**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF APPELLANT UNTIL FURTHER ORDER OF THE DISTRICT COURT.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 22/2025**
**[2026] NZSC 81**

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| BETWEEN | BW<br>Appellant |
| AND | COMMONWEALTH OF AUSTRALIA<br>Respondent |

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| Hearing: | 4 November 2025 |
| Court: | Winkelmann CJ, Glazebrook, Ellen France, Williams and Miller JJ |
| Counsel: | T Epati KC, M K Mahuika and M D N Harris for Appellant<br>M J Lillico and N N A El-Sanjak for Respondent |
| Judgment: | 23 June 2026 |

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**JUDGMENT OF THE COURT**

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**A** **The appeal is allowed.**

**B** **The reference to the Minister of Justice under s 48 of the Extradition Act 1999 is revoked.**

**C** **The quashing of the surrender order by the High Court is reinstated.**

**D** **We make an order prohibiting publication of the name, address and identifying particulars of the appellant until further order of the District Court.**

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## REASONS



**WINKELMANN CJ, GLAZEBROOK AND WILLIAMS JJ**
(Given by Glazebrook J)

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### Introduction

[1] Mr BW is accused of assaulting a man in Perth, Australia in 2014, causing grievous bodily harm. The Commonwealth of Australia has requested Mr BW's extradition to face criminal charges related to the alleged assault.

[2] On 4 April 2023, the District Court held that Mr BW is eligible for surrender and issued a surrender order under s 47 of the Extradition Act 1999.[1] The surrender order was quashed by the High Court on 19 June 2023.[2] The High Court considered "that the effluxion of time would, in the combined circumstances of [Mr] BW's case, make it oppressive to surrender him".[3] On 12 February 2025, the Court of Appeal overturned the High Court decision and referred the case to the Minister of Justice (the Minister) under s 48 of the Extradition Act.[4]

[3] Leave to appeal to this Court was granted on 16 June 2025. The approved question was whether the Court of Appeal was correct to allow the appeal and find that the High Court erred in law when it concluded it would be oppressive to extradite Mr BW to Australia.[5]

**Legislation**

[4] Part 4 of the Extradition Act provides for a simplified extradition process from New Zealand to Australia and any other designated country.[6] Section 45(1) requires the court to determine whether a person to whom this simplified process applies is eligible for surrender. Mr BW accepts that, in his case, all relevant procedural steps have been taken and he is eligible for surrender under s 45, subject to s 45(4).[7] Section 45(4) provides:

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1 *Commonwealth of Australia v [BW]* [2023] NZDC 5941 (Judge Cathcart) [DC judgment].

2 The High Court issued a results judgment on 19 June 2023: *BW v The Commonwealth of Australia* [2023] NZHC 1525 (Ellis J). The reasons were issued on 23 June 2023: *BW v Commonwealth of Australia* [2023] NZHC 1587 (Ellis J) [HC reasons judgment].

3 HC reasons judgment, above n 2, at [45]; and see Extradition Act 1999, s 8(1)(c).

4 *Commonwealth of Australia v BW* [2025] NZCA 8 (French P, Collins and Hinton JJ) [CA judgment]. Leave to appeal had earlier been granted by the Court of Appeal: *The Commonwealth of Australia v BW* [2024] NZCA 25; and see s 69(2) of the Extradition Act, which provides that sub-pt 8 of pt 6 of the Criminal Procedure Act 2011 (appeals on questions of law) applies as far as applicable with any necessary modifications to every appeal under pt 8 of the Extradition Act.

5 *BW (SC 22/2025) v Commonwealth of Australia* [2025] NZSC 66 (Ellen France, Williams and Miller JJ).

6 Section 39.

7 See CA judgment, above n 4, at [10]–[13].

> **45 Determination of eligibility for surrender**
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> …
>
> (4) The court may determine that the person is not eligible for surrender if the person satisfies the court that a discretionary restriction on the surrender of the person applies under section 8.

