument, but there is a passage from the speech of Lord Steyn which is well worth reproducing as a statement of general principle:[27]

> If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is

---

22 At 28.
23 At 33.
24 At 30.
25 *R v Latif* [1996] 1 WLR 104 (HL).
26 At 109.
27 At 112.

> for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: …

[47] In *R v Mullen* the Court of Appeal of England and Wales was concerned with a case involving clear collusion between English and Zimbabwean authorities to effect the executive deportation of the defendant from Zimbabwe.[28] On arrival in England he was arrested and later convicted of conspiracy to cause explosions and sentenced to 30 years' imprisonment. The conviction was quashed by the Court of Appeal. The evidence disclosed that there was a meeting between the English police and security intelligence services to see if the defendant could "secretly, be summarily deported" from Harare to London.[29] The Zimbabwean authorities indicated they "did not want to get involved in extradition which was likely to get bogged down".[30] British authorities had attempted to conceal the fact that they had initiated contact in relation to the return of Mr Mullen. British SIS (MI6) expressed the view:[31]

> The ideal would be for Mullen to be arrested shortly before the departure of a direct flight and put aboard it. A stage manager's skills would be essential here …

There was evidence that British security authorities had made efforts to "lean on" their Zimbabwean counterparts. The Zimbabwean authorities instructed that Mr Mullen "be allowed no access whatsoever to his lawyers".[32]

[48] There was no question before the Court that Mr Mullen had entered Zimbabwe on the basis of false particulars. He was therefore amenable to deportation. Nor was there any question, given the evidence, of his guilt of the offence with which he had been charged and later convicted. But as the Court noted, "certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice".[33] Consideration was given by the Court to the gravity of the offending, whether any consideration of urgency justified expedient measures, and in particular the conduct of those involved in the deportation on behalf

---

28 *R v Mullen* [2000] QB 520 (CA).
29 At 526.
30 At 526.
31 At 527–528.
32 At 528.
33 At 534. Woodhouse J made a similar point in *R v Hartley*, above n 10, at 216–217.

of the receiving (and ultimately prosecuting) state. The position was summarised by Rose LJ in these terms:[34]

> This court is firmly of the view that it must have been appreciated by the SIS, and probably by the police in Britain, that the vital element in the operation, the insulation of the defendant from any legal advice following his detention, was in breach of specific provisions of the law of Zimbabwe, or, at the least, was contrary to the defendant's entitlement as a matter of human rights.
>
> In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.

The Court therefore found, echoing the words used by Lord Steyn in *Latif*, that the conduct of the prosecuting authorities was "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed".[35]

[49] In *Burns v R* the Court of Appeal of England and Wales was concerned with an appellant who had been arrested in the United Kingdom for the unlawful importation of cocaine.[36] He escaped custody, making his way to Venezuela, entering that country under a false name and using a false passport. Almost five years later he was arrested in Venezuela for drug-related offences unconnected with those in the United Kingdom. Venezuelan authorities made contact with British Customs and Excise, and they made the link between the arrested "Edward Cooper" and the Mr Burns they were looking for. Venezuelan authorities indicated that the matter would be put before a judge, and given the appellant was present in Venezuela on a false passport, he would probably be deported. At the request of Venezuelan authorities, British Customs and Excise provided a letter providing details about the appellant. It was, as Judge LJ put it, "a direct response to the request to provide factual details".[37] A deportation order was then made against the appellant by a judge. The following day he was taken to the airport by security officials and escorted to

---

34 At 535.
35 At 535, quoting *R v Latif*, above n 25, at 113.
36 *Burns v R* [2002] EWCA Crim 1324.
37 At [11].

an aircraft for a flight to London. On arrival in London, the appellant was arrested. As Judge LJ said:[38]

> … it is perhaps worth emphasising that if the Venezuelan authorities did not want the appellant to remain in Venezuela, the decision that he should be deported to this country was perfectly logical. He was a citizen of the United Kingdom. He had left his country of origin, and the Venezuelan authorities returned him to it. If he had not escaped lawful custody and faced charges on his return, we should not have entertained the slightest concern with what seems to have been a common sense approach to the problem posed by a foreigner who made his way into Venezuela, using a false identity, and who was not wanted there. Equally, as the appellant had escaped from custody, and disappeared abroad, it would hardly have been surprising for the authorities here to be somewhat gratified at the prospect of his return.

[50] After citing *Bennett* and *Latif*, Judge LJ said:[39]

> An indicative, but not determinative line, may be drawn between cases where the prosecuting authorities have acted in bad faith, or with an excess of misguided enthusiasm for what is perceived to be a proper objective, deliberately subverting the defendant's rights not to be forcibly abducted to this country without proper process, and those cases where the prosecuting authorities, acting in good faith, have undermined or contributed to the undermining of the rights of the Defendant. In *R v Mullen* … Rose LJ pointed out further considerations: "In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged." In short, when deciding whether to exercise its undoubted powers to prevent an abuse of its process, the exercise of the court's discretion is fact specific.

