IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-583
[2025] NZHC 2634

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	KIM DOTCOM Applicant
AND	MINISTER OF JUSTICE First Respondent
	COMMISSIONER OF POLICE Second Respondent

Hearing: 26 and 27 May 2025

Appearances: R M Mansfield KC and S L Cogan for Applicant
J E Hodder KC and S J Leslie for First Respondent
G M Taylor and F R J Sinclair for Second Respondent

Judgment: 10 September 2025

JUDGMENT OF GRICE J
(Judicial review)

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Introduction

[1] In 2012 the United States requested the extradition of Mr Kim Dotcom from New Zealand to face charges of copyright infringement, money laundering, and wire fraud, in relation to his company, Megaupload Ltd.

[2] On 4 November 2020, the Supreme Court of New Zealand held that Mr Dotcom was eligible for surrender to the United States on 12 charges.[1]

[3] On 8 August 2024, the Minister of Justice (the Minister) determined that Mr Dotcom should be surrendered to the United States to face trial on the 12 charges.[2] By letter dated 12 August 2024, the Minister set out his reasons for the decision and attached a surrender order made under the Extradition Act 1999 (the Surrender Decision).[3]

[4] Mr Dotcom now seeks judicial review of the Surrender Decision. He points to a significant disparity between the sentence he might face if he is found guilty on the charges in the United States, and the domestic sentences imposed on his alleged co-offenders in New Zealand. Mr Dotcom also seeks judicial review of the decision of the Commissioner of Police (the Commissioner) not to lay charges against him in New Zealand, thereby leaving him open to extradition under the Treaty on Extradition between New Zealand and the United States of America (the Treaty).[4] He contends that this was unlawful, and the Commissioner made the decision based on political and other irrelevant considerations.

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1 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 [SC eligibility judgment]. Following the delivery of the Supreme Court's eligibility judgment, an outstanding judicial review required the matter to be remitted back to the Court of Appeal. That Court released its decision declining judicial review on 12 July 2021. The Supreme Court declined leave for a further appeal on 21 December 2021. The matter was then referred to the Minister for his decision on 21 March 2022.

2 Extradition Act 1999, s 30.

3 Sections 31 and 67.

4 Treaty on Extradition between New Zealand and the United States of America 791 UNTS 253 (signed 12 January 2017, entered into force 8 December 1970) [the Treaty].

[5] At the beginning of the hearing, I dealt with a number of applications, including an application for adjournment. I set out the reasons for declining that application, as well as the reasons for my decision to allow in part an application for Mr Dotcom to amend his statement of claim, at the end of this judgment.[5]

The statutory framework

[6] The Extradition Act, together with relevant extradition treaties, promotes the public interest in maintaining a network of mutual assistance between states, to ensure that "suspected offenders who flee abroad [are] brought to justice".[6]

[7] Various mandatory and discretionary restrictions are imposed on surrender decisions.[7] These restrictions are derived from fundamental principles and rights contained within various international covenants ratified by New Zealand. They are also reflected to some extent in the rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 (NZBORA).[8]

[8] In relation to New Zealand and the United States, the Treaty entitles each party to seek to extradite persons who have been charged with or convicted of a qualifying offence in the requesting country. The United States may seek the surrender of a person by instigating a request to the New Zealand Minister of Justice through diplomatic channels.[9] This triggers the provisions of the Extradition Act. The Minister may seek that the District Court issue a warrant for the arrest of the person.[10] There follows a process of determination as to whether the person is eligible for surrender. This requires consideration by the District Court of the matters set out in s 24 of the Extradition Act. The Court must examine the offences for which extradition is sought and determine whether there are equivalent offences for which the person could be charged in New Zealand. In addition, it must be satisfied that none of the

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5 At the beginning of the hearing, Mr Mansfield KC, for Mr Dotcom, indicated that he did not intend to pursue applications filed to cross-examine the Minister, the Honourable Paul Goldsmith, or retired Assistant Police Commissioner, Ms Sue Schwelgar. The Minister and the Commissioner had opposed those applications.

6 *Soering v United Kingdom* [1989] ECHR 14038/88, (1989) 11 EHRR 439 at [89], cited with approval in *Bujak v Minister of Justice* [2009] NZCA 570 at [56].

7 Extradition Act, ss 7 and 8.

8 *Kim v Minister of Justice* [2019] NZCA 209, [2019] 3 NZLR 173 [*Kim* (CA)] at [11].

9 Extradition Act, s 18.

10 Section 19.

mandatory restrictions set out in s 7 of the Act apply. The Court may also determine that the person is not eligible for surrender if the person satisfies the Court that a discretionary restriction under s 8 applies.[11]

[9] If the Court decides the person is eligible, the Minister is empowered to determine whether that person should be surrendered.[12] The circumstances in which a person must not or may not be surrendered are set out in s 30, which relevantly provides:

> **30 Minister must determine whether person to be surrendered**
>
> (1) If the court issues a warrant for the detention of a person under section 26(1)(a) or section 28(2)(a), the Minister must determine in accordance with this section whether the person is to be surrendered.
>
> (2) The Minister must not determine that the person is to be surrendered—
>
> (a) if the Minister is satisfied that a mandatory restriction on the surrender of the person applies under section 7; or
>
> (ab) if the Minister is satisfied that a mandatory restriction on the surrender of the person applies under the provisions of the treaty (if any) between New Zealand and the extradition country; or
>
> (b) if it appears to the Minister that there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or
>
> …
>
> (3) The Minister may determine that the person is not to be surrendered if—
>
> (a) it appears to the Minister that the person may be or has been sentenced to death by the appropriate authority in the extradition country, and the extradition country is unable to sufficiently assure the Minister that—
>
> (i) the person will not be sentenced to death; or
>
> (ii) if that sentence is or has been imposed, it will not be carried out; or
>
> (b) it appears to the Minister that a discretionary restriction on the surrender of the person applies under section 8; or
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> …

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11 Section 24(4).
12 Section 30(1).

(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.

…

(6) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

[10] Sections 7 and 8 of the Extradition Act provide restrictions on the ability to surrender:

7 Mandatory restrictions on surrender

A mandatory restriction on surrender exists if—

(a) the offence for which the surrender is sought is an offence of a political character; or

(b) the surrender of the person, although purportedly in respect of an extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions, or for an offence of a political character; or

(c) on surrender, the person may be prejudiced at his or her trial or punished, detained, or restricted in his or her personal liberty by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions; or

…

(e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or New Zealand, or has undergone the punishment provided by the law of that country or New Zealand, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence; or

…

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 the person is accused of an offence, the fact that the accusation against the person was not made in good faith in 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.

(2) A discretionary restriction on surrender exists if the person has been accused of an offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of.

[11] The Surrender Decision which is the subject of this judicial review followed the confirmation that Mr Dotcom and his alleged co-offenders were eligible for extradition. The events surrounding that decision are set out below.

Background

Events giving rise to the Surrender Decision

[12] Mr Dotcom has been a New Zealand resident since 2010.[13] He was the chief executive officer of Megaupload Ltd until August 2011, when he became its chief innovation officer. It is alleged that Mr Dotcom was the head of the conspiracy associated with Megaupload, and received USD 42 million for his role in the 2010 calendar year.[14] In 2011, a federal criminal prosecution was commenced in the United States against Mr Dotcom and his three alleged co-offenders, Mr Ortmann, Mr van der Kolk, and Mr Batato.

[13] Mr Dotcom had established a business providing cloud storage and file sharing facilities for internet users. It used a number of companies and websites, with Megaupload Ltd being the primary vehicle through which the business was run. Those companies and websites are collectively referred to as the Megagroup or the Megasites.[15]

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13 He is dual citizen of Germany and Finland.
14 As recorded in the indictment 16 February 2012.
15 Supreme Court eligibility judgment, above n 1, at [13].

[14] Mr Dotcom co-founded Megaupload Ltd with Mr Ortmann and Mr van der Kolk. Mr Ortmann was the chief technical officer and a director of the company. Mr van der Kolk was the chief programmer for the Megagroup. Mr Batato was the chief marketing and sales officer for the Megagroup (and the only appellant in the Supreme Court who had no equity interest in the group).[16] Mr Dotcom (through related companies) owned 68 per cent of Megaupload Ltd, Megaupload.com, Megaclick.com and Megapix.com, and 100 per cent of the registered companies behind other related websites.[17] Mr Ortmann indirectly held a 25 per cent shareholding in Megaupload Ltd and the websites it owned, while Mr van der Kolk indirectly held a 2.5 per cent shareholding in Megaupload Ltd and its websites.[18]

[15] The United States's allegations against Mr Dotcom and his co-defendants were described in the Supreme Court eligibility decision as follows:[19]

> [16] In essence, the United States alleges that the Megagroup business model (by design) encouraged third parties to upload to the Megasites digital files that infringed copyright, which could then be shared. The United States alleges that the appellants knew that third parties were uploading infringing material to Megasites and that they incentivised this and profited from it. The United States claims this is criminal conduct in the United States and meets the threshold for extradition under the NZ/US Treaty and under the Extradition Act.
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> [17] The formal charges are as follows:
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> (a) Conspiracy to commit racketeering: essentially, this is an umbrella allegation of using a business enterprise in which all the appellants were participants to engage in the illegal activities alleged in the remaining counts (count 1).
>
> (b) Conspiracy to infringe copyright on a commercial scale: this is an allegation that the appellants conspired to commit copyright infringement through the Megasites for financial gain (count 2).
>
> (c) Conspiracy to commit money laundering: this is an allegation that the appellants conspired to deal with the money received from the unlawful activity alleged in the other counts (count 3).
>
> (d) A discrete count of wilful infringement of copyright by distributing an infringing pre-release copy of the movie *Taken*

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16 At [14]. Mr Batato died in June 2022. The United States' extradition request against him was abandoned due to his terminal illness.

17 At [14], n 27. Those related websites included Megavideo.com, Megaporn.com and Megapay.com.

18 At [14], n 28 and 29.

19 Footnotes omitted.

by making it available through one of the Megasites when the appellants knew or ought to have known it was intended for commercial distribution (count 4).

(e) Discrete counts of wilful infringement of copyright by reproducing and distributing copyright works on the internet (counts 5–8).

(f) Discrete counts of wire fraud by devising a scheme to obtain money by deceiving copyright owners into believing that take-down notices had been complied with (counts 9–13).

[16] A formal extradition request was made to New Zealand by the United States for the surrender of Mr Dotcom, Mr Ortmann, Mr van der Kolk, and Mr Batato in 2012. The request for extradition was made under the Treaty. The District Court initially determined that Mr Dotcom and his three alleged co-offenders were eligible for surrender to the United States.[20] The High Court upheld the District Court's decision,[21] as did the Court of Appeal.[22] The eligibility question was finally determined by the Supreme Court, which held that Mr Dotcom was eligible for surrender on 12 of the 13 charges he faced in the United States.[23]

[17] Mr Dotcom was discharged by the Supreme Court in respect of count 3.[24] In relation to the other 12 charges, the Court found that the alleged conduct (if proved), would constitute New Zealand offences under the Crimes Act 1961 and the Copyright Act, and the evidence amounted to a prima facie case that would justify trial if the conduct occurred in New Zealand.[25] It rejected Mr Dotcom's argument that safe harbours under s 92B and 92C of the New Zealand Copyright Act would apply.[26]

Mr Ortmann and Mr van der Kolk

[18] Given Mr Dotcom's focus in the hearing on the disparity between the likely treatment and sentence he would receive if convicted in the United States and his possible sentencing New Zealand, evidenced by the domestic sentences of his alleged

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20 *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015 [DC eligibility judgment].
21 *Ortmann v United States of America* [2017] NZHC 189 [HC eligibility judgment].
22 *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [CA eligibility judgment].
23 SC eligibility judgment, above n 1, at [591]–[595].
24 At [599].
25 At [434] and [496].
26 At [385]–[388].

co-offenders, I now outline the circumstances relating to the prosecution of Mr Ortmann and Mr van der Kolk.

[19] New Zealand charges against Mr Ortmann and Mr van der Kolk were laid following the Supreme Court's confirmation that they, and Mr Dotcom, were eligible for surrender. Mr Ortmann and Mr van der Kolk entered into plea agreements with the New Zealand Police and the United States. While copies of the plea agreements have not been discovered,[27] the Assistant Commissioner of Police (the Assistant Commissioner) in her affidavit confirmed that in return for agreeing to enter guilty pleas and offer assistance to prosecute Mr Dotcom in the United States, Mr Ortmann and Mr van der Kolk were charged with two charges of participating in an organised group,[28] one charge of conspiring to cause loss by deception,[29] and one charge of conspiring to dishonestly obtain documents,[30] in New Zealand. On that basis, the United States agreed not to seek their extradition. Mr Ortmann and Mr van der Kolk also agreed to forfeit approximately $10 million worth of assets, said to represent "all funds that remain in [their] names in overseas accounts at the end of the sentencing process". An unknown proportion of that sum would be received by New Zealand.