[5] Mr BW relies on s 8(1)(c) of the Act. Section 8(1) provides:

> **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,—
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> and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

[6] If the court determines that a person is eligible for surrender under s 45, then s 47(1) is engaged. Under s 47(1), the court must, immediately after issuing a warrant for the person's detention, make an order surrendering the person, provided the case is not referred to the Minister for his or her consideration under s 48(1) or (4) (as the Court of Appeal did in this case).

[7] Appeals against determinations in respect of eligibility for surrender under s 24 or s 45 of the Extradition Act are confined to questions of law.[8] Section 72(2)(a) provides that, when considering such an appeal, the High Court cannot have regard to any evidence of a fact or opinion that was not before the District Court when it made the determination appealed from. The parties accept that the same restriction applies before the Court of Appeal and this Court. Section 72(1) provides that the High Court must hear and determine the question or questions of law placed before it and must

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[8] Extradition Act, ss 69 and 72. An error of law may arise where the decision-maker misapplied the legal test, failed to consider relevant matters (including those not listed in the statute) or considered irrelevant matters, or where the ultimate conclusion on the facts was so clearly untenable as to amount to an error of law: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27].

exercise one or more of its powers. These include the powers to reverse, confirm or amend the determination appealed from, to remit the determination to the District Court and to make any other order it thinks fit.[9]

[8] We also note that, when considering an application under pt 4 to surrender a person, the court is not entitled to receive "evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which surrender is sought".[10] Nor can the person to whom the proceedings relate adduce such evidence.[11]

**The alleged offending**

[9] The alleged offending occurred in the car park of a fast food restaurant in Perth on 8 November 2014. The allegations are as follows. The victim was sitting in a car on the passenger side with the window down. In an unprovoked attack, the offender ran up to the victim, jumped in the air and kicked the victim once in the head through the open car window. The victim got out of the car and approached the offender, who punched him once on the head, causing the victim to fall to the ground unconscious. The offender then kicked the victim once on the head and twice on the shoulder.

[10] The victim suffered significant injuries, including a comminuted right scapula fracture and intra-articular extension and a comminuted impacted fracture of the right distal clavicle. The victim also sustained a haematoma to his right fronto-temporal scalp and a contusion to his left hand. Without surgery, these injuries would have been likely to cause permanent damage.

[11] The assault was reported to the police on 24 November 2014. In February 2015, the Western Australia Police identified Mr BW as the person responsible for the attack.

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9 Section 72(1).
10 Section 45(5)(a).
11 Section 45(5)(a).

[12] Mr BW had returned to New Zealand in February 2015. The District Court proceeded on the basis that Mr BW did not know he was a suspect in the assault when he left Australia.[12]

**Delays**

[13] On 17 June 2015, the issuing of an arrest warrant for Mr BW was approved by a Magistrate at the Rockingham Magistrates Court in Western Australia. The charge alleged Mr BW had caused grievous bodily harm with intent to cause grievous bodily harm.[13]

[14] On 25 June 2015, a report to the Office of the Director of Public Prosecutions for Western Australia (ODPPWA) was submitted by an Investigating Officer for review and approval by the Mandurah District Office.

[15] It was not until 13 June 2016 that Superintendent Russell of the Mandurah District Office approved the report and it was submitted to the ODPPWA. There was no explanation for the delay of a year. The Officer in Charge of the Rockingham Detectives assumed that there had been an oversight by the Western Australia Police.

[16] The Director of Public Prosecutions for Western Australia approved the request to seek an extradition order on 27 February 2020. An extension of that approval was granted on 9 April 2021.

[17] In response to a query from the Western Australia Police as to the delay, the ODPPWA explained that the delay between the receipt of the request in June 2016 and the initial approval in February 2020 was attributable to a combination of factors, including workload pressures of the prosecutor assigned to the matter.[14] The ODPPWA advised that the request was reallocated to another prosecutor in January 2020, but the extradition process could not be progressed between

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12 DC judgment, above n 1, at [38].

13 The Criminal Code (WA), s 294. In Western Australia, this offence carries a maximum penalty of 20 years' imprisonment. The equivalent offence in New Zealand is s 188 of the Crimes Act 1961, which carries a maximum penalty of 14 years' imprisonment.