[51] It was accepted by the Court of Appeal that there had been breaches of both domestic and international law by Venezuelan authorities. But there had been no collusion or connivance by the British authorities within those breaches. They were not involved in the initial arrest, and they did not exaggerate or falsify the information provided to the Judge who made the deportation order.[40] As Judge LJ went on to note:[41]

> It is of course true that the British authorities did not try and discourage the authorities in Venezuela from the process, on which they seemed determined, nor question or challenge its legality. It was not incumbent on them to do so. And given their understanding of the view likely to be taken by the Venezuelan authorities, they sought to co-operate in the process, no doubt in the hope of achieving the Appellant's return to the United Kingdom where

---

38 At [24].
39 At [27], quoting *R v Mullen*, above n 28, at 537.
40 At [29].
41 At [30].

> he could be arrested. In our judgement, the process of this court was not subverted.

[52] Finally in this survey of the case law, we refer to *Wilson v R*.[42] *Wilson* is not a disguised extradition case, but rather concerned police misconduct in producing a false search warrant, targeted at an undercover officer, in order to enhance his credibility with a gang under investigation. The majority judgment of William Young, Glazebrook, Arnold and Blanchard JJ (given by Arnold J) stated:[43]

> The power of a court to grant a stay of proceedings has long been recognised as necessary to enable a court to prevent an abuse of its processes. In New Zealand, the existence of this power was confirmed in several decisions of the Court of Appeal, most notably *Moevao v Department of Labour*,[44] where it was accepted that the power applies in respect of both criminal and civil proceedings.
>
> In relation to criminal proceedings, a stay may be granted where there is state misconduct that will:
>
> (a) prejudice the fairness of a defendant's trial ("the first category"); or
>
> (b) undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed ("the second category").
>
> It follows that the analysis is not backward-looking, in the sense of focussing on the misconduct, but rather forward-looking, in that it relates to the impact of the misconduct on either the fairness of the proposed criminal trial or the integrity of the justice process if the trial proceeds.

[53] The Court also approved the observations of McGrath J in *Fox v Attorney-General*, a case concerning whether it was abusive for the police to re-lay charges that had previously been withdrawn by agreement:[45]

> Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. … The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude

---

42 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
43 At [39]–[40] (footnote omitted).
44 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).
45 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

> the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[54] In *Wilson*, Arnold J went on to say:[46]

> To summarise, when considering whether or not to grant a stay in a second category case, the court will have to weigh the public interest in maintaining the integrity of the justice system against the public interest in having those accused of offending stand trial. In weighing those competing public interests, the court will have to consider the particular circumstances of the case. While not exhaustive, factors such as those listed in s 30(3) of the Evidence Act will be relevant, including whether there are any alternative remedies which will be sufficient to dissociate the justice system from the impugned conduct. In some instances, the misconduct by the state agency will be so grave that it will be largely determinative of the outcome, with the result that the balancing process will be attenuated. The court's assessment must be conducted against the background that a stay in a second category case is an extreme remedy which will only be given in the clearest of cases.

[55] Bearing in mind Lord Steyn's sensible injunction in *Latif* that general guidance on how the discretion to stay for abuse of process in particular cases is not useful,[47] the following limited general points may be gleaned from the case law:

(a) The appropriate test for a "category 2" stay based on state misconduct is whether there has been an abuse of process "which amounts to an afront to the public conscience"[48] or which is "so inconsistent with the purposes of criminal justice that for the Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety".[49]

(b) The hallmark of category 2 abuse process is unlawful conduct by the New Zealand authorities in the foreign jurisdiction or want of good faith or a proper motive in subverting the defendant's rights in that jurisdiction.

(c) It is not, therefore, sufficient simply for the deportation to be unlawful according to the laws of the state deporting. As the decision in *Burns*

---

46 *Wilson v R*, above n 42, at [60].
47 *R v Latif*, above n 25, at 113.
48 At 112.
49 *Fox v Attorney-General*, above n 45, at [37].

makes clear, what is needed is a knowing appreciation by the requesting state that deportation is unlawful, or is likely to be unlawful according to those laws. As Judge LJ stated in *Burns*, it is not incumbent on the requesting state to question or challenge the legality of deportation.[50] We add that that observation applies with particular force where deportation is ordered by a court of competent jurisdiction — as it was in *Burns* (compared with *Mackeson, Mullen* and *Bennett* where the deportation was a purely executive action by the deporting state).