[20] Messrs Ortmann and van der Kolk were sentenced in the High Court on 15 June 2023.[31] The sentencing Judge noted that the financial harm to copyright owners caused by Megaupload was estimated by the United States Department of Justice to be at least USD 500 million. This was described as a conservative estimate, given that any higher figure would not have materially affected sentencing in the United States.[32] The scale of the business was significant. Megaupload claimed to

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27 *Dotcom v Minister of Justice* [2024] NZHC 3834 [discovery judgment]. The events surrounding the surrender of Messrs Ortmann and van der Kolk were also set out in the briefing paper prepared by the Ministry and considered by the Minister in making his decision. The paper noted that the alleged co-offenders had approached Crown Law, proposing a New Zealand resolution to the charges. This would involve their prosecution in New Zealand for equivalent offences under New Zealand law, instead of extradition. The United States authorities were consulted on the proposal and agreed that the extradition request would be withdrawn when the New Zealand charges were resolved. The New Zealand Police were consulted and decided to lay equivalent charges under New Zealand law.

28 Crimes Act 1961, s 98A.

29 Crimes Act, ss 310 and 240.

30 Crimes Act, ss 310 and 228.

31 *R v Ortmann* [2023] NZHC 1504 [sentencing notes].

32 At [12].

have 50 million daily users, 180 million registered users and, at one time, to have commanded four per cent of all internet traffic.[33] Steps had also been taken by Mr Dotcom, Mr Ortmann and Mr van der Kolk to avoid detection of the copyright infringements.[34]

[21] A number of victims had submitted victim impact statements, including a New Zealand-based victim. That victim said that the piracy reduced his income to such an extent that it was no longer viable for him to work fulltime on his software business.[35] In addition, the Motion Picture Association, whose members are the five major United States film studios, as well as other United States corporations, submitted statements to the Court.[36]

[22] The copyright holders were said by the Crown to have suffered losses in the billions of dollars. However, the Judge demurred from conducting an assessment of that, given that the quantum was contested by the defendants.[37]

[23] While the Judge expressly noted that Mr Dotcom was not bound by the summary of facts to which Mr Ortmann and Mr van der Kolk had pleaded guilty,[38] he was said to be the controller of all aspects of Megaupload's operations and "closely monitored and directed the administration of the entire business".[39] In addition, he took most of Megaupload's income for himself, receiving approximately $100 million.

[24] The Crown's overall approach suggested a starting point of around 12 and a half years, while counsel for the defendants called for a starting point of seven years for Mr Ortmann and five years for Mr van der Kolk.[40] A review of the principles of sentencing as they applied to the offenders led the Judge to adopt starting points of 10 years and six months' imprisonment for Mr Ortmann, and 10 years' imprisonment for Mr van der Kolk.[41]

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33 At [23].
34 At [30]–[36].
35 At [55].
36 At [42].
37 At [44].
38 At [7].
39 At [15].
40 At [93].
41 At [91].

[25] A number of personal mitigating factors applied. The Judge adopted guilty plea discounts of 25 per cent, and considered the provision of assistance to the authorities warranted a discount of around 30 per cent. This led to a combined discount of around 55 per cent, which the Judge adjusted to 60 per cent.[42] Other factors personal to the respective defendants allowed a further discount of 15 per cent.[43] Therefore, the combined discount for personal mitigating factors amounted to 75 per cent. This resulted in an end sentence of two years and seven months' imprisonment for Mr Ortmann, and two years and six months' imprisonment for Mr van der Kolk.[44] In addition, orders for reparation were made.[45]

[26] Mr Dotcom requested that he also be charged domestically. The Police refused to do so. The request for extradition by the United States remains outstanding and the Minister was required to make a decision on whether Mr Dotcom should be surrendered.

The Surrender Decision

[27] In reaching the Surrender Decision, the Minister considered a briefing paper prepared by Ministry of Justice (the Ministry) officials, dated 2 July 2024 (the Briefing Paper). Work on the Briefing Paper began in 2022 and the briefing process was overseen by Mr Edrick Child, the Ministry's deputy chief legal counsel. Mr Child says that aside from the correspondence referred to in the Briefing Paper, and other limited correspondence with Crown Law relating to three minor factual matters, the Ministry did not consult or correspond with any other third parties about the preparation or contents of the Paper.[46] In addition, the Minister did not seek further advice or consult any sources other than the Briefing Paper before reaching his decision.[47]

[28] Mr Dotcom provided 210 pages of initial legal submissions to the Ministry on 25 July 2022. The submissions were supported by an electronic bundle of documents

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42 At [105].
43 At [123].
44 At [124].
45 At [126].
46 See discovery judgment, above n 27, at [29].
47 At [39].

comprising thousands of pages. Mr Dotcom later provided further information and supplementary submissions. The Minister also sought information from a small number of other agencies or people, namely: a United States legal expert, Mr David Debold, regarding United States sentencing and forfeiture law; Crown Law, regarding documents filed in the United States court; and the Commissioner, regarding the prosecution of Mr Dotcom's alleged co-offenders, Mr Ortmann and Mr van der Kolk. Mr Dotcom was provided with the information received, and made further submissions on those matters on 9 May 2024.

[29] In the Surrender Decision, the Minister determined that the absence of a domestic prosecution of Mr Dotcom did not constitute a reason to refuse surrender. He noted that Mr Dotcom had not made a comparable domestic charging proposal to that made by Mr Ortmann and Mr van der Kolk. He accepted the Assistant Commissioner's explanation for not charging Mr Dotcom, including that it would not be viable or practical to conduct a trial in New Zealand.

[30] In addition, the Minister found that the United States' sentence Mr Dotcom would likely receive if surrendered would not be disproportionately severe. He accepted there was a possibility of a compassionate release (including for reasons such as health), and also a power of executive clemency in the United States. Therefore, he did not consider that the potential sentence would amount to an "irreducible life sentence".

[31] The Minister also found that Mr Dotcom's health and family circumstances did not provide a reason to decline surrender, nor did the passage of time since the alleged offending.

Approach to judicial review

[32] Judicial review is a supervisory jurisdiction that enables the courts to ensure that public powers are exercised lawfully.[48] The appropriate standard of review to be applied in an application for judicial review of an extradition surrender decision remains unsettled. The issue is whether it is one of *Wednesbury* unreasonableness (or

[48] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1].

that the decision was obviously incorrect), or one of "heightened scrutiny". The Human Rights Commissioner, as intervenor in the Supreme Court in *Minister of Justice v Kim*, advanced a standard of correctness.[49] The courts below had adopted the heightened scrutiny test,[50] however the appropriate standard of review was not the subject of argument in the Supreme Court.[51] Nevertheless, the Court noted that "a correctness standard would be difficult to apply in practice", where the executive possesses particular expertise or competence in the matter which the court should properly give weight to.[52]

[33] Given the observations of the Supreme Court and the adoption of the heightened scrutiny test by the Court of Appeal in *Kim*, that is the standard which I apply. However, as indicated by Mr Hodder KC, for the first respondent, in the circumstances of this case, the standard would not likely make any difference.

Grounds of review

First cause of action: error of law — mandatory restrictions

[34] Under the first cause of action against the Minister, Mr Dotcom alleges that the Surrender Decision disregards mandatory restrictions under s 7 of the Extradition Act. He submits that the Minister erred in failing to find that the offences for which his extradition is sought are of a political character.[53] Mr Dotcom contends that the United States prosecution is motivated by improper purposes, namely: to appease copyright owners; alter the interpretation of the Digital Millennium Copyright Act without legislative change; and deprive Mr Dotcom of safe harbour protections under New Zealand's Copyright Act 1994, thus increasing the likelihood of his serving a disproportionate sentence. Mr Dotcom further asserts that his surrender is sought in order to make an example of him for political gain, rather than for legitimate criminal prosecution.[54]

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49 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 [*Kim* (SC)].
50 At [40].
51 At [51].
52 At [49].
53 Extradition Act, s 7(a).
54 Section 7(b).

[35] Mr Dotcom also contends that the Minister erred in finding that there was no real risk that, if surrendered, he would face a trial that falls below the minimum standards required under art 14 of the International Covenant on Civil and Political Rights (ICCPR).[55] He says he is unable to fund his defence due to an extant United States' civil forfeiture order, and would be required to rely on the under-resourced public defence service to defend the largest criminal copyright case in history. In addition, he points to the likelihood of his being remanded in custody.

[36] Mr Dotcom further argues that the Minister erred in finding that no mandatory restriction applied in relation to the provisions of the Treaty.[56] He says the United States has breached its duty of candour under the Treaty, by failing to disclose the test-case nature of the prosecution and the absence of criminal liability for secondary copyright infringement under United States law. He also says that he was deprived of accessing available remedies under New Zealand law because of attacks on his funding. In addition, Mr Dotcom contends that the extradition process has been tainted by the unlawful actions of New Zealand authorities, including: illegal surveillance; unlawfully withholding evidence; unlawfully dealing with seized evidence; and failing to ensure the United States complied with its duty of candour.[57] Those breaches and allegations were not pursued in written or oral submissions at the hearing.

Second cause of action: error of law — discretionary restrictions

[37] The second cause of action against the Minister pleads a number of the same allegations as the first cause of action. Mr Dotcom argues that the Minister erred in finding that no discretionary restrictions under s 8 of the Extradition Act applied such as to preclude his surrender. He asserts that the United States prosecution was not brought in good faith or in the interests of justice, as it was motivated by political purposes.[58] He also points to undue delay in the extradition process, lasting over 12 years, during which time Mr Dotcom has been subject to restrictive bail conditions,

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55 Section 7(c).
56 Section 11.
57 The Treaty, art IX.
58 Extradition Act, s 8(1)(b).

incurred significant legal costs, and suffered harm to his family life and business interests.[59]

[38] Mr Dotcom further contends that surrendering him would be unjust and oppressive, given the grossly disproportionate treatment he faces compared to his alleged co-offenders, who were charged and sentenced under New Zealand law for the same conduct. He emphasises that, if charged in New Zealand, he would be entitled to safe harbour protections which are unavailable under United States law. Furthermore, his likely sentence in the United States would be far more severe. Mr Dotcom also says the process relating to his extradition has been unlawful, including because material decisions were made by a United States judicial officer who had an undisclosed conflict of interest. In addition, he says that his deteriorating health constitutes extraordinary circumstances that make surrender unjust and oppressive.[60]

Third cause of action: unreasonableness

[39] The third cause of action against the Minister alleges the Surrender Decision was unreasonable. This is on the basis that it will result in New Zealand authorities choosing to assert jurisdiction over two members of the alleged conspiracy, but not Mr Dotcom, despite all three being alleged members of the same organised criminal group. Furthermore, it will deny him immunities under the Copyright Act and subject him to grossly disproportionate treatment compared to his alleged co-offenders. Mr Ortmann and Mr van der Kolk served less than one year in prison,[61] while Mr Dotcom faces a potential life sentence in the United States. Mr Dotcom contends that the cumulative reasons for refusing surrender overwhelmingly outweigh any reasons in favour, making the decision unreasonable.[62]

Abandonment of fourth and fifth causes of action

[40] The fourth cause of action related to procedural fairness and breach of natural justice, based on the alleged failure of the Minister to defer the Surrender Decision

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59 Section 8(1)(c).
60 Section 30(3)(d).
61 Being eligible for parole after serving one-third of their sentences.
62 Extradition Act, s 30(3)(e).

until a request under the Official Information Act 1981 for the plea agreement had been resolved. The fifth cause of action alleged there had been an abuse of process because of undue delay, and sought a stay of the extradition proceeding.

[41] Both causes of action were abandoned. Mr Dotcom had applied for discovery against the Minister in relation to documents concerning his surrender, and against the Commissioner in relation to documents concerning the charging and plea bargaining of Mr Ortmann and Mr van der Kolk. The application was declined on 13 December 2024.[63] The Judge held that privilege attached to the plea agreements,[64] and aspects of the discovery application amounted to a "fishing expedition".[65] Furthermore, he rejected Mr Dotcom's allegations of improper purpose — that the underlying motivation in refusing to charge Mr Dotcom in New Zealand was to appease the United States — as lacking in evidentiary foundation.