14 Further information had been sought by the Office of the Director of Public Prosecutions for Western Australia from the Western Australia Police in June 2016, but this request had been attended to in a timely manner.

February 2020 and February 2021 because of border closures due to the COVID-19 pandemic.

[18] On 10 June 2021, the request for extradition was signed by a Magistrate in Western Australia. Inquiries were made as to Mr BW's whereabouts and the warrant was endorsed by a New Zealand District Court Judge on 23 September 2022. Mr BW was arrested in October 2022 and made aware for the first time that he was a suspect in the 2014 assault.

[19] The District Court found that the Australian authorities had been "inexcusably dilatory".[15] The Commonwealth did not seek to challenge that assessment before us.

[20] Mr BW deposed that he had some recollection of an incident that occurred while he was living in Perth but, given the passage of time, he could only remember "bits and pieces". He said that there were a lot of people around at the time. Most were strangers but he did know three of them: two were back in Gisborne but he did not know the whereabouts of the third. We note too that the memory of material witnesses is in any event likely to have been adversely affected by the passage of time since the incident. Mr BW said he was concerned that his ability to obtain any CCTV evidence from neighbouring businesses will have been compromised (to the extent this footage has not been accessed and retained by the police).

**Mr BW's circumstances[16]**

[21] Mr BW is of Rongowhakaata descent. He comes from a settlement near Gisborne and in his early 20s moved to Australia for work. He first moved to Sydney in around 2012 but only stayed for around six months. In around 2014, he decided to give Australia another try, this time moving to Perth. While there and in early 2015

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15 DC judgment, above n 1, at [36] citing *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 785 per Lord Edmund-Davies.

16 This information is sourced from affidavits filed before the District Court by Mr BW, his partner and his mother. The Commonwealth of Australia did not seek to challenge any of this background. Section 72(2)(a) of the Extradition Act means that this Court has no updating evidence but we were assured from the Bar that there were no changes of circumstances that Mr BW's counsel considered that they, as officers of the Court, would be required to share with us.

Mr BW had serious issues with his mental health. In late February 2015, Mr BW returned to his tūrangawaewae to be closer to whānau support.

[22] Mr BW decided to move back to Australia in 2018. This time he went to Sydney, where his cousin and brother were living. He stayed for around a year, doing casual work on homes, cars and pools. During this period, he took an overseas trip to Vietnam and visited New Zealand as well, but on these occasions he always returned to Australia.

[23] Mr BW left Australia in early 2020 and moved back to live and work in his home settlement near Gisborne. At no stage during his travels was Mr BW informed of a warrant for his arrest. Mr BW can only recall being stopped once at the border in Australia and being questioned about something to do with fines.

[24] Since returning to New Zealand in 2020, Mr BW has worked across a number of industries in his community, including scaffolding and forestry work. He said in his affidavit that since he has returned to Gisborne he has got his "life back on track". Part of that is giving up drinking alcohol. He takes part in activities that he says "help me with my wairua", including hunting, fishing, and playing rugby and touch rugby.

[25] Mr BW also reconnected with his iwi and has become an integral part of his community. He delivered firewood to kaumātua and food parcels to people in need during the COVID-19 pandemic. He volunteers at the local marae, including monthly lawn and grounds maintenance work among other duties. He is also a major support person, emotionally and financially, for his mother, who we understand is a widow.

[26] In July 2021, Mr BW entered into a relationship with his current partner. The couple soon began planning a future together, including starting a family and applying for iwi assistance to purchase a house together. In December 2022, two months after Mr BW was arrested, their son was born. Mr BW's partner deposed that she relies on Mr BW for emotional, physical and financial support.[17] She said that, if

[17] At the time of the District Court hearing Mr BW's partner was on maternity leave: DC judgment, above n 1, at [46].

they had known that Mr BW was going to be extradited, they would not have planned to have a baby. Mr BW's mother deposed that Mr BW's extradition would cause "a huge emotional toll on [Mr BW's partner] and his [then] soon-to-be-born son" and have a "huge impact" on the whānau unit generally.