(d) A stay of prosecution altogether is an extreme step and will be granted only in the clearest of cases. Likewise, the setting aside of convictions on the same grounds.

(e) The burden of proof lies on the applicant to establish misconduct and to justify the grant of a stay. The burden may shift if all relevant knowledge about the abuse resides with the prosecuting authorities.[51]

(f) Although the evaluation is sometimes described as a discretionary test, according to principles laid down in *Taipeti v R* the assessment is an evaluative rather than discretionary one.[52] But as we deal with the issue effectively at first instance, the significance of the distinction is limited in this case.

Deportation versus extradition

[56] The essence of extradition is, and always has been, the making of a formal request by one state for the remission of an individual by another state. At common law, there was some debate as to whether extradition was possible.[53] The eventual view reached was that extradition was not available at common law and could only occur with statutory authority.[54] The Extradition Act 1870 (UK) 33 & 34 Vict c 52

---

50 *Burns v R*, above n 36, at [30].
51 *Grant v R* [2005] EWCA Crim 1089, [2006] QB 60 at [44]–[45].
52 *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [49].
53 See Alun Jones and Anand Doobay *Jones and Doobay on Extradition and Mutual Assistance* (3rd ed, Sweet & Maxwell, London, 2005) at [1–001]–[1–005]. The Statute of Foreigners (Law No 6,815/1980, Brazil) proceeded on that same premise: see [58] below.
54 *R v Governor of Brixton Prison ex parte Soblen* [1963] 2 QB 243 (CA) at 300 per Lord Denning

introduced a system whereby an arrangement with a foreign state for the surrender of fugitive criminals could be recognised and applied under the Act by an Order in Council of Her Majesty. Extradition therefore is a matter for domestic law, which by statute gives effect to various international treaties and bilateral arrangements at international law.

[57] Extradition is now governed in New Zealand law by the Extradition Act 1999. New Zealand and Brazil have no extradition agreement. If New Zealand wishes to obtain extradition from Brazil it must implement the formal request procedures in pt 6 of the Act. The request must be made to the competent authorities in that country or to a diplomatic representative.[55]

[58] Extradition from Brazil under Brazilian law was governed by arts 76 to 94 of the Statute of the Foreigner at the relevant time. In the absence of an extradition treaty, art 76 states that extradition will be granted where reciprocity is promised to Brazil. Article 80 states that extradition shall be requested through diplomatic channels, accompanied by prescribed documentation including, for example, a certificate of conviction. That request shall be passed by the Ministry of Justice to the Federal Supreme Court.[56] The state interested in extradition may, prior to formalising the request or with the request, seek the provisional arrest of the person to be extradited through diplomatic channels, to be granted by the Federal Supreme Court.[57] The requesting state then has 90 days to formalise the request for extradition.[58] Once the person is provisionally imprisoned, the extradition request shall be forwarded to the Federal Supreme Court.[59] Extradition may only occur at the order of the Federal Supreme Court.[60]

[59] In short, whether to pursue extradition is not a decision for Brazilian authorities. It is dependent, as conventional, on request — here by New Zealand

---

MR; and *Ex parte Lillywhite* (1901) 19 NZLR 502 (SC) at 505 per Stout CJ. See James Fitzjames Stephen *History of the Criminal Law of England* (MacMillan and Co, London, 1883) vol 2 at 66.

55 Extradition Act 1999, s 61(2).

56 Statute of the Foreigner, art 81.

57 Article 82.

58 Article 82, § 03.

59 Article 84.

60 Article 83.

authorities through diplomatic channels under art 80. But it is then to be granted or refused by the Federal Supreme Court of Brazil.

[60] The decision to pursue deportation, on the other hand, is one for Brazilian authorities. At the relevant time, deportation was mainly governed by arts 57 to 64 of the Statute of the Foreigner. Whether deportation will be ordered evidently is a decision for the Brazilian courts. Two particular provisions are relevant. First, art 58 states that deportation shall be to the country of nationality or origin of the foreigner, or to another country that consents to accept them. Second, art 63 states that deportation will not take place if it "involves extradition not admitted by Brazilian law". Whether or not that provision is triggered obviously is primarily a question for the Brazilian courts in considering a deportation order, or an appeal therefrom.

Det Supt Pannett's evidence

[61] In advance of the stay hearing to occur in the District Court on 12 November 2015, Det Supt Pannett swore an affidavit. It was referred to by the Crown in the present appeal, without objection. It represents, in addition to the disclosed documents, a fundamental source of information on which this Court can assess whether or not there has been an abuse of process. The appellant's own affidavits say little apart from exhibiting documents disclosed to him and a legal opinion from Professor Cláudio Finkelstein of the Pontifícia Universidade Católica de São Paolo.