[42] Mr Mansfield KC, for Mr Dotcom explained that this issue did not require revisiting here, and the discovery decision was the subject of appeal in any event.[66]

Sixth cause of action: refusal to charge and prosecute in New Zealand

[43] The sixth cause of action challenges the Commissioner's decision to refuse to charge Mr Dotcom under New Zealand law, despite charging Mr Ortmann and Mr van der Kolk for the same conduct. He argues that this amounts to disproportionate treatment and the decision was made for an improper purpose.

Proposed seventh cause of action

[44] A seventh cause of action sought to be added to the amended statement of claim related to the failure by the Minister's lawyers to agree to an adjournment on 25 August 2025, in view of Mr Dotcom's changes in health. For reasons discussed at the end of this judgment, the leave to amend the pleading to add the cause of action was declined.

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63 Discovery judgment, above n 27.
64 At [56].
65 At [57].
66 Presumably special leave to bring the appeal has been sought from the Court of Appeal.

[45] The focus of the submissions at the hearing was on the disparity in treatment alleged between Mr Dotcom and Messrs Ortmann and van der Kolk. They were prosecuted and sentenced domestically, whereas Mr Dotcom would face a trial in another jurisdiction where sentences are substantially greater than in New Zealand for the relevant charges. This issue is particularly relevant to the second, third and sixth causes of action. It is convenient to address the ground relating to the Commissioner's decision not to prosecute Mr Dotcom in New Zealand first.

The Commissioner's decision not to charge Mr Dotcom in New Zealand

Submissions

[46] Mr Dotcom pleads that on 5 July 2023, he invited the Commissioner to confer with Crown Law and advise whether the Police would agree to charge him in New Zealand, if the United States agreed to withdraw its request for his surrender. Mr Dotcom would submit to the New Zealand jurisdiction and any charges could be determined domestically under New Zealand law. On 18 July 2023, the Police declined Mr Dotcom's proposal.

[47] In deciding not to prosecute him in New Zealand, Mr Dotcom says the Commissioner was acting: for an improper purpose, that is to appease the United States and make an example of him, and therefore not impartially; contrary to the Solicitor-General's Prosecution Guidelines; and unreasonably, given that Mr Ortmann and Mr van der Kolk were alleged to be his co-offenders and were facing allegations of substantially the same conduct. As a result, Mr Dotcom, pleads that he faces grossly disproportionate consequences, contrary to NZBORA, including the right to be free from disproportionately severe punishment (s 9), the right to a fair trial (s 25), and the right to natural justice (s 27). Furthermore, he says the decision is contrary to New Zealand's obligations under the ICCPR, including arts 9 and 14.

[48] The Commissioner says that it was for the Police to decide how to deploy its investigating and prosecution resources. Ms Taylor, for the Commissioner, says that Mr Dotcom invites the Court to conduct a merits review of whether a prosecution in

New Zealand should have been brought.[67] The Commissioner further denies that there was any apparent bias or that he acted with an improper purpose to appease the United States and to make an example of Mr Dotcom. The Commissioner also denies any breach of NZBORA.

[49] While Mr Mansfield did not pursue the failure to disclose the plea agreement, he noted that this meant the only relevant information he had in relation to the prosecution of Messrs Ortmann and van der Kolk were the sentencing notes of Fitzgerald J dated 15 June 2023, a letter from the Assistant Commissioner dated 18 July 2023 rejecting the proposal to charge Mr Dotcom in New Zealand, and the letter from the Assistant Commissioner dated 7 February 2023 which was attached to the Briefing Paper.

Evidence of the Assistant Commissioner

[50] The Assistant Commissioner in her evidence explained why the decision not to prosecute Mr Dotcom was made. She noted the terms of the Treaty,[68] and said that it would be:

> …an unusual step to commence a domestic prosecution in relation to the same conduct which gave rise to the United States charges. Police were prepared to consider it only in the exceptional circumstances that arose.

[51] Consistent with earlier explanations, she said that Mr Dotcom was in a fundamentally different position to that of Messrs Ortmann and van der Kolk, in particular:

(a) The United States signalled it was willing to forego its requests for extradition of Messrs Ortmann and van der Kolk. The Assistant

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67 The Commissioner refers to *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL) at 59, where Lord Keith discusses the wide discretion of police as to the manner in which their duty to enforce the criminal law is discharged. This includes how available resources should be deployed, lines of enquiry that should or should not be followed, and whether certain crimes should be prosecuted. Lord Keith noted that it is only if a decision on such matters is one that "no reasonable chief officer of police would arrive at" that there might be recourse to judicial review.

68 The Treaty came into force on 8 December 1970. The Extradition Act, s 104 applies the Act to treaties where an Order in Council was made under the Extradition Act 1965 and was in effect when the 1999 Act came into force. The relevant Order in Council is the Extradition (United States of America) Order 1970.

Commissioner said that "[w]ithout this, Police would not have considered domestic charges".

(b) Mr Ortmann and Mr van der Kolk had promised to provide assistance in the investigation of Megaupload. It was expected their cooperation would simplify any trial of Mr Dotcom in the United States and strengthen the prosecution case, noting that he was alleged to be the most significant offender in the conspiracy. The assistance to be provided was outlined in the sentencing notes of Fitzgerald J, and included surrendering various devices and computers to the FBI, waiving privilege, being interviewed by the relevant authorities, and giving evidence against Mr Dotcom.[69]

(c) Mr Ortmann and Mr van der Kolk offered to plead guilty.

[52] Thus, the Assistant Commissioner asserted that Mr Ortmann and Mr van der Kolk were not "offered a deal", but rather they had proposed a resolution on the basis that they would plead guilty and offer assistance. No comparable proposal had been received from Mr Dotcom. The plea agreements with Mr Ortmann and Mr van der Kolk could not be replicated in relation to Mr Dotcom, because a significant part of the rationale for those agreements was to strengthen the United States' case against Mr Dotcom, who was considered the "primary offender".

[53] Furthermore, the Assistant Commissioner said that the New Zealand Police were not in a position to prosecute a case through to trial. She noted:

> This was a United States, not a New Zealand, investigation. It involves a vast volume of complex evidence, and the investigating agents and witnesses are located in the United States.

Legal principles relating to prosecutorial decisions

[54] The decision of the Police not to prosecute Mr Dotcom is reviewable by way of judicial review. However, as the Court of Appeal noted in *Fitzgerald v Attorney-General*, referring to the Court of Appeal's comments in

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69 Sentencing notes, above n 31, at [100].

Osborne v Worksafe, judicial restraint is necessary in reviewing a decision not to prosecute:[70]

> [94] In *Osborne* this Court noted different considerations would be in play when the decision sought to be challenged was one *not* to prosecute or to discontinue a prosecution already commenced. Notwithstanding these considerations, it is clear that the Court contemplated in an appropriate and exceptional case, subject to what it said about the need for judicial restraint, that the court could review a decision to prosecute where it could be established that the decision was affected by relevant and significant error.

[55] The Court of Appeal in *Fitzgerald* also referred to the comments of the Supreme Court in *Osborne* in relation to decisions to prosecute, noting that the Prosecution Guidelines must be considered.[71] Particularly relevant here is the need to protect rule of law values such as equality of treatment.

[56] In this case, any decision to prosecute must take into account the extradition context. Where proceedings have been initiated in New Zealand for the offence for which extradition is sought, extradition will not be granted.[72] There is also a mandatory restriction on surrender under s 7(e) of the Extradition Act if the requested person has been acquitted or convicted and punished for the extradition offence in New Zealand.

[57] Otherwise, the Treaty requires New Zealand to extradite those who are charged with an offence listed in Article II. That is a binding obligation at international law. As the Court of Appeal noted in *Yuen Kwok-Fung v Hong Kong*, the provisions of the Extradition Act provide a strong direction that treaties must be complied with.

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70 *Fitzgerald v Attorney General* [2024] NZCA 419, [2024] 3 NZLR 817 (footnotes omitted), citing *Osborne v Worksafe* [2017] NZCA, [2017] 2 NZLR 513 [*Osborne* (CA)]. The Court in *Ftizgerald* also observed that a stronger case for restraint exists where the prosecutorial decision is one that a prosecution should proceed. This is due to the risk of collateral challenge to the criminal justice system and the fact that culpability is established by the conclusion of the criminal trial: at [92].

71 *Fitzgerald* above n 70, at [97], citing *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447. The Court of Appeal's decision in *Osborne* was overturned by the Supreme Court on appeal, but its ratio on the amenability of prosecutorial decisions to judicial review remains current.

72 The Treaty, art VI(1) provides that extradition shall not be granted when the person whose surrender is sought is being proceeded against in New Zealand for the offence for which his extradition is sought. This requires a domestic prosecution to have been underway at the time the extradition request was made.

Furthermore, "a state cannot invoke its internal law to justify its failure to perform a treaty".[73]

[58] Therefore, where there is an extant extradition request, a decision to commence a domestic prosecution for the same offence, without the agreement of the requesting state, would be contrary to the tenor, if not the terms, of the Treaty. There is no provision in the Extradition Act for a requested person to be discharged from extradition and released from custody or bail if they are charged for the same conduct in New Zealand.

[59] In *R (Bermingham) v Director of the Serious Fraud Office,* the High Court of England and Wales considered a judicial review of the Serious Fraud Office's decision not to investigate three bank employees, who were due to be extradited to the United States for fraud offences related to the failed Enron Corporation.[74] Some of the alleged conduct had taken place in the United Kingdom.[75] The Court set out several principles which are of some relevance here, albeit they relate to the decision of whether to investigate, rather than whether to prosecute:

(a) It would be against the relevant statutory scheme for a decision of whether to investigate to be made that would pre-empt that statutory extradition process, by deciding the appropriate forum for trial in favour of the United Kingdom.[76]

(b) A decision of whether to investigate is not the proper means of protecting the defendant's human rights in the extradition process, as the statute allocates that responsibility to the court in the extradition proceedings.[77]

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73 *Yuen Kwok-Fung v Hong Kong Special Administrative Regime of the People's Republic of China* [2001] 3 NZLR 463 (CA) at [16].

74 *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727.

75 This was decided before the introduction of the "forum bar" (allowing extradition to be refused if domestic charges are more appropriate), which is discussed in more detail below.

76 *Bermingham*, above n 74, at [65].

77 At [70]–[72].

(c) Review of a decision of this nature "will involve consideration of the manner in which available resources should be deployed and whether particular lines of inquiry should or should not be followed… it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not".[78]

(d) The Director was entitled to take into account the fact that although the United Kingdom had jurisdiction, the witnesses and evidence were located in the United States, and the United States investigation was at a more advanced stage.

(e) It would be a "wholly unacceptable state of affairs" if a well-advanced extradition process could be halted or interrupted by collateral challenges to the decisions of investigating or prosecuting bodies.[79]

[60] To similar effect, the High Court of England and Wales dismissed a judicial review of a prosecutorial decision in *R (on the application of Ahsan) v Director of Public Prosecutions.*[80] In that case, the Director of Public Prosecutions refused to consider prosecuting the defendants in the United Kingdom for alleged acts of terrorism, for which the United States had sought extradition. The Court noted that in *Bermingham*, the request to investigate "in effect invited the Director of the Serious Fraud Office to constitute himself the judge of the proper forum for the Defendants' trial and to decide the issue in favour of trial in this country and not in the United States".[81] The Court in *Ahsan* said that reliance on international prosecution as a means of "securing a decision on forum by the Director of Public Prosecutions", amounted to an "impermissible attempt to circumvent the statutory extradition process".[82] In addition, the Court noted that the judicial review of a prosecutorial

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78 At [64]. The Court expressed the view that the Director's discretion in a decision not to investigate is "even more open-ended" than in a decision not to prosecute. Thus, the circumstances in which judicial review is warranted in such cases will be more limited.

79 At [71].

80 *R (on the application of Ahsan) v Director of the Public Prosecutions* [2008] EWHC 666 (Admin).

81 At [38], citing *Bermingham,* above n 74, at [65].

82 At [38].

decision, while available in principle, was "a highly exceptional remedy".[83] It considered the same comment applied to an alleged failure to embark upon the decision-making process in the first place.

[61] The Commissioner also cites the comments of the United Kingdom Supreme Court in *Norris v Government of the United States of America*:[84]

> [67] Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country.

Analysis

[62] Mr Dotcom says if there was a prima facie case as a basis to charge Messrs Ortmann and van der Kolk, then there must be enough evidence to charge him as well. He says any willingness to enter a guilty plea and whether or not he could provide assistance for the prosecution is a matter to be considered at sentencing, not in relation to whether to lay charges. However, these points overlook the reality of the different circumstances and roles of the alleged co-offenders in the extradition context, and in any event, those are matters for the Commissioner to consider.