**District Court judgment**

[27] Judge Cathcart in the District Court did not consider that the inexcusable delay meant that it would be unjust to surrender Mr BW. The Judge recognised that the significant delay would make Mr BW's capacity to mount an effective defence difficult. He considered, however, that it could not be argued that a fair trial was impossible because of a lack of procedural safeguards. The Judge said that the trial court could be trusted to grant a stay of prosecution, should a trial be unfair because of delay. He also said that the Court should not "second-guess the trial judge's possible obligations to deal with the claimed prejudice from delay by way of jury instructions or self-reminder".[18]

[28] The Judge also rejected the submission that the extradition would be oppressive. He said that as a "matter of comity" he was "wary of reviewing the actions of the Australian authorities leading up to the request here".[19] He did not consider it a "borderline case where the element of prosecutorial delay might tip the balance in favour of [Mr BW]".[20]

[29] Counsel for Mr BW had placed emphasis on *Curtis v Commonwealth of Australia*, in which the appellant, Mr Curtis, had successfully relied on s 8(1)(c) of the Extradition Act.[21] The Judge considered that there were material differences between Mr BW's situation and that of Mr Curtis. In particular, the delay in Mr Curtis' case had deprived him of an opportunity to be dealt with as a 14- or 15-year-old youth. This did not apply to Mr BW.[22]

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18 At [52].
19 At [56].
20 At [56].
21 At [57]–[59] citing *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621.
22 DC judgment, above n 1, at [59].

[30] The Judge recognised that, given BW's personal circumstances, extradition would bring real hardship for him. Removing him from his cultural connections would also cause real hardship to Mr BW and his whānau. The Judge said: "But even taken collectively the circumstances relied upon do not reach the acute level of oppression. Nor is this a borderline case".[23]

[31] The Judge did not consider a referral to the Minister under s 48 was warranted.[24] He therefore issued a surrender order under s 47 of the Extradition Act.

**High Court judgment**

[32] Ellis J in the High Court considered that the District Court Judge erred in his analysis of oppression.[25] The Judge considered *Curtis* to be a useful example but said that there was a danger in using it as a benchmark as that approach made it too easy to miss or minimise factors that were unique to Mr BW's case.[26]

[33] First, she noted that Mr BW's position was in fact "better" than that of Mr Curtis because Mr Curtis was aware that he was wanted by the Australian authorities and Mr BW was not. The delay in Mr BW's case was also two years longer than the delay in *Curtis*.[27]

[34] The Judge then said that the interests of Mr BW's child and his family, while mentioned in the narrative of his circumstances, did not feature in the District Court's analysis of oppressiveness.[28] It was indisputable that Mr BW's surrender would not be in the best interests of his infant son.[29] The Judge also considered there was a powerful link between Mr BW's son and the delay as there was no reason to doubt the evidence of Mr BW's partner that they would not have chosen to have a child had they known Mr BW might be removed from New Zealand for an uncertain period.[30] In addition, as a result of the child's birth, Mr BW's partner and child were financially

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23 At [60].
24 At [68]–[69].
25 HC reasons judgment, above n 2, at [29].
26 At [31].
27 At [32].
28 At [35].
29 At [36].
30 At [37].

dependent on him. Removing Mr BW from New Zealand would deprive him of the opportunity to support his family, building on the oppression.[31]

[35] In terms of similarities with *Curtis*, the Judge acknowledged that Mr BW would not have been tried as a youth had he been arrested in 2014 or 2015 but noted that, as a man in his early 20s, he was still a young person.[32] Courts in New Zealand recognise that many men in their early 20s have not yet "grown up".[33] She said:[34]

> BW has, in my view, very plainly "grown up" in the eight years since his departure from Perth; he is not the same person he was in November 2014. His growth during that period—manifested in his stable employment and his established family—would be materially disrupted, if not destroyed, by extradition. And as the Judge noted in relation to Mr Curtis "this level of oppression would not be remedied if there were a stay hearing in Australia".