[62] In his affidavit Det Supt Pannett sets out the background circumstances in which he flew to Rio de Janeiro to assist tracing the appellant. He advises that in his role as police liaison officer to the Americas, his role was to coordinate and liaise with the Brazilian Federal Police, Brazilian Interpol and other Brazilian agencies as required. He states that his role was in effect transactional and primarily involved acting as a conduit for information between the Brazilian authorities and the New Zealand police. He states:

> Once Mr Smith was located by [the Brazilian Federal Police] and arrested I continued to act as a live conduit for information between [the Brazilian Federal Police] and [the New Zealand police]. This included asking questions to try to establish what was going on and the processes that were required to be followed once deportation had been ordered, as well as answering questions I was asked by the [the Brazilian Federal Police].

[63] Det Supt Pannett asserts, quite vigorously, that the New Zealand police had no knowledge of any illegality in the deportation of the appellant.[61] He states that his enquiries led him to believe that the deportation order made by the 3rd Federal Criminal Court was "both legitimate and lawful". He continues:

> I also believed, as a result of my [enquiries], that it would be lawful to carry out the deportation order as no orders or rulings had been made by the Brazilian Supreme Court indicating the matter had moved from being handled as a deportation to a formal extradition process, or otherwise indicating that it would be unlawful to follow the ruling of the Brazilian Federal Court. We also did not hear from Mr Smith's Brazilian lawyers at any stage, and no appeals or other attempts to review the deportation order were made to my knowledge.

He relied also on the invitation received from the Brazilian Federal Police and Brazilian Interpol to allow New Zealand police staff to enter Brazil for the purpose of escorting the appellant to New Zealand in accordance with the deportation order and the advice he had received from the Federal Police Chief Asmuz as to her understanding that deportation could proceed in the absence of a Federal Supreme Court decision. Similar advice was received from Federal Police Chief Patury.

[64] Det Supt Pannett also states, again with some vigour, that New Zealand authorities did not encourage or instigate the deportation order. We quote his remarks in full at [78] below.

A fundamental failing by the appellant

[65] It may be noted that at the November 2015 hearing referred to at [33] above, Det Supt Pannett was to have been cross-examined on his affidavit. As we have noted, that hearing did not proceed. Yet the appellant expressly elected not to seek to cross-examine Det Supt Pannett in this Court. Tackled on the point, the appellant submitted we could draw all necessary adverse inferences in support of the appeal from the disclosed documents. We disagree.

---

[61] It may be noted that this affidavit was sworn four years before the appellant procured the contrary opinion of Professor Finkelstein.

[66] Section 92 of the Evidence Act 2006 applies. A witness should be cross-examined if a court is to be asked to disbelieve them.[62] The rationale for this is to ensure fairness and completeness.[63] The appellant invites this Court to reject Det Supt Pannett's explanation of his actions and instead interpret his actions and those actions of the New Zealand authorities as being in bad faith. He goes further, as we will address in a moment, and effectively invites this Court to conclude the order of the 3rd Federal Criminal Court was obtained by improper means. These allegations are central to the essential issue of whether there has been an abuse of process. They should have been tested in cross-examination, as originally arranged. Rationally contested allegations of bad faith and deception ought not be resolved without the benefit of oral evidence and cross-examination.[64]

[67] Bearing in mind that we come to this analysis effectively as a court of first instance, we think considerable caution is needed before adverse findings of bad faith can be made against the officer concerned in the absence of cross-examination. He has given a cogent explanation of his understanding and actions, consistent with an understanding of legality of deportation and an absence of bad faith or improper pressure being applied by himself or other New Zealand agencies on the Brazilian authorities and judiciary. This point will become important as we turn now to consider the merits of the appellant's claim of abuse of process.

Was there such misconduct here that the convictions are an affront to the public conscience?

[68] Six submissions by the appellant require analysis.

[69] First, the appellant submits that his deportation from Brazil was unlawful under Brazilian law. He provides, appended to his affidavit, the opinion from Prof Finkelstein referred to earlier and produced without objection. Prof Finkelstein opines that the appellant's deportation was an inadmissible extradition under Brazilian law, violating art 63 of the Statute of the Foreigner as well as the fundamental guarantee set forth in art 5 of the Brazilian Federal Constitution prohibiting life

---

62 *Dewar v R* [2008] NZCA 344 at [41], citing *Browne v Dunn* (1893) 6 R 67 (HL).

63 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [104]. See also *Gutierrez v R* [1997] 1 NZLR 192 (CA) at 199.

64 *Boswell v Mitchell* [2017] NZCA 105 at [3].

imprisonment. The appellant observes that the Crown has produced no opposing expert opinion to challenge that of Prof Finkelstein.