[63] Despite Mr Dotcom suggesting his leadership role in the enterprise is a recent allegation made by the alleged co-offenders, as Mr Hodder points out, that has always been the United States' position.[85] The record of the case submitted by the United States alleges that Mr Dotcom was the principal offender, and the District Court decision refers to Mr Dotcom as "the head of the Mega conspiracy".[86] In the superseding indictment, Mr Dotcom is alleged to have received USD 42 million from the enterprise in the year 2010, compared to Mr Ortmann, who was estimated to have received USD 9 million, and Mr van der Kolk, who was estimated to have

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83 At [39].
84 *Norris v Government of the United States of America* [2010] UKSC 9, [2010] 2 AC 487 at [67].
85 *United States of America v All Assets listed in Attachment A* 114 CV 969 (ED Va 2015) at [3] n 4.
86 DC eligibility judgment, above n 20, at [296].

received USD 2 million. Nevertheless, it is open to Mr Dotcom to run those arguments at his trial.

[64] It is relevant that it was only once they had exhausted their appeals as to eligibility that Mr Ortmann and Mr van der Kolk approached the Police offering to plead guilty and assist in prosecuting Mr Dotcom. In addition, while bearing in mind that the summary of facts at their sentencing was not agreed to by Mr Dotcom, the Judge noted that although Messrs Ortmann and van der Kolk played leading roles, they were not "the overall leader of the enterprise".

[65] The Assistant Commissioner addressed the difficulty that the Police faced in pursuing a domestic prosecution against Mr Dotcom, including the lack of any evidence in New Zealand. She said the Police were in no position to prosecute a case such as this through to trial, noting that it would involve a "vast volume of complex evidence, and the investigating agency and witnesses are located in the United States". In relation to Mr Dotcom's assertions that these challenges are "overstated", as the Commissioner notes, that is not a ground for judicial review.

[66] Mr Dotcom also refers to the 2024 Solicitor-General's Prosecution Guidelines, which state:[87]

> Prosecutors should be as consistent as possible in plea discussions with all defendants. Defendants who are comparably situated should be provided with a comparable opportunity to engage in plea discussions and be treated similarly in the discussions.

[67] The 2024 Guidelines came into force on 1 January 2025, after the time that the Minister and the Police made their respective decisions. The 2013 Guidelines did not include similar guidance. Furthermore, the Commissioner submits that there was no requirement for Police to consider the test for prosecution under the Prosecution Guidelines when there was an extant extradition request in the United States. Mr Hodder points out the prosecution guidelines set out general expectations rather than rules, and do not create any procedural or substantive rights that can be enforced in a legal proceeding. The 2013 Guidelines state that they are not "an instruction

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[87] Crown Law *Solicitor-General's Prosecution Guidelines — Decisions to prosecute* (1 January 2025) at [64].

manual for prosecutors", nor do they cover every decision that must be made by prosecutors.[88] They are not legal standards which can be enforced by way of judicial review.[89] In any event, they require a prosecutor to be satisfied that there is sufficient evidence in New Zealand to support a reasonable prospect of conviction, which in this case, the Commissioner was not.

[68] Mr Dotcom also says it would be in the public interest to prosecute him, according to the Commissioner's allegation that he was the "ring leader" of the Megaupload operation. However, again, the public interest assessment is a matter for the Commissioner.

[69] Mr Dotcom's submissions invite the Court to conduct a merits review of the Police prosecution decision, and to reach its own view as to whether Mr Dotcom should have been charged in New Zealand. This includes determinations as to whether the evidentiary and public interest tests for prosecution were made out, and whether the challenges identified with the trial in New Zealand were "overstated". Mr Dotcom also seeks to isolate the decision not to prosecute from the context of extradition.

[70] In addition, there is no evidential basis for the allegations of improper purpose, nor any evidence that supports the allegation that the Police were acting to appease the United States by making an example of Mr Dotcom. Similarly, there is no evidential basis for the allegations of bias against the Commissioner. The evidence indicates that the Police made their decision independently of the Minister and based on reasonable grounds. The Surrender Decision was for the Minister, whose discretion was appropriately exercised independently of the Commissioner's decision not to prosecute.

[71] In relation to the allegations that the Police breached s 9 of NZBORA, the Commissioner submits that the treatment or punishment that Mr Dotcom receives in the United States (including any sentence if convicted) is not a consequence of the Police decision. It is the Minister's Surrender Decision which requires consideration

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88 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [2.3]. See also Crown Law *Solicitor-General's Prosecution Guidelines — Principal Guideline* (1 January 2025) at [1] and [3].

89 *Osborne* (CA), above n 70, at [74].

of the recognition of human rights in the requesting state.[90] The failure to prosecute domestically does not amount to "treatment or punishment" as that term is used in NZBORA. Treatment or punishment under s 9 generally requires conduct by a public official that is intentionally directed at a specific person. For instance, in *Neville v Attorney-General*, a claim under s 9 was struck out in the High Court on the basis that an injury to an innocent bystander during an armed police operation was not "treatment", because it was not intentionally directed at the victim.[91]

[72] However, Venning J in *Neville* accepted that the impugned conduct could amount to treatment even where only a reasonable apprehension of the potential consequences to the person was established.[92] In this case, there is no evidential basis suggesting the Police deliberately or otherwise directed a theoretical or unknown punishment or sentence that might later be imposed by a United States court outside New Zealand's jurisdiction. Nevertheless, the Police were aware of the extradition request so the outcome for Mr Dotcom could be foreseen and therefore reasonably apprehended. Based on *Neville*, the Commissioner's decision did constitute treatment for the purposes of s 9, however I am not persuaded that it was disproportionately severe treatment. The surrounding circumstances are relevant to that assessment, and in *Neville* the countervailing factors included that the shooting occurred in an emergency situation in which the police officers who shot Mr Neville had an obligation to act.[93]

[73] The circumstances were similarly relevant here. The Police were entitled to take into account New Zealand's obligations to honour an extradition request in accordance with the Treaty, and to allow the statutory extradition process to run its course, particularly when it was already well-advanced at the time Mr Dotcom requested to be charged. A further factor was that the circumstances of the alleged co-offenders were different, as set out above. They entered into plea agreements in exchange for offering assistance in the prosecution of Mr Dotcom in the alleged conspiracy. As the Commissioner submits, this is not uncommon in the prosecution of alleged co-defendants. In addition, it was relevant that it was not the Police who

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90 Extradition Act, s 30(2)(a), (3)(a) and (3)(e).
91 *Neville v Attorney General* [2015] NZHC 1946, [2015] NZAR 1537.
92 At [72].
93 At [99].

were making the Surrender Decision. Disproportionality was a matter for consideration by the Minister, and I therefore consider that issue in relation to the Surrender Decision.[94]

[74] In those circumstances, there is no basis to interfere with the Police decision not to prosecute. The decision was not unreasonable in the circumstances, nor is there any evidential basis for the allegations of improper conduct. The Police made no errors in the public law sense in the decision not to prosecute.

[75] I now turn to consider the issues raised by the grounds of review brought against the Minister's Surrender Decision.

Minister's consideration of the decision not to prosecute Mr Dotcom domestically

Submissions

[76] Mr Dotcom submits that the Minister misdirected himself by characterising the decision in respect of the difference in treatment between Mr Dotcom and his alleged co-offenders as being a decision on whether to intervene in, or interfere with, the Commissioner's exercise in prosecutorial discretion. He submits that the correct test was whether, in the circumstances, it would be unjust, repressive or otherwise unreasonable to surrender Mr Dotcom. He says the Minister was not being asked to interfere in the Commissioner's decision, but rather to consider whether Mr Dotcom should be surrendered given the gross disproportionality that would result between himself and Messrs Ortmann and van der Kolk. In that regard, he says Mr Ortmann and Mr van der Kolk were members of the same alleged conspiracy as him, were originally charged with the same offences in respect of the same alleged conduct, and had no stronger ties to New Zealand than did Mr Dotcom.

[77] Mr Dotcom notes that ultimately, Mr Ortmann and Mr van der Kolk served sentences of approximately ten months' imprisonment. In comparison, he will, if surrendered, not only be deprived of the potential safe harbour from liability under

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94 The Court in *Neville* accepted that "disproportionately severe" treatment as affirmed in s 9 of NZBORA was substituted for "inhuman" in art 7 of the ICCPR, and was a high threshold to establish: at [87] and [98]. I discuss this in further detail below in the context of the Minister's surrender decision.

ss 92B and 92C of the Copyright Act but, if convicted, be exposed to a sentence of between 30 and 150 years' imprisonment, which will be effectively the rest of his life.

[78] Mr Dotcom also says that in the absence of any legitimate reason for treating him differently from Mr Ortmann and Mr van der Kolk, it can be inferred that the reason was political and therefore for an improper purpose. That purpose is suggested as being to facilitate the United States' prosecution of Mr Dotcom by removing legal arguments available in New Zealand, and enabling the United States to make a public example of him by exposing him to life imprisonment.

[79] Mr Dotcom submits that the Minister should have interrogated the Assistant Commissioner's explanation for the decision not to charge, and sought objective evidence of the Police position. In addition, the reasoning behind the United States abandoning the request for surrender was suspect, given that it had pursued Mr Ortmann and Mr van der Kolk (together with Mr Dotcom) for over a decade. Furthermore, Messrs Ortmann and van der Kolk would be unreliable witnesses, as they had been induced to change their position by the terms of the plea agreement.

[80] Mr Dotcom also says it has only relatively recently been asserted that he had the leading role in the alleged offending. Before that, Mr Dotcom says, the offenders had defended the extradition in concert with him. In addition, while Mr Dotcom has not offered to plead guilty if charged domestically, neither was there an offer to charge him, nor to withdraw the request for surrender, if he was charged and pleaded guilty. Therefore, Mr Dotcom says it is artificial to assert that he did not make a comparable proposal to that of Mr Ortmann and Mr van der Kolk.

[81] Mr Dotcom says the Minister's task was not to facilitate Mr Dotcom being offered the same deal as his alleged co-offenders, but to assess the impact on him of the United States and the Commissioner refusing to offer him that deal.

[82] The Minister submits that New Zealand has an obligation under art II of the Treaty to extradite to the United States those charged with a qualifying offence**.** That is a binding obligation at international law. The Extradition Act creates the domestic processes to enable this to occur, and s 11 of the Act requires its provisions be

construed to give effect to extradition treaties. Relevantly, s 6 provides that an extraditable person who is sought by an extradition country may be surrendered, whether or not any New Zealand Court has jurisdiction in respect of that conduct.

Forum bar: comparative jurisdictions

[83] The Briefing Paper noted that extradition requests are not generally approached as a choice between domestic prosecution or a prosecution in the requesting country. Where a domestic investigation does not exist, "even in its most initial stages, it may be seen to be usurping the obligation to extradite by initiating a domestic investigation and prosecution instead".

[84] Mr Hodder, in his submissions, reviewed the position of other jurisdictions including the United Kingdom, which has introduced a forum bar.[95]

[85] There, a District Judge considering whether to surrender a person must consider forum (whether the person's conduct could be prosecuted domestically) before determining that the person is eligible for surrender. Relevant considerations include whether a substantial measure of the defendant's relevant activity occurred in the United Kingdom. In addition, the Judge must consider where a trial would best occur having regard to matters such as the availability of evidence and witnesses, the interests of victims, any delay that conducting a prosecution in either jurisdiction would cause, and the practicality and desirability of the having all prosecutions in the same jurisdiction. The Judge is required to discharge the person if a substantial measure of the relevant activity was performed in the United Kingdom, and the additional considerations mean that extradition should not occur.[96] Mr Hodder notes that the forum bar has attracted criticism for its intrusion into prosecutorial independence.[97]

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95 The forum bar was intended to prevent extradition where only a tenuous connection existed between the requested person and their acts, and the requesting state: Paul Arnell and Gemma Davies "The Forum Bar in UK Extradition Law: An Unnecessary Failure" (2020) 84 J Crim Law 142 at 145.