[36] The Judge did not consider it necessary to refer the case to the Minister in light of her "clear view that the effluxion of time would, in the combined circumstances of BW's case, make it oppressive to surrender him".[35] She therefore allowed the appeal and quashed the surrender order.

**Court of Appeal judgment**

[37] The Court of Appeal set out a number of principles it said assisted in applying s 8(1)(c) of the Extradition Act.

[38] First, it said that the procedure in pt 4 of the Act is "'underpinned by the presumption of legal and procedural similarity', of comity between New Zealand and Australia", citing the dissenting reasons of Ellen France and McGrath JJ in this Court's decision in *Radhi v District Court at Manukau* (*Radhi* (SC)).[36]

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31 At [38].
32 At [41].
33 At [42].
34 At [42].
35 At [45].
36 CA judgment, above n 4, at [23] citing *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 [*Radhi* (SC)] at [83] per Ellen France and McGrath JJ dissenting, in turn citing Rynae Butler "Imbalance in Extradition: The Backing of Warrants Procedure with Australia under Part 4 of the Extradition Act 1999" [2017] NZCLR 63 at 64–65. The Court also referred to Te Aka Matua o te Ture | Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [7.18]: CA judgment, above n 4, at [23].

[39] Second, the Court relied on *Taipeti v R* and *Union of India v Narang* for the proposition that, despite the heading of s 8 referring to "[d]iscretionary restrictions on surrender", the decision involves an evaluative judgment, not the exercise of judicial discretion.[37] The Court said that "[a]ppeals from decisions concerning s 8 are therefore treated as general appeals."[38]

[40] Third, it said that "unjust" in s 8(1)(c) refers to the risks of prejudice to a fair trial, whereas "oppressive" refers to hardship arising from changes in circumstances from the time of the alleged offending to the time the extradition application is heard. It said the concepts overlap and there may be factors relevant to the application of both.[39]

[41] Fourth, the threshold to show oppression is high[40] and "[t]he onus is on the person resisting extradition to establish either unjustness or oppression on the balance of probabilities".[41] In borderline cases, prosecutorial delay may tip the balance in favour of a finding of oppression but this should not be over-emphasised.[42] This is because the requesting state will usually be in a better position to grant an appropriate remedy for any delay.[43]

[42] Fifth, the disruption of families is a natural consequence of extradition. By itself it is not likely to constitute oppression but "the interests of a child whose life

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37 CA judgment, above n 4, at [24] citing *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308 at [54] and *Union of India v Narang* [1978] AC 247 (HL) at 272–273 per Viscount Dilhorne, 281 per Lord Morris, 283 per Lord Edmund-Davies, 287–288 per Lord Fraser and 293 per Lord Keith.

38 CA judgment, above n 4, at [24].

39 At [25] citing *Kakis*, above n 15, at 782–783 per Lord Diplock and *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [43(e)] and [51].

40 CA judgment, above n 4, at [26] citing *Mercer*, above n 39, at [52], in turn citing *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 WLR 1979 at [26] per Simon Brown LJ, with whom Royce J agreed.

41 CA judgment, above n 4, at [26] citing *Mercer*, above n 39, at [29], in turn citing *Wolf v Federal Republic of Germany* [2001] NZAR 536 (HC) at [66] and *New Zealand v Moloney* [2006] FCAFC 143, (2006) 235 ALR 658 at [31].