[70] We accept (as does the Crown) the possibility that had the appellant challenged the order made by Judge de Souza on appeal, there is a prospect (applying the principles expounded by Prof Finkelstein) that his appeal would have been successful. It may be observed, however, that a lawsuit filed by the appellant for damages against the Brazilian Federal Government for wrongful deportation was dismissed by the Regional Federal Court of the 2nd Region.

[71] But in our view any potential underlying invalidity of Judge de Souza's order on its merits is beside the point. The order was not executive, but judicial, made by a Court of competent jurisdiction. In the ordinary course, courts do not question the merits or the validity of the reasoning of a foreign judgment if satisfied that the foreign court acted within its jurisdiction, the judgment is final and there is evidence of its formal validity.[65] Even less so, it may be thought, might New Zealand police be expected to question such a judgment when dealing with their counterparts in Brazil, who sought and obtained it. Whatever the susceptibility of Judge de Souza's deportation order on appeal, had there been one, it was an apparently regular order by a court of competent jurisdiction. It was not for the New Zealand authorities to look behind it in the absence of knowledge it was obtained or likely obtained unlawfully or contrary to natural justice.[66] Nor was it for those authorities to second guess its prospects had an appeal been advanced. The advice from the Ministry of Foreign Affairs and Trade to take the order at "face value" was, we consider, appropriate.

[72] Secondly, the appellant asserts that New Zealand authorities had knowledge of the illegality of his deportation under Brazilian law. He points in particular to communications from Mr de Almeida, a Senior Federal Prosecutor, indicating that in his opinion under Brazilian law the extradition process cannot be substituted for

---

65 F A Mann "The Sacrosanctity of the Foreign Act of State" (1943) 59 LQR 155 at 155–156; *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [36]; *Kemp v Kemp* [1996] 2 NZLR 454 (HC) at 458; and *Ross v Ross* [2010] NZCA 447, [2011] NZAR 30 at [13]–[14]. See also Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [5.10]–[5.13]; and Lord Collins (ed) *Dicey, Morris and Collins: The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) vol 1 at [14R–020]–[14–027].

66 As to which, see [76] below.

a deportation process.[67] He also refers to a communication on 21 November 2014 from Ms de Sousa Coutinho, Head of the Department of Foreigners at the Brazilian Ministry of Justice, which indicated in her opinion under Brazilian law deportation could not be used in an extradition case and that deportation would not be an appropriate avenue if the consequence of deportation would be that the deportee would serve a life sentence. In a contemporaneous email Ms de Sousa Coutinho indicated that deportation would not go forward because Brazil could not deport someone facing a life sentence.

[73] The position is, we think, both more complex than the appellant suggests, but in the end also relatively straightforward.

[74] The added complexity we refer to is the inconsistency of stance and advice being taken by the Brazilian authorities. But for all practical purposes, that appears to have ended with Chief Navajas's concession to the 3rd Federal Criminal Court on 24 November 2014.[68]

[75] The essential simplicity of the position is fourfold. First, whatever the views of Mr de Almeida and Ms de Sousa Coutinho, Federal Prosecutor Ms Pereira Duque Estrada nonetheless made an application to the 3rd Federal Criminal Court on 21 November 2014 for the appellant's deportation. Secondly, the deportation order had in due course been made by the 3rd Federal Criminal Court, a Brazilian court of competent jurisdiction. As we have said, the advice from the Ministry of Foreign Affairs and Trade that this might be taken by the police at face value is correct in terms of the position identified by Judge LJ in *Burns*.[69] Thirdly, although the Brazilian authorities anticipated New Zealand might initiate an extradition request via diplomatic channels (pursuant to art 80 of the Statute of the Foreigner), New Zealand had not done so. Lastly, it is evident that the New Zealand police plainly preferred being the recipient of deportation, rather than the initiator of extradition. As we have said already, in that respect the position is comparable to that of the United Kingdom authorities dealing with Venezuela in *Burns.* We will address in a moment the claim

---

67 See [17] above.
68 See [23] above.
69 *Burns v R*, above n 36, at [30].

that in doing so, the New Zealand authorities overstepped the line and subverted the appellant's rights.

[76] We add that while the appellant alleged various breaches of natural justice in the making of his deportation order and the ensuing execution of it, it did not appear to us from the record that these points were either expressed at the time, were expressed to the police, or were apprehended by them regardless of communication by the appellant. The record before us is silent on such matters, save for an email from Det Supt Pannett shortly prior to the appellant's deportation stating that the appellant had "[m]ade a bit [of] a play of having engaged a lawyer but otherwise quiet". Det Supt Pannett states that the police "did not hear from Mr Smith's Brazilian lawyers at any stage, and no appeals or other attempts to review the deportation order were made to my knowledge". We decline to draw an adverse inference in the absence of factual underpinning on the record or cross-examination of Det Supt Pannett.