96 Extradition Act 2003 (UK), s 83A.

97 See Arnell and Davies, above n 95, at 160.

[86] Canada takes into account forum only where its own citizens are sought for extradition. This is in order to ascertain whether the citizen's right to remain in Canada, as affirmed under the Canadian Charter of Rights and Freedoms, is justifiably limited by extradition in the circumstances of the case.[98]

[87] The position in New Zealand is similar to that in Australia, although the latter has made some legislative amendments. The Federal Court of Australia nevertheless rejected arguments that the Minister, in deciding whether to surrender a person to the United States, must make a determination of forum at the surrender stage. This is despite the introduction of "prosecution in lieu" provisions. Where a person has not committed an offence in Australia (and so would not be prosecuted in Australia), but cannot be surrendered because it would be oppressive to do so, a "notional offence" for which they can be prosecuted domestically (a prosecution in lieu) is created. The conduct giving rise to the notional offence must be an offence in Australia if committed there. While the Attorney-General must consent to the prosecution, the decision itself is undertaken independently by the domestic prosecution authorities. In *Lobban v Minister for Justice*, the Court held that the prosecution in lieu provision "does not empower or oblige the Minister to actually commence or decide to commence a prosecution".[99] That decision was for the Director of Public Prosecutions. Nothing compelled the Minister to commence a prosecution in their own name nor to direct a prosecuting authority to indict the person whose extradition was sought.[100]

[88] In New Zealand there is no forum bar. However, the Minister points out that even in a jurisdiction with a forum bar, such as the United Kingdom, the facts of this case would not justify a domestic prosecution. The bulk of the offending did not occur in New Zealand, nor did the investigation occur here. In addition, none of the relevant

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98 *United States of America v Cotroni* [1989] 1 SCR 1469.

99 *Lobban v Minister of Justice* [2015] FCA 1361 at [36].

100 The Minister refers to the Australian Social Policy and Legal Affairs Standing Committee "Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011" (September 2011). This noted that the proposed measures maintained the requirement for prosecution authorities to act independently, and were designed to ensure Australia was not regarded as a safe haven for criminals evading justice in foreign countries due to the lack of extradition relationship between Australia and the foreign country.

evidence or witnesses are in New Zealand and the Police have advised they are not in a position to advance a prosecution.

Analysis

[89] In regard to the decision of whether to prosecute Mr Dotcom in New Zealand, the Briefing Paper noted:

> *Prosecution in NZ*
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> 42. It is an important constitutional principle that decisions on whether to prosecute an individual in NZ are made independently by the Police. It would be inappropriate for the Minister or the Ministry to seek to interfere with or influence any decision to prosecute or not prosecute Mr Dotcom in NZ. Extradition requests are not generally approached as a choice between a domestic prosecution or a prosecution in the requesting country. The decision for the Minister is just whether to agree to the other country's request to extradite.

[90] The Briefing Paper went on to summarise the information obtained from the New Zealand Police explaining their decision and the relevant advice from officials, as follows:

> *Information obtained from the NZ Police*
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> …
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> 44. The Police said it would be an unusual step to commence a domestic prosecution in relation to conduct for which another country had sought extradition. In respect of Messrs Ortmann and van der Kolk, the Police were only prepared to consider it in the "exceptional circumstances" of that case. The Police would not have considered domestic charges without the US having signalled its willingness to forgo its right to seek extradition. It was also important that Messrs Ortmann and van der Kolk offered to plead guilty and to provide assistance to the US authorities in respect of the case against Mr Dotcom, who the US considers to be the primary offender.
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> 45. The Police noted that Mr Dotcom had not made a comparable proposal. The Police advised that NZ charges would not be viable or practical if the matter required a trial in NZ.
>
> *Theoretical possibility of a NZ prosecution*
>
> 46. It is not your role to speculate on whether NZ is a more appropriate forum for a prosecution than the US. Any question about a prosecution in NZ is for the NZ Police to make independently.

> 47. There are no features of this case that ought to displace that principle, nor is there any other feature of this case to suggest that a domestic prosecution is so viable or likely that extradition should be refused. Here, there is no prosecution of Mr Dotcom underway in NZ, and it seems very clear that the NZ authorities have no intention to prosecute him.
>
> *Different treatment between co-offenders*
>
> 48. Mr Dotcom argues that the difference in treatment between him and his alleged co-offenders is wrong, and also that it suggests a political motivation to the US's pursuit of him. But there is nothing necessarily unusual or improper in prosecuting authorities electing to treat alleged co-offenders differently over what charges (if any) are brought or what sentences are sought. In particular, in a criminal enterprise, it is not uncommon for the primary offender to be treated differently from those with a lesser role.

[91] The explanation given by the Police for the domestic charging of Messrs Ortmann and van der Kolk was reasonable, justifying, as the Assistant Commissioner explained, a different approach.

[92] The Minister was entitled to rely on the explanations given by the Police.[101] As discussed above, according to the Assistant Commissioner, the Police's decision not to prosecute Mr Ortmann and Mr van der Kolk was based on their offer to plead guilty to the New Zealand charges, their promise to provide assistance to the United States investigation and prosecution, and the fact that Mr Dotcom was alleged to be the primary offender. This was also the basis for the United States agreeing to withdraw the extradition requests in relation to them. Mr Dotcom, on the other hand, says he would require an "ironclad assurance" that the United States would withdraw its extradition request before he would agree to plead guilty.

[93] As submitted, neither the Treaty nor the Extradition Act contemplate domestic prosecution as an alternative to extradition. The Minister was not entitled to second guess the independent prosecutorial decision of Police, in circumstances where they made a decision not to prosecute and pointed to a reasonable basis for that decision. It was not the failure to prosecute domestically that was the relevant issue for the Minister, but rather the disparity between the sentence and treatment that Mr Dotcom

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[101] As noted above, discovery of the plea agreements and related material for the purposes of these proceedings was refused: discovery judgment, above n 27.

might receive if convicted in the United States instead of New Zealand. In particular, the issue was whether the United States sentence would be disproportionately severe.

Minister's consideration of disproportionately severe treatment

[94] Mr Dotcom points to s 9 of NZBORA, which affirms the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Article 7 of the ICCPR and art 16(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, are of similar effect, although they use the term "inhuman" rather than "disproportionately severe".

[95] The Briefing Paper dealt with whether or not Mr Dotcom would face a disproportionately severe sentence in the United States. The issue was said to warrant particularly careful consideration, noting that it engaged an NZBORA right.

[96] Mr Dotcom says not only is there a disparity between the sentence he would receive in the United States compared to that which he would receive in New Zealand, but also between his likely sentence and the sentences received by Messrs Ortmann and van der Kolk. On that basis, he contends that his sentence would be a disproportionately severe punishment. He says the Briefing Paper omits to examine the comparison with Mr Ortmann and Mr van der Kolk's sentencing for offending which (until recently) had involved allegations of the same conduct as alleged against him.

[97] As the Minister submits, in the extradition context, a grossly disproportionate sentence, such that surrender should be refused, may occur in two ways. First, the sentence itself may be disproportionately severe relative to the conduct, and therefore in breach of s 9 of NZBORA. To that extent consideration of the treatment of alleged co-offenders is relevant to disproportionality.

[98] Second, Mr Dotcom's sentence or treatment might be disproportionately severe if it amounts to an "irreducible life sentence", being one where there is no prospect of release at all. An irreducible life sentence may breach the provisions of the relevant rights instruments referred to above.

[99] The Minister's consideration of these two types of disproportionately severe treatment in reaching his Surrender Decision are discussed below.

Disparity between sentence in New Zealand and the United States

[100] The Ministry had sought advice from Mr Debold, a United States expert on sentencing and forfeiture law. Relevantly, he gave advice on the likely sentence that Mr Dotcom would receive if convicted, as well as potential ways he could avoid serving the entire sentence. In his memorandum dated 11 May 2023, Mr Debold said that Mr Dotcom would likely receive a prison sentence of at least 30 years (and would likely serve the vast majority of that sentence), however could potentially be sentenced to up to 150 years. Early release on parole is not a feature of the United States federal system, however a reduction of approximately one seventh of a sentence for good behaviour is possible. Relief on compassionate grounds is also available. The Briefing Paper also referred to the ability to apply for exercise of executive clemency, which is a commutation of the sentence by the President.

[101] The Briefing Paper noted that the uncertainty of the United States sentence (somewhere between 30 and 150 years' imprisonment) made the assessment complicated. It suggested that the practical reality was that Mr Dotcom was likely to spend the rest of his natural life in jail in the United States if convicted, given that he was then 50 years of age. Therefore, Mr Dotcom faced what could effectively be seen as a life sentence for the purposes of assessing proportionality.

[102] If convicted on equivalent charges in New Zealand, Mr Dotcom would likely receive a prison sentence in the range of 12–15 years (based on the sentencing of Mr Ortmann and Mr van der Kolk). He would be eligible for parole after serving one third of that time.

[103] Mr Dotcom says the likely sentence which might be imposed in the United States is understated at 30 years, and cumulative sentences would total about 150 years. Accepting that there might be scope for downward variance, Mr Debold had said it was "difficult to predict how a judge would approach this situation" given that sentences of that length are reached so infrequently, especially in economic crime

cases. However, the Minister dealt with this by assuming any sentence would be for the rest of Mr Dotcom's natural life.

[104] Mr Dotcom also says the Briefing Paper overstated the likely sentence in New Zealand at between 12–15 years, given that this is approximately six times more than the sentences of Mr Ortmann and Mr van der Kolk. Mr Dotcom denies that his role was different to theirs and says credibility of that allegation would be "strenuously tested".

[105] The Minister suggests that Mr Dotcom brushes over the differences between his own situation and that of his co-offenders — in particular their respective roles in the alleged offending, the co-offenders' guilty pleas, and their provision of evidence to assist the United States prosecution. These are all factors which would justify a different outcome in both New Zealand and the United States.[102]

[106] As the Minister says, it is apparent from the eligibility judgments that there is "extensive evidence that would tend to support the United States' contention that Mr Dotcom was the leader and guiding mind" of the alleged Megaupload conspiracy. This includes emails and messages in which he gave instructions to Mr Ortmann and Mr van der Kolk (among others), made demands of them, and monitored them when they did not meet his expectations.[103] This was accepted at the sentencing of Mr Ortmann and Mr van der Kolk.[104] It is also apparent from Mr Dotcom's share of ownership in the companies associated with the operation, and reflects the allegations and indictments made in the United States from the outset.

[107] As noted earlier, in the absence of any error in the refusal of the Police to lay domestic charges against Mr Dotcom, the issue for the Minister is whether the United States sentence and trial process is disproportionately severe. The Minister must undertake a risk analysis, taking into account the advice he has received. This involves consideration of what the expected outcome might be for Mr Dotcom if tried

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102 Sentencing Act 2002, ss 8(a), 9(2)(b) and 9(2)(f).

103 Examples were given of the emails and messages in the DC eligibility judgment, above n 20, at [282], [283], [325], [326], [328], [331] and [332].

104 Sentencing notes, above n 31, at [90].

and sentenced in New Zealand, but always bearing in mind the extradition context, and that it is not in New Zealand but in the United States that he will be dealt with.

[108] In arguing that the disparity in Mr Dotcom's sentencing does not make his surrender disproportionately severe, the Minister points to the decision of the European Court of Human Rights in *Bijan Balahan v Sweden.*[105] The Court held that a sentence is not "grossly disproportionate" merely because it is more severe than one imposed in another state.[106] In that case, which related to interfering with witnesses, the applicant argued that his extradition would violate art 3 of the European Convention on Human Rights (ECHR) because, if convicted in California, he risked receiving a sentence with a lengthy minimum term (61 years), which would exceed his life expectancy.[107] The maximum penalty in Sweden for the corresponding crimes was 10 years' imprisonment.[108] He argued that the sentence was therefore an irreducible life sentence and grossly disproportionate.

[109] The European Court of Human Rights dismissed the claim that there was a real risk he would be subject to a term of 61 years, noting that it was impossible to predict every permutation that might occur.[109] Even though the convictions would be subject to the Californian three strikes regime, the sentencing judge would have discretion to impose a shorter minimum term — potentially as low as 17 years.[110] The various uncertainties made it very difficult to predict the likely sentence.[111]

[110] The Court pointed out that the imposition of a sentence of life imprisonment was not of itself prohibited, nor incompatible with art 3.[112] It noted that "grossly disproportionate" is a strict test, and it is only on rare and unique occasions that this test will be met.[113] Furthermore, "due regard" had to be given to the fact that

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105 *Bijan Balahan v Sweden* ECHR 9839/22, 29 June 2023.
106 At [66].
107 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.
108 *Balahan*, above n 105, at [37].
109 At [61].
110 At [33(c)].
111 At [62].
112 At [52].
113 At [53].

sentencing practices varied greatly between states.[114] There would often be legitimate and reasonable differences between states as to the length of sentences imposed, and it was only "in very exceptional cases" that an applicant would be able to demonstrate that the sentence they faced would be "grossly disproportionate".[115] Relevant to the Court's view that the sentence did not meet the threshold in that case was the fact that the applicant would only be sentenced in the United States if convicted following a fair trial.[116]

[111] The comments of the Federal Court of Australia in *Lobban v Minister for Justice* are to similar effect.[117] The Court there noted that in criminal law "respect must be given to the judicial system of the requesting country".[118] The Court considered it was not open to it, to conclude that the decision to surrender fell "within the ambit of legal unreasonableness".[119] While others might have come to a different conclusion and the decision might in the circumstances have appeared harsh, this did not expose the Minister's surrender determination to jurisdictional error.