[77] Thirdly, the appellant submits that the New Zealand authorities procured his deportation from Brazil in order to avoid the extradition process. He refers in particular to the evidence identified at [16] above, namely the indication that the New Zealand police, and Det Supt Pannett in particular, were exploring "every opportunity for deportation". Det Supt Pannett was in communication with those Brazilian officials who ultimately made application to Judge de Sousa for the deportation of the appellant. He submits that the efforts by the police in conjunction with the Ministry of Foreign Affairs and Trade amounted to "sustained efforts to procure a deportation" and the multi-agency resolution to that effect. On the basis of that evidence, the deportation from Brazil "was not a unilateral decision taken by the Brazilian authorities of their own volition". It was instead procured by the New Zealand authorities.

[78] We do not think the evidence before us supports that inference as a matter of necessity or probability, and it is controverted directly by Det Supt Pannett in his affidavit. In it he states:

> Throughout the investigation I was conscious that it would be inappropriate for myself or any member of the [New Zealand police] to interfere in any way with the Brazilian justice system, and I was very careful not to place any pressure on the Brazilian judiciary or to encourage or persuade any person to

> make an order deporting Mr Smith. As such, the deportation order was, as far as I could tell, wholly the result of internal Brazilian processes and was not procured or influenced by members of the [New Zealand police].
>
> I was also aware that the Brazilian authorities (and in particular the Brazilian Federal Court Judge who granted the deportation order) were convinced in their desire to deport Mr Smith, and seemed intent on either deporting or removing Mr Smith.
>
> Although my primary role was that of an information conduit, once the deportation order was made and I had been told that it was within the lawful power of the Brazilian authorities to deport Mr Smith, I sought to co-operate in the process of deportation and co-ordinated with [New Zealand police] in New Zealand to arrange a team to accompany Mr Smith on his flight to New Zealand. My cooperation in this was always contingent on and subject to my belief that it would be lawful to do so.

[79] We have set out the relevant evidence from the record at [11] to [27] above. We have found that it is likely that Brazilian authorities would have been aware that their New Zealand counterparts would prefer deportation, rather than having to make an extradition request. And we have found the offer of assistance by the New Zealand authorities was material to the Brazilian authorities' decision to apply for deportation.[70] It was also referenced in Judge de Souza's decision.

[80] When uncertainty developed over the propriety of deportation (at the instance of Interpol Brasilia), the New Zealand police appear on the record to have quite properly stood back and allowed the argument (which was between different branches of the Brazilian Federal government) to be resolved by that government.[71]

[81] In the absence of cross-examination, we decline to reach the conclusion of impropriety urged upon us by the appellant. The deportation ordered by the Federal Criminal Court cannot be said to be procured by New Zealand authorities, any more than the cooperation by United Kingdom authorities with their Venezuelan counterparts procured the deportation of *Burns*.

---

70 At [19] above.

71 We do not overlook Det Supt Pannett's internal email of 25 November 2014 stating "The [Brazilian Federal Police] administration are nervous about making a decision at this point in time and I continue to push as hard as I can on this point." However, we consider it has to be read in the context set out at [22]–[24] above. The "decision" referred to concerned permission for New Zealand police officers to travel to Brazil to accompany the appellant back to New Zealand.

[82] Fourthly, the appellant submits that the New Zealand authorities took steps to ensure that his final destination was New Zealand, by obtaining an emergency travel document unlawfully (in breach of s 23(1) of the Passports Act — which required an application by the appellant for issue) and then detaining and escorting him to the airport, through transit in Chile, and on to New Zealand.

[83] We begin by noting that the terms of the deportation order indicate that the appellant was to be deported to his "home country" — New Zealand. In making the order Judge de Souza was aware that New Zealand police were willing to travel to Brazil and accompany the appellant to ensure his deportation to his country of origin. It was apparently for that purpose that the Judge de Souza directed that New Zealand police were to be informed of the order.

[84] The exact circumstances of the appellant's physical deportation from Brazil and transit through Chile are not covered in any detail in the affidavits before this Court (least of all by the appellant). We infer from the record that the appellant remained effectively in the custody of Brazilian authorities until seated on the plane to Chile. From this point he was clearly in the custody of the accompanying New Zealand officers. But it was a foregone conclusion that the consequence of his deportation by Brazil to his "home country" meant he would have to return to New Zealand. It is utterly improbable that Chilean authorities would have admitted him to that country, had he sought to clear customs in that country. It is likewise improbable that, had he been in possession of his emergency travel document and not been accompanied by police, he could have entered or ended up in any country other than New Zealand. It cannot be said that New Zealand authorities ensured his final destination was New Zealand. Rather, it was the direct consequence of the judicial deportation order.