[112] The Minister also points to the Canadian decision of *United States of America v Ferguson*.[120] In that case, Mr Ferguson argued that the disparity between an expected sentence of 15–19.5 years' imprisonment in the United States compared to a sentence of three to four years in Canada for the alleged conduct would "shock the conscience of reasonable Canadians".[121] However, the Court noted that there was a consistent body of law which held that the length of sentence a person could expect to receive in the United States was not sufficient reason in itself to deny surrender.[122]

[113] A further example in which the Canadian courts have compared domestic sentences against relevant United States' sentences and have not found the disparity to be grounds to refuse extradition, is *Canada (Attorney General) (United States of*

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114 At [53].
115 At [53].
116 At [67].
117 *Lobban,* above n 99, at [75]. This was upheld on appeal in *Lobban v Minister for Justice* [2016] FCAFC 109, (2016) 244 FCR 76.
118 At [76].
119 At [77].
120 *United States of America v Ferguson* 2023 BCCA 186.
121 At [101].
122 At [102].

America) v Hillis.[123] The applicant would have likely faced a sentence of between 90 days and three years if prosecuted in Canada, for charges of sexual offending involving a child. The relevant United States' charges would have attracted a statutorily-mandated minimum sentence of 30 years' imprisonment.[124] The Ontario Court of Appeal commented that the interference with the Minister's decision would be limited to "exceptional cases of real substance", and the surrender decision, which was largely political in nature, fell within the reasonable range of outcomes.[125] It asked whether the Minister had considered the relevant facts and rendered a defensible conclusion, bearing in mind the constraints imposed on the Minister by international law, including Canada's treaty obligations.[126]

[114] The applicant in *United States of America v Wilcox* faced a maximum sentence of ten years' imprisonment in Canada, but between 26–108 years' imprisonment in Arizona for sexual offending against a child.[127] The Court of Appeal of British Columbia noted the 57-year-old offender effectively faced a life sentence if extradited.[128] In the *United States of America v UAS,*[129] the same Court considered an application by an applicant who faced a mandatory minimum sentence in the United States of 25 years and a maximum of 99 years, compared to the Canadian maximum penalty of ten years imprisonment in relation to the child sex charges.[130] The Court noted that while the mandatory sentence of 25 years was "harsh or severe", it would not "shock the conscience of Canadians".[131]

[115] The overseas cases provide some general guidance as to what is required of the Minister in the extradition context. It is a complex risk assessment. It involves "a tentative prognosis that will inevitably be characterised by a very different level of uncertainty when compared to the domestic context".[132] The analysis requires consideration of the possibility of sentence reductions for cooperation, guilty pleas

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123 *United States of America v Hillis* [2016] ONCA 447, 156 OR (3d) 525.
124 At [95].
125 At [85]
126 At [85].
127 At [24].
128 *United States of America v Wilcox* 2015 BCCA 39 at [40].
129 *United States of America v UAS* 2013 BCCA 483.
130 At [70].
131 At [73].
132 *Sanchez-Sanchez v United Kingdom* ECHR 22854/20, 3 November 2022 at [92].

and other reasons, as well the possibility of parole and other release mechanisms, which are referred to in *Sanchez-Sanchez v United Kingdom*.[133] In that case, the Court was considering the extradition of a Mexican national accused of drug trafficking, who said he would face a mandatory minimum life sentence without parole if extradited to the United States.

[116] It is apparent from the Briefing Paper that in making the Surrender Decision, the Minister had the necessary material before him upon which to undertake the required risk assessment as to whether a possible United States sentence would be disproportionately severe. The Minister appropriately assumed any sentence would be in the range of 30–150 years, which would be in practical terms the rest of Mr Dotcom's natural life. The Minister compared that with the likely range of 12-15 years imprisonment which might be imposed in New Zealand.

[117] In addition, the advice from Mr Debold made it clear that while there were uncertainties in relation to the likely United States sentence, it would be imposed only after a fair trial and sentencing, following the generally applicable statutory process and guidelines based on the gravity of the offending and factors personal to Mr Dotcom.

[118] The Minister acknowledged the difference between the likely United States outcome and the notional New Zealand equivalent, but concluded that this did not necessarily make the United States sentence disproportionately severe. That is consistent with the approach in the overseas cases referred to above, which were before the Minister. He considered the relevant facts and came to a defensible conclusion, bearing in mind the constraints imposed on the Minister by international law, including treaty obligations.[134]

[119] The threshold for "disproportionately severe" is a high one, requiring that the sentence is so excessive it would "shock the conscience of properly informed

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133 At [92].
134 *Hillis*, above n 123, at [85].

New Zealanders".[135] The Ministry Briefing Paper noted the observations of the Ontario Court of Appeal in *Hillis* in relation to that threshold, as follows:[136]

> ...it is well settled that, absent sentences that would invoke consequences such as torture, the death penalty, excision of limbs and the like, the sentencing regimes of other nations, despite their severity compared to our own, will not generally "shock the conscience" of Canadians.

[120] The assessment of whether a sentence would shock the conscience of New Zealanders must take into account the differences between sentencing generally in the domestic jurisdiction and the United States. It is not an assessment of whether New Zealanders would be shocked if the relevant sentence were imposed in New Zealand, but of their reaction if that sentence were imposed in the United States' context. The difference in penalty must also be balanced against other factors such as comity and reciprocity, which underpin extradition.[137]

[121] The Minister made no error in making his assessment in reliance on advice that the likely range if Mr Dotcom were to be sentenced in New Zealand would be between 12–15 years' imprisonment, with eligibility for parole after serving one third. In particular, the Briefing Paper noted that during the sentencing of Messrs Ortmann and Van der Kolk, the Crown had indicated it would seek a minimum of 16 and a half years' imprisonment for "the leader" of the conspiracy. However, given that the maximum penalty for the relevant charges was 14 years' imprisonment, the Briefing Paper indicated that a starting point of 14 years would be likely. The Briefing Paper also reviewed possible discounts for personal factors, including health issues and guilty pleas, as well as "modest" discounts available for other factors such as rehabilitation and reparation. That suggested a likely end sentence in the region of 12–12.5 years, although this could be higher if different or additional charges were laid.

[122] Mr Mansfield submits that the end sentence might be brought even lower. However, that is a matter of speculation, and the range considered by the Minister was well within what could be considered appropriate for the nature of the alleged

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135 *Fitzgerald*, above n 70, at [134].
136 At [104].
137 At [75] and [102].

offending and factors relevant to Mr Dotcom. The paper also noted that Messrs Ortmann and Van der Kolk did not get a credit for time on bail, and it was likely that Mr Dotcom would not either.

[123] It was open to the Minister to reach the conclusion that surrendering Mr Dotcom to an extradition partner where he would face the prospect of an effective life sentence, compared to the likely range of sentence which might be imposed locally, would not shock the conscience nor, as it has been put in other cases, be "so out of proportion to the particular circumstances as to cause shock and revulsion",[138] or "so excessive as to outrage standards of decency".[139] Therefore the Minister made no error in his analysis and concluding that the sentence was not disproportionately severe.

Irreducible life sentence

[124] While any likely United States sentence would be determinate, as both Mr Dotcom and the Minister note, a sentence of 30 years or more without parole will effectively be "a whole-of-life" sentence for him, given his age and health. He submits that, in practical terms, the sentence would be irreducible as, in Mr Debold's words, "[t]here are limited opportunities under federal law to have a sentence reduced". Mr Debold had not factored this into his advice because he considered it "highly uncertain". Mr Mansfield emphasised that these are extreme last resort options which will only apply if, for instance, there is a diagnosis of a terminal disease.

[125] The Minister points to other comparable jurisdictions where arguments that the prospect of a longer finite sentence or life sentence would breach art 7 of ICCPR or equivalent provisions have been dismissed.[140] For instance, in *Gwynne v Canada (Minister of Justice)* the Court of Appeal of British Columbia noted that it was possible under the Criminal Code of Canada (although not for the crimes of extortion which were under consideration) for a person to be sentenced to a finite term that would cause a middle-aged offender to doubt whether their normal life expectancy would exceed

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138 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172].

139 At [92].

140 Such as the Canadian Charter of Rights and Freedoms, s 12, which protects the right not to be subjected to any cruel and unusual treatment or punishment.

the period of parole ineligibility.[141] The severity of such a sentence was not in itself grounds for refusing extradition. The Court also noted:

> [28] I think it would be difficult to establish that the severity of a sentence in a foreign jurisdiction, imposed after a trial with reasonable procedural safeguards by a court of competent jurisdiction under legislation of general application, was a breach of s. 7 of the *Charter*. I say this in light of the judgment of the Supreme Court of Canada in *Jamieson v Canada (Minister of Justice* [1996] 1 S.C.R. 465 (S.C.C.), which substantially adopted the dissenting reasons of Mr. Justice Baudouin in *Jamieson v. Canada (Minister of Justice)* (1994) 197 N.R. 2, 93 C.C.C. (3d) 265 (Que. C.A.).
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> [29] If this matter revealed no other circumstance than service of the unexpired portion of an admittedly harsh sentence, but one imposed by law, and the allegation of procedural unfairness on the part of the Minister, I would not be prepared to conclude he had exercised his discretion in a manner which would permit this Court to interfere on either *Charter* or non-*Charter* grounds.

[126] The Minister, in his submissions, notes that there has been no direct judicial consideration of whether a life sentence without parole (or a life sentence per se), might breach s 9 of NZBORA or art 7 of ICCPR. In *Kim v Minister of Justice*, Mr Kim faced such a sentence in China, which was seeking to extradite him for murder.[142] In that case, the matter had only been argued in passing, and there was an absence of evidence as to whether life imprisonment without parole in the Peoples Republic of China, as a matter of law and fact, was irreducible. The Court of Appeal noted that there may be rights of commutation in Chinese legislation, but without a proper evidential basis for the argument, it did not propose to address it.[143] The issue was not pursued on appeal.[144]

[127] In any event, a Court will only interfere where there is a "real risk" that the person will be subject to a life sentence without parole, having regard to the opportunities in the process to plead guilty and cooperate, as well as the ability to make submissions as to the length of sentence if convicted.[145] This is consistent with the Court of Appeal's comments in *Kim*.

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141 *Gwynne v Canada (Minister of Justice)* (1998) 50 CRR (2d) at [27]. This case involved consideration of the extradition of a fugitive who had been serving a sentence of 120 years in an Alabama prison.

142 *Kim* (CA), above n 8.

143 At [268].

144 *Kim* (SC), above n 49.

145 *Sanchez-Sanchez*, above n 132, at [95].

[128] The possibility of compassionate release (including for reasons such as health), as well as the exercise of executive clemency in the United States, has been held by the England and Wales High Court to provide a sufficient review mechanism such that the sentence cannot be regarded as not allowing for any possibility of relief. After a review of the authorities, the Court in *Hafeez v Government of the United States of America* said that the two routes available in the United States offered transparent means of challenging one's sentence, and meant that the proposed sentence of life imprisonment did not violate art 3 of the ECHR.[146] Since the decision in *Hafeez*, as Mr Debold recorded, new amendments have been made to the United States Sentencing Guidelines. These included amendments to a provision allowing prisoners to make applications to the sentencing judge for a reduced sentence based on extraordinary and compelling reasons.

[129] In response to Mr Dotcom's submission that the Minister made a factual error in finding he would not be subject to an irreducible life sentence, Mr Hodder submits that the task of the Minister is one of assessment and evaluation, as the European authorities set out in the Briefing Paper made clear. That task is not limited to what the person's sentence might be, if convicted of all charges after defending them at trial, which was the question the Ministry's expert Mr Debold was asked to address.

[130] In making the Surrender Decision, the Minister specifically considered the issue of whether the effective life sentence Mr Dotcom would face in the United States amounted to an irreducible life sentence, and would therefore be disproportionately severe. He concluded, due to the possibility of compassionate release (including for health reasons) and "the power of Executive Clemency", that it did not. Given the Minister's task was one of assessment and evaluation, he made no error in reaching that conclusion.