[85] The appellant relies on the decision of the High Court of Australia in *Moti v R*,[72] where as part of a disguised extradition by deportation (from the Solomon Islands) Australian authorities supplied Mr Moti (an Australian, but the former Solomon Islands Attorney-General) with travel documents to enable travel back to

---

[72] *Moti v R* [2011] HCA 50, (2011) 245 CLR 456.

Australia to face seven charges of sexual intercourse with a person under the age of 16. The prosecution ultimately was stayed as an abuse of process, because the Australian officials knew or believed the process was unlawful under Solomon Islands law: it permitted a judicial appeal before deportation was effected. That right had been drawn to the Australian authorities' attention by their Acting High Commissioner, but deliberately overlooked by them. A point of peripheral significance, but not the subject of formal finding, was that Mr Moti had not applied for his travel document.[73] Its relevance there was that it was a step taken in what was a knowingly unlawful rendition. The case is very different to the present one.

[86] The appellant contends that the emergency travel document he was supplied with had not been applied for by him, as s 23(1) of the Passports Act contemplates. The Act creates a statutory obligation on the Crown's part to issue passports and a statutory discretion to issue emergency travel documents on the making of a proper application.[74] The issue of such instruments, each confirming both identity and nationality of a New Zealand citizen, has historically been an executive act sourced in the Crown's prerogative.[75] As Professor Joseph observes, the Act "supplements" the prerogative by establishing a right to a passport, and (it might be added) the circumstances in which the discretion to issue an emergency travel document must be exercised.[76] In terms of the principle in *Attorney-General v De Keyser's Royal Hotel Ltd* in our view the Act does not "cover the field" and oust the prerogative altogether as a source of power to issue either instrument.[77] Rather it enacts procedural conditions under which persons may apply for such instruments, the completion of which may (in the case of passports) confer an entitlement. The Crown remains entitled to issue an emergency travel document of its own motion and apart from the Act. There is no suggestion that the appellant was not entitled in fact to

---

73 At [65].

74 Passports Act, ss 4(1) and 23(1).

75 *R v Brailsford* [1905] 2 KB 730 at 745; *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) at 369; *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215 (ONCA) at [53]; *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* [1989] QB 811 (CA) at 817 and 820; and Paul F Scott, "Passports, the Right to Travel, and National Security in the Commonwealth" (2020) 69 ICLQ 365 at 366–378.

76 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 689.

77 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 539; and *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [110]–[121].

the document, or that it misstated his identity or nationality. The issue of the document was lawful.

[87] Fifthly, the appellant also submits that the New Zealand authorities procured his deportation by the provision of false information to the Brazilian authorities and effecting his deportation in the knowledge that he had made an application for habeas corpus which had not yet been determined.

[88] The allegation that New Zealand authorities provided false information relates to an email dated 10 November 2014 sent to Interpol Brasilia by Det Sgt Humphries stating that "[the appellant] has previously told his associates that he wants to travel to South America to sexually offend against young boys". The appellant deposes that he did not make this statement. Following an official information request by the appellant, Det Sgt Humphries responded that he was unable to find any document from which the statement was sourced and concluded that the information was received verbally and transcribed directly into the 10 November 2014 email. Det Sgt Humphries deposes that he did not fabricate the statement as the appellant alleges. He states he most likely received the information from a police or corrections officer but cannot remember who.

[89] It is unnecessary for us to decide whether this statement was false, or whether it was supplied to procure the appellant's deportation. The concern expressed in the application and resulting order was focussed on his "dangerousness" and the information that he travelled to Brazil intending to marry and have children. The decision makes no reference to it. We were informed from the bar that if he were to have children, he could not be deported under Brazilian law. If Det Sgt Humphries' statement was false, it cannot be said to have procured his deportation.

[90] If it were necessary to decide this factual issue, we would not be willing to conclude that Det Sgt Humphries knowingly provided false information in bad faith. Det Sgt Humphries too was not cross-examined by the appellant. We also accept Mr Sinclair's submission that any bad faith would be insignificant as the reference to the appellant's statements that he wished to sexually offend against young boys were not repeated in subsequent communications including the Red Notice.

[91] Sixthly, it is also submitted (by Mr Tuck) that the New Zealand authorities' actions infringed the appellant's rights under the New Zealand Bill of Rights Act 1990 (NZBORA). There is nothing in that Act which expressly prohibits its extraterritorial application. The NZBORA therefore applies to the actions of the state in question, namely the officers acting outside their lawful authority under the Policing Act 2008. Three rights are alleged to have been breached. First, the alleged disguised extradition is said to resulted in the appellant's arbitrary detention, in breach of s 22 of the NZBORA. Secondly, the failure to ensure the appellant could consult with his lawyer prior to deportation breached his rights under s 23(1)(b). Thirdly, extradition before the determination of the appellant's habeus corpus application breached his right to natural justice under s 27(1).