[131] For completeness, I note that at the hearing Mr Sinclair, for the Commissioner, made further submissions concerning a United States sentencing case. He attached the publicly available government sentencing memorandum and United States Department of Justice press release issued after the sentencing to his submissions,

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146 *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin) at [58].

noting that a sentencing decision of the kind issued in New Zealand courts is not available in the United States. The offender in the case was sentenced on charges of a significant copyright fraud.[147] Mr Sinclair noted that the offender's final sentence was far lower than that which had been originally estimated at the time he pleaded guilty.[148] The copyright fraud, taking place from 2016–2019, involved approximately USD 167 million, where the offender personally received around USD 30 million. This case had not been before the Minister when he made his decision, and was introduced in the second respondent's oral submissions. Mr Mansfield therefore had minimal time to consider the case and respond. In those circumstances, I place no reliance on the case. Nevertheless, the material does indicate the United States courts will take into account the circumstances of the offending and the offender in imposing a sentence, if that were in doubt.

[132] In conclusion, for the reasons set out above, the Minister made no error in his analysis and conclusion concerning the factors related to whether Mr Dotcom would face disproportionate treatment if sentenced in the United States, and whether the likely sentence would be an irreducible life sentence.

Impact of United States forfeiture regime on fair trial rights

[133] A further matter raised by Mr Mansfield as disadvantaging Mr Dotcom and hampering his ability to defend himself at trial, is the United States' civil forfeiture regime. As a result of a civil forfeiture order granted pursuant to the "fugitive disentitlement" doctrine, Mr Dotcom is likely not to have any funds or assets to fund a United States defence lawyer.

[134] The lack of access to funds was taken into account by the Minister under the "any other reason" provision in the Extradition Act,[149] as well as in relation to its effect on the right to a lawyer required under NZBORA.[150]

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147 The offender was Mr Bill Omar Carrasquillo.

148 He was ultimately sentenced to five years and six months' imprisonment, although the government has proposed a sentence range of 15 years and eight months to 19 years and seven months. The sentences to which Mr Carrasquillo had pleaded guilty carried combined maximum sentences of 98 years.

149 Section 30(3)(c).

150 Section 24(f).

[135] The Minister had before him the requisite information on the United States forfeiture regime. The Briefing Paper noted that, to date, the United States forfeiture orders were not registered in New Zealand, and Mr Dotcom had received substantial allowances from frozen funds for his living expenses and legal expenses in New Zealand.[151] However, that would change if he were extradited. The Minister noted that effectively Mr Dotcom's argument was that, due to the complexity of the charges, the legal representation offered by a public defender in the United States to which he would be entitled, would be inadequate.

[136] In response, the Minister noted that the lack of funds would not adversely affect Mr Dotcom's constitutional right to a lawyer, and the fact that he would be reliant on a public defender does not in itself suggest he would have an unfair trial. The Minister went on to say that if there is concern about the adequacy of counsel and the effect on his ability to obtain a fair trial, that is a matter Mr Dotcom can raise with the United States trial court, and is not a basis to refuse surrender.

[137] Mr Mansfield made only passing comments in his oral submissions on this point. However, he points to no error in the Ministers consideration or conclusion. The Minister's conclusion was open to him based on the material before him, which was adequate to enable him to reach a decision on the issue.

Bad faith

[138] Nor did Mr Mansfield dwell on the claims of bad faith against the United States Government in his submissions. There is no evidence to support the allegations that the United States has acted in bad faith, nor to appease copyright holders.

[139] Mr Dotcom maintains that the United States is attempting to deprive him of the safe harbours available under the New Zealand Copyright Act, however there is no evidential basis for that. In addition, this claim seeks to relitigate the Supreme Court's findings on double criminality. The Court said:[152]

> [384] We accept the appellants' submission that ss 92B and 92C are not defences. Rather, if they apply, there is no copyright infringement and, if that

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151 As a result of freezing orders obtained by copyright holders in New Zealand and Hong Kong.
152 SC eligibility judgment, above n 1, at [384]–[388] (footnotes omitted).

> is the case, s 131(1) cannot apply. We also accept that the Megagroup comes within the definition of ISP.
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> [385] We do not, however, accept that the Megagroup could avail itself of the protection of s 92B(2). As noted above, that subsection provides that an ISP cannot be subject to criminal sanctions merely because someone uses its services to infringe copyright "without more". In this case there is much more alleged. The allegation is that the Megagroup business model was designed to encourage and facilitate widespread copyright infringement. We also agree with the High Court that an interpretation of s 92B that would cover the Megagroup's activities would deprive s 92C of any effect.
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> [386] Turning now to s 92C, the protection is not available if the ISP knows or has reason to believe it is storing infringing material and does not delete the material or prevent access as soon as possible after becoming aware of the infringement. In this case the allegation is that the whole business design was to encourage users to ignore the Megaupload terms of service with regard to copyright, and that the appellants knew or at the very least had reason to believe that the Megasites contained a large amount of copyright infringing material and failed to delete it or to prevent access, despite having the means to do so. Indeed, to the contrary, it is alleged that the Megagroup facilitated and encouraged access to infringing files by, among other things, copying the most popular content to Cogent Communications servers to enable more rapid distribution. The alleged conduct means s 92C does not apply.
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> [387] The appellants' submissions on s 92C concentrated on the Megagroup's response to the copyright infringement notices (take-down notices) and the abuse tool. But the United States' case on knowledge is wider than this and does not suggest that the Megagroup's knowledge of infringement arose only because of the take-down notices. Even if the Megagroup's response to those notices or the design of the abuse tool was adequate, this is not a complete answer.
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> [388] The response to the take-down notices certainly forms part of the allegations about knowledge on the basis that take-down notices are an assertion that copyright exists and belongs to someone else. By responding to the take-down notices, it is alleged that the Megagroup must have accepted there was copyright infringement with regard to the particular URL and the take-down notice must have alerted it to the fact that there was copyright infringement by other users having URLs to the same file. We are thus inclined to accept the above argument on this point, but it is not necessary to come to a definite conclusion. In any event, safe harbour provisions in the United States will be a focus at trial.

[140] While it seems unlikely, given those comments, that Mr Dotcom would be able to avail himself of the safe harbour provisions in the Copyright Act if he were tried in New Zealand, that is not a matter for the Minister. The Minister was not obliged to be satisfied beyond reasonable doubt that Mr Dotcom had committed copyright offences in New Zealand before surrendering him to the United States, or in order to dismiss Mr Dotcom's unsupported assertion that the United States is seeking to prosecute him

to deprive him of New Zealand safe harbours. It is the Minister's job to determine whether to surrender Mr Dotcom under s 30 of the Extradition Act.

[141] The Supreme Court also noted that the United States has safe harbour provisions on which Mr Dotcom may seek to rely at trial.[153]

[142] Mr Ortmann and Mr van der Kolk made admissions in relation to the core allegations disentitling reliance on the safe harbour provisions. Whether Mr Dotcom is guilty of the same conduct and knowledge that Megaupload was storing infringing material and did not delete material or prevent access as soon as possible after becoming aware of the infringement, such that he would be outside the safe harbours, is a matter for his trial. Mr Dotcom will be able to challenge the admissions in evidence of Mr Ortmann and Mr van der Kolk at trial, if they are called as a witnesses.

[143] In addition, the courts considering eligibility rejected the argument that the United States prosecution had been commenced or continued in bad faith because the prosecutors wished to proceed to trial in the United States.[154] There is no basis for the Minister to have accepted that was the case. The Minister therefore made no error under this head.

Alleged breach of art IX of the Treaty and abuse of process

[144] The amended statement of claim pleaded that the Minister had breached art IX of the Treaty, and the extradition proceeding had therefore been tainted by abuse of process by New Zealand authorities, including: illegal surveillance; unlawfully withholding disclosure; unlawfully dealing with seized evidence; and failing to ensure that the United States complied with its duty of candour. These breaches and allegations were not pursued by Mr Mansfield in submissions.

[145] Mr Dotcom alleges he will not face a fair trial in the United States due to political motivation for laying the charges. In the pleadings, he also makes allegations of bias against the United States Judge assigned to manage the case. Such submissions

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153 SC eligibility judgment, above n 1, at [217].

154 HC eligibility judgment, above n 21, at [523], [525] and [552]; and CA eligibility judgment, above n 22, at [289] and [301].

by Mr Dotcom were before the Minister, including that: this was a politically motivated case, not brought in good faith; and previous legal steps taken by United States or New Zealand authorities were tainted with unlawfulness or abuse of process in various ways, including that Mr Dotcom would not receive a fair trial in the United States because he could not properly fund his defence. The last issue has been dealt with above.

[146] All of the matters raised were referred to in the Briefing Paper and were before the Minister when he made his surrender decision. There is no evidence to suggest that the trial would be undertaken other than with reasonable procedural safeguards under legislation of general application by a court of competent jurisdiction. There is no evidential basis for these claims, nor were the abuse of process claims listed above pursued in submissions, other than as part of the arguments already dealt with.

[147] No errors have been established in relation to the Minister's assessment regarding these matters. For completeness, the pleaded claims insofar as they relate to these allegations are not made out.

Undue delay

[148] Regarding delay to action the extradition request, the Minister in the Surrender Decision said:

> 59. Surrender can be refused if that would be unjust or oppressive because of the amount of time that has passed since the alleged offending. The alleged offending here occurred 12-19 years ago. That is not an uncommon delay in light of other extradition case law in NZ and overseas. Mr Dotcom's main argument here is a concern about the failure by the US to preserve relevant evidence. Whether his trial would be prejudiced by that is a matter that the courts in the US are better placed to assess.
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> 60. I do not consider that the passage of time provides a reason to decline surrender.

[149] More than 12 years have elapsed since Mr Dotcom's arrest, and during that time he has been on bail. Mr Mansfield indicated in his submissions that he did not rely on delay as a factor supporting review in this application.

[150] Nevertheless, this was a matter raised in the earlier application for adjournment.[155] Although it has taken some time to get to this point in the extradition process, that has been largely due to the litigation over eligibility. While Mr Dotcom is entitled to test the extradition process in court, the delay, in context, is not undue and does not give rise to grounds for declining the extradition request.

[151] For completeness, I am satisfied that the Minister made no error in his assessment under this head.

Mr Dotcom's Health

[152] Some time was spent during the hearing on the issue of Mr Dotcom's health, albeit in the context of Mr Mansfield's application for an adjournment. He sought an adjournment not only to await further health reports, but also in order that a further application could be made to the Minister to review or otherwise reverse the Surrender Decision based on health considerations. Before I move to the reasons for refusing the second adjournment, I deal with the health issues as they relate to the Surrender Decision.

[153] Section 30(3)(d) of the Extradition Act provides that the Minister may decide not to surrender an individual where it appears there are compelling or extraordinary circumstances, including in relation to the health of the person, that would make surrender unjust or oppressive. There were full submissions before the Minister in relation to Mr Dotcom's health at the time, including from his general practitioner, Dr Stephen Child. While Mr Dotcom suffered from some significant health conditions, the Minister considered those and did not err in finding that they did not reach the threshold of "extraordinary circumstances".

[154] As I noted in the adjournment decision, taking into account the medical evidence before me in relation to Mr Dotcom's progress since the November 2024 stroke, "while there is no doubt some way to go, Mr Dotcom has improved considerably in the three month period since the stroke".[156]

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155 *Dotcom v Minister of Justice* [2025] NZHC 759 [adjournment judgment] at [18]–[20].
156 At [17].

[155] The Minister had full information before him concerning Mr Dotcom's multiple health conditions. He also had information concerning the facilities available to prisoners in the United States. The Briefing Paper noted that the Ministry had considered seeking further information from the United States Government on the medical treatment available, but concluded there was no need given that "US law provides for prisoners to receive health treatment, and … the US is an advanced nation with a modern and sophisticated medical establishment". The Briefing Paper said that whatever measures were reasonably required by Mr Dotcom would be a matter of professional judgment, and so concrete actions to address those could not be clearly identified in advance nor definitively guaranteed.

[156] The Briefing Paper reviewed the authorities, noting that New Zealand courts have found there is a high bar before surrender might be declined due to an individual's health. Even in a case involving severe health issues, including significant brain injury, suicidal ideation, mild cognitive impairment, depression, heart disease and a tumour, the Court of Appeal had described such health issues as "not out of the ordinary", and said there was no suggestion that the authorities in the requesting country could not address them.[157]

[157] As the Minister submits, the developments in Mr Dotcom's health did not exist at the time the Minister made his decision, and therefore are not relevant to the Court's assessment in this judicial review. The Minister also points out that Mr Dotcom's fitness to stand trial is a matter for the United States trial court, not for the courts of the requested state.[158]

[158] Minister ultimately concluded that Mr Dotcom's health conditions did not prevent surrender, saying:

> 54. Surrender may be refused if there are compelling or extraordinary personal circumstances (such as health) that would make surrender unjust or oppressive. NZ and UK case law shows this to be a high bar. This argument has usually failed in other cases where serious physical and mental health conditions have been raised. The case law

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157 *Mailley v District Court at North Shore* [2016] NZCA 83 at [64].