[92] The NZBORA does not apply to officials of overseas countries that detain a person for extradition to New Zealand.[78] But whether the NZBORA applies to acts of the New Zealand state performed abroad has yet to be authoritatively explored.[79] We accept for present purposes that the NZBORA may have extraterritorial application. This Court has observed that there is no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore.[80] Again for present purposes, whether the NZBORA will apply turns on whether the New Zealand officials in question perform a New Zealand public function, and whether the NZBORA's application is justifiably limited by the relevant foreign state's domestic laws.[81]

[93] We have found the appellant was in the custody of the Brazilian Federal Police until seated on the plane bound for Chile. The alleged breaches of ss 23(1)(b) and 27(1) appear misplaced. The appellant was under the control of Brazilian authorities, subject to the Brazilian legal system. In this respect we follow the approach taken by Tipping J in *R v Matthews*, a case concerning the actions of Australian officers, with

---

78 *R v Matthews* (1994) 11 CRNZ 564 (HC).

79 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [39]. The issue was left open in *Jian v Residence Review Board* HC Wellington CIV-2005-485-1600, 3 August 2006 at [26]; and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [87].

80 *Young v Attorney-General* above n 79, at [40].

81 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 115.

a New Zealand officer observing, arresting an individual in Brisbane on an extradition warrant in favour of New Zealand.[82]

[94] We turn now to the alleged arbitrary detention and breach of s 22 following custody passing from Brazilian authorities to New Zealand authorities aboard the aircraft. The NZBORA may apply from this point onwards. We have found the appellant was clearly in the custody of the New Zealand police officers from that point. The essential question is whether there was lawful authority for that detention from handover until arrival in New Zealand. Mr Tuck's submission that the officers had no authority as they did not fall within the definition of subpt 2 of pt 5 of the Policing Act is misplaced. We accept that they were not involved in an "overseas operation" as defined by s 86 of the Policing Act. But that did not prevent the officers exercising extraterritorial authority. This Court has held that powers of arrest under ss 31 and 315 of the Crimes Act may be exercised outside the territorial limits of New Zealand in relation to arrests for offences triable in New Zealand courts.[83] The officers undeniably had good cause to suspect the appellant of committing an offence triable in New Zealand and punishable by imprisonment.

[95] In our view, the NZBORA argument advanced by Mr Tuck adds little to the second category of common law abuse of process with which we are concerned. Fair trial rights affirmed by the NZBORA clearly inform any analysis under the first category. But the second category is concerned with whether an abuse of process affects public confidence in the integrity of the judicial process. In essence, Mr Tuck's submission is that arbitrary detention as part of a disguised extradition breaches the appellant's rights under s 22 and is an abuse of process. The reasoning is circular: the detention may be arbitrary in these circumstances if an abuse of process (disguised extradition) has occurred. The better course here is to examine the premise, the abuse of process, on which the further alleged consequence depends. There is no need to go beyond that.

---

82 *R v Matthews*, above n 78.

83 *Teddy v New Zealand Police* [2014] NZCA 422, [2015] NZAR 80 at [76]–[77]. The Supreme Court refused leave to appeal: *Teddy v New Zealand Police* [2015] NZSC 6.

Conclusion

[96] This is not a case in which a man lawfully entitled to travel to a foreign state has been wrested from that jurisdiction to suit the prosecutorial convenience of his state of domicile. It is, therefore, to be distinguished from *Hartley*, *Bennett* and *Mullen*. Instead the appellant was a convicted and imprisoned offender who had escaped from custody and travelled unlawfully into Brazil as a fugitive. He openly acknowledges having committed the acts forming the offences, escaping from lawful custody and passport fraud, on which (at his own invitation) he was convicted. It was always open to the Brazilian authorities to deport him back to his state of origin, and that is what they did. We do not identify on the evidence improper pressure put on the Brazilian authorities to deport rather than extradite. What is more, the appellant's deportation was not the product of a purely executive order, but rather a judicial order made by a court of competent jurisdiction. There was no basis for the New Zealand authorities to have to look behind that judicial order. Finally, no extradition order had been sought by New Zealand, and none had been made by Brazil.

[97] We do not consider the appellant has established misconduct sufficient to take the exceptional step of precluding his conviction on the basis of abuse of process. In this respect the case falls clearly on the *Burns* side of the scale. The return of the appellant in these circumstances and his convictions for escaping lawful custody and obtaining a passport by false pretences — actions which he does not deny — are not an affront to the public conscience.

Result

[98] The appeal against conviction is dismissed

Solicitors:
Crown Law Office, Wellington for Respondent