158 He cites *Edwards v Government of the United States of America* [2013] EWHC 1906 (Admin); *R (on the application of Warren) v Secretary of State for Home Dept* [2003] EWHC 1177 (Admin); and *Kisun v New Zealand* [2023] FCA 1576.

> also establishes that extradition is not oppressive even if it would interrupt treatment or lead to a decline in a medical condition or increased morbidity. US law allows for prisoners to receive (and requires the government to fund and provide) medical care. Although every individual's circumstances are unique, Mr Dotcom's health situation appears broadly comparable to other NZ cases where extradition was upheld.
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> 55. I do not consider that Mr Dotcom's health provides a reason to decline surrender.

[159] For completeness, I note that Mr Mansfield said in the course of his oral submissions that he did not advance the ground of review insofar as it related to Mr Dotcom's health.

[160] The Minister was entitled to reach the decision that Mr Dotcom's health did not provide a reason to decline the extradition request, based on the material before him. He was entitled to find that the health issues fell short of reasons that would amount to compelling or extraordinary circumstances, and would make surrender unjust or oppressive. The Minister made no error in his conclusion under this head.

Adjournment application and procedural matters

[161] Mr Mansfield renewed an adjournment application on the day of the hearing. The respondents both opposed the adjournment, submitting that the matters raised in support of the application had been canvassed in a decision refusing an adjournment made on 2 April 2025.[159] I refused the application and now set out the reasons for that decision.

[162] The new application was based, as the earlier one had been, on the fact that a specialist medical report had been obtained in relation to Mr Dotcom's ongoing physical health challenges, and a further assessment was due in June in relation to his mental, cognitive and emotional difficulties. These reports would be put before the Minister with a request that he reconsider his decision.

[163] The rehabilitation specialist who is treating Mr Dotcom, Dr Toni Auchinvole, provided a report which was attached to Dr Child's affidavit. Dr Auchinvole was

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159 Adjournment judgment, above n 155.

overseas so it was not possible to arrange for her to swear an affidavit. Mr Mansfield further noted that Dr Christine Canty, a neuropsychologist, was to assess the cognitive impairment caused by Mr Dotcom's stroke. She had made appointments for the assessment of Mr Dotcom in June and her report would be available sometime after that. The report of Dr Auchinvole had been sent to the lawyers acting for the Minister with a request that he agree to an adjournment. The refusal of that request on 22 May 2025, is the basis of a proposed seventh cause of action in the amended statement of claim.

[164] Mr Mansfield noted that, as had been indicated at the adjournment application hearing in March 2025, the reports of Dr Auchinvole and Dr Canty would shed light on the physical, cognitive and emotional state of Mr Dotcom following the stroke. The stroke had occurred on 6 November 2024 and by three months after that date (February 2024) the specialists agreed that most improvements in Mr Dotcom's health would have been evident. Mr Dotcom's health had likely stabilised at 4–6 months post-stroke and improvements had been achieved.

[165] Mr Dotcom has moved to Dunedin to be near his rehabilitation team. Dr Auchinvole noted many improvements, however there were continuing difficulties with mobility and personal care. Mr Mansfield noted that the specialist was more optimistic about improvements than was Dr Child.

[166] Mr Mansfield submitted that these difficulties would exacerbate the detrimental effect of transporting Mr Dotcom to the United States and housing him there for a lengthy remand period pending his trial, as well as during the trial and, if convicted, following sentence.

[167] Mr Mansfield also pointed out that there would be a request by Mr Dotcom for reconsideration of the extradition order by the Minister, which might be judicially reviewed. Therefore, he said all matters should be dealt with together to avoid duplication of judicial review applications.

[168] Mr Hodder said that the adjournment application merely reprised the matters raised in support of the application for adjournment which was dismissed in

April 2025. In addition, Dr Child, Mr Dotcom's general practitioner, was not a specialist and there was no indication that he had recently examined Mr Dotcom. Mr Hodder also pointed out that Dr Auchinvole should have sworn an affidavit if her report was to be relied upon.

[169] The judicial review application was filed on 9 September 2024. It had been timetabled for a five-day hearing commencing 26 May 2025, following a teleconference on 25 October 2024. On 25 February 2025, the adjournment application was set down for hearing. It was heard on 25 March 2025 and declined on 2 April 2025. An application for special leave to appeal from that decision has been filed in the Court of Appeal.

[170] As Mr Hodder submitted, this second application for adjournment seeks to review the decision declining the earlier application for adjournment. Rule 7.52 of the High Court Rules 2016 provides that a party who fails on an interlocutory application must not apply for the same or a similar order again without leave, which is only to be granted in special circumstances. Such circumstances are not present here.[160]

[171] For the reasons as set out in the earlier adjournment judgment, together with the fact that the Court is being asked to review its own decision, the application was declined. As I noted in the earlier adjournment judgment, judicial review is intended to be "simple, untechnical and prompt",[161] and further:

> [30] On balance, I conclude that the interests of justice are best served by the judicial review hearing proceeding on schedule. I conclude there are strong public interest reasons for the judicial review to be heard as scheduled, rather than delayed further based on speculation as to what might happen in the future and the possibility a new review of a decision which is yet to be made. Mr Dotcom's fair trial and natural justice rights, insofar as they relate to the judicial review before the Court, are not unacceptably compromised.

[172] In addition, the Commissioner noted that the judicial review claim against him relating to his failure to prosecute Mr Dotcom is not affected by the medical issues

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160 See *Singh v Chief Executive of Ministry Business, Innovation and Employment* [2021] NZHC 2471 at [17].

161 Adjournment judgment, above n 155, at [26], citing *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [39].

facing Mr Dotcom. Therefore, even if the matter had been adjourned against the Minister, it could proceed in relation to the Commissioner.

Application for leave to file the amended statement of claim

[173] Mr Dotcom sought leave to file an amended statement of claim. No objection was made to the proposed amendments at [3.12] and [3.22] of the pleading, which refer to the Briefing Paper provided to the Minister. These amendments had been heralded in a draft amended statement of claim, which was before the Court at the adjournment application hearing on 25 March 2025. Mr Hodder agreed that the respondents were not taken by surprise in relation to those amendments.

[174] However, the respondents opposed the addition of the proposed seventh cause of action at [9]. This was against the first respondent and was described as a "review of statutory power of decision (refusal to reconsider surrender decision in light of material change of circumstances in relation to applicant's health)".

[175] The claim pleads that the Minister has refused to reconsider or make a new surrender decision, notwithstanding the significant deterioration in Mr Dotcom's health and a neuropsychological assessment was not available until the end of June. While the date of the Minister's decision refusing to reconsider is not specifically pleaded, Mr Mansfield clarified that the decision referred to was that of 22 May 2025, when the Minister's solicitors advised that they would not agree to an adjournment. That refusal was in response to a request to adjourn the proceeding by Mr Cogan, on behalf of Mr Dotcom.

[176] As Mr Hodder pointed out, the refusal was based on the fact that nothing had changed since the earlier adjournment application had been refused. In addition, there was nothing to be referred to the Minister until a reconsideration application was prepared, which would need to include all the medical material, including Dr Canty's assessment. Mr Hodder also indicated he was in no position to consider the new claim pleaded in order to argue it at the hearing.

[177] The application for leave to amend the statement of claim by adding a seventh cause of action is declined.[162] The respondents were not given notice of the proposed amendment and were not prepared to argue the points raised at the hearing. To allow sufficient time to respond would have required an adjournment of the hearing. Secondly, the amendment was sought in order to review a decision to refuse an adjournment which, as Mr Hodder says, was not a reviewable ministerial decision, but merely a response to a renewed application for an adjournment without any new grounds. Mr Mansfield has indicated that no ministerial reconsideration will be sought until Dr Canty's assessment is available.

[178] The amendment seeks review of a separate decision. It also adds unnecessary complexity to the claim and in practical terms amounted to an application for an adjournment which had already been refused.

[179] Accordingly, as I indicated in my oral results decision, I grant leave to amend the statement of claim to include [3.21] and [3.22], but not to add the new cause of action at [9].

[180] I direct that an amended statement of claim reflecting those amendments be filed and served on or before seven days from the date of this judgment to ensure the record reflects the pleadings upon which the judicial review was argued.

Further affidavits

[181] In support of the adjournment application, Mr Mansfield sought leave to file two further affidavits. Both were in the nature of updating affidavits. The first was an affidavit of Dr Child in support of an application for adjournment, and the second was an affidavit of Ms Megan Henderson in support of the application for leave to file an amended statement of claim adding the seventh cause of action. The affidavits, together with the proposed amended statement of claim, were filed on the morning of the hearing.

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[162] Leave is required for the filing of an amended statement of claim after close of pleadings under the High Court Rules 2016, r 7.7. The leave requirement applies to judicial review proceedings: *Singh*, above n 160, at [29].

[182] I considered Dr Child's affidavit for the purposes of the adjournment application. However, the Minister has had no opportunity to consider it further, nor to respond to it. In addition, Dr Auchinvole's report is produced through Dr Child's affidavit, and if it were to be relied on it should be produced in an affidavit by Dr Auchinvole. Furthermore, as Mr Hodder pointed out, it does not meet the requirements of the High Court Rules as to expert evidence.[163] The affidavit is admitted for the purpose of the argument concerning the adjournment only.

[183] Leave is also granted to admit Ms Henderson's affidavit, as it was only for the purposes of arguing the amendment application.

Conclusion

[184] To conclude, in relation to the pleaded grounds of review, I find that:

(a) The Minister did not disregard any mandatory restrictions under s 7 of the Extradition Act in reaching his Surrender Decision. There is no evidence to support Mr Dotcom's allegation that the United States prosecution was politically motivated or carried out for any other improper purpose. Furthermore, the claims that Mr Dotcom's trial will fall below the minimum standards required under the ICCPR are unsupported, despite the fact that he will be required to rely on a public defender as counsel. Nor was there any conduct amounting to a breach of the Treaty, bad faith, or an abuse of process.

(b) For similar reasons, the Minister did not fail to take into account any discretionary restrictions under s 8 of the Extradition Act. Mr Dotcom's contention that he will face grossly disproportionate treatment, thus making his surrender unjust and oppressive, is not made out. While Mr Dotcom's likely sentence if convicted in the United States is substantially higher than what he would expect to receive in New Zealand, this is not such that it would "shock the

[163] High Court Rules, r 9.43 and sch 4.

conscience" of properly informed New Zealanders, nor does the likely United States sentence amount to an "irreducible life sentence", so as to constitute a grossly disproportionate punishment. Furthermore, the Minister was entitled to rely on the explanations given by the Police for deciding to prosecute Mr Dotcom's co-offenders in New Zealand but not Mr Dotcom, and the disparity between their sentences and Mr Dotcom's was not a relevant factor. In addition, there has been no undue delay in the extradition process.

(c) The Minister's Surrender Decision was not unreasonable. As discussed above, Mr Dotcom will not be subject to grossly disproportionate treatment as a result of his surrender to the United States.

(d) In relation to the Commissioner's decision to charge Messrs Ortmann and van der Kolk in New Zealand, but not Mr Dotcom, that decision was a proper exercise of the Police's discretion. There were differences in circumstances between Messrs Ortmann and van der Kolk and Mr Dotcom which entitled the Police to reach different conclusions with respect to the alleged co-offenders. There is no evidentiary basis for Mr Dotcom's allegations of bias or unreasonableness. It is not appropriate for this Court to engage in what effectively amounts to a merits review of the Police's prosecution decision.

[185] The Briefing Paper was fair, accurate and adequate in terms of the advice it provided, and the Minister had sufficient information upon which to base his Surrender Decision.

[186] The application for judicial review is declined.

Costs

[187] Costs would normally follow the event based on schedule 2B. Any application should be made by way of memorandum filed within 15 days of the date of this judgment, any response within another 15 days, and any reply to that within a further

five days. Costs applications have been filed in relation to the adjournment decision and they will be dealt with at the same time.

Grice J

Solicitors:
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Luke Cunningham Clere, Wellington for First Respondent
Crown Law, Wellington for Second Respondent