42 CA judgment, above n 4, at [27] citing *Mercer*, above n 39, at [53].

43 CA judgment, above n 4, at [27] citing *Republic of Argentina v Mellino* [1987] 1 SCR 536 at 554–555 per Dickson CJ, Beetz, McIntyre, Le Dain and La Forest JJ and *Mercer*, above n 39, at [53].

will be severely impacted through the extradition of their parent" can be a relevant consideration in deciding on oppression.[44]

[43] In its analysis of Mr BW's appeal, the Court said that the "principle of comity weighs heavily in favour of allowing the appeal".[45] It said that there were two relevant aspects of comity in this case. The first was "the trust and confidence that the Australian criminal justice system will treat BW in the same way he would be treated had the alleged offending occurred in New Zealand".[46] This included the appropriateness of allowing Australia's courts to assess the impact of delay.[47] The second aspect of comity was the particularly close and trusting relationship between New Zealand and Australia.[48]

[44] The Court considered that the seriousness of the offending also weighed in favour of allowing the appeal.[49] The Court considered there to be four counterbalancing factors:[50]

(a) The extraordinary four-year delay of the ODPPWA.[51]

(b) The fact there is no evidence Mr BW sought to evade the Australian authorities.[52]

(c) That Mr BW and his partner have made significant changes to their lives on the assumption they would be able to continue living together,

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44 CA judgment, above n 4, at [28] citing *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [29]. See also *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 157 [*Radhi* (CA)] at [44] and [38] referring to *Mailley v District Court at North Shore* [2016] NZCA 83 [*Mailley* (2016)] at [50]. On appeal, the majority of the Supreme Court affirmed this principle, but allowed the appeal on another ground: *Radhi* (SC), above n 36, at [38] per William Young J, with whom Glazebrook and O'Regan JJ agreed: at [62]–[63].

45 CA judgment, above n 4, at [53].

46 At [54].

47 At [54].

48 At [55] citing *Radhi* (SC), above n 36, at [83] per Ellen France and McGrath JJ dissenting, in turn citing Te Aka Matua o te Ture | Law Commission, above n 36, at [7.18].

49 At [56] citing *Pearson v Commonwealth of Australia* [2024] NZCA 447 at [109]–[110]; *Curtis*, above n 21, at [110], in turn citing *R (on the application of Cepkauskas) v District Court at Marijampole Lithuania* [2011] EWHC 757 (Admin) at [31]; and *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [5] per Lady Hale SCJ.

50 CA judgment, above n 4, at [57].

51 At [58].

52 At [59].

the most significant being the birth of their child.[53] The Court said that the ratification by New Zealand of the United Nations Convention on the Rights of the Child (UNCROC) meant it is "axiomatic" that the best interests of the child are relevant in this context.[54] Separating a parent from their child for what could be a significant period "is a factor to be carefully balanced against the public interest in extradition".[55]

(d) It was "significant that Mr BW has reconnected with his whānau and is endeavouring to live his life in accordance with tikanga".[56] The Court, however, quoted the following passage from *Tukaki v Commonwealth of Australia* with approval:[57]

> If the consequences are no more than the inevitable consequences of extradition, then to allow that they meet the threshold of oppression would be to create the "safe havens" referred to in *HH v Deputy Prosecutor of the Italian Republic, Genoa*.[58]

[45] Contrary to the view of Judge Cathcart in the District Court, the Court considered "the issues raised in this appeal are very finely balanced".[59] The Court said, however, that Ellis J in the High Court placed considerable emphasis on the effects of delay on Mr BW and his family but did not analyse the importance of the principle of comity and did not address the seriousness of the offending.[60]

[46] The Court said that by the "narrowest of margins" it was:[61]

> … satisfied that the principle of comity and the seriousness of BW's alleged offending outweigh the factors [summarised above] and that Ellis J erred in law when she did not give sufficient consideration to these matters.

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53 At [60].
54 At [61] citing United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC]. New Zealand ratified UNCROC on 6 April 1993. It entered into force for New Zealand on 6 May 1993 in accordance with art 49(2).
55 CA judgment, above n 4, at [62] citing Clive Nicholls and others *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013) at [7.77] and *H(H)*, above n 49, at [8] per Lady Hale SCJ.
56 CA judgment, above n 4, at [63].
57 At [63] citing *Tukaki*, above n 44, at [39].
58 *H(H)*, above n 49, at [8(4)] per Lady Hale SCJ.
59 CA judgment, above n 4, at [64].
60 At [64].
61 At [65].

[47] The Court went on to say:[62]

> While extradition would have the effect of separating BW from his child, the public interest in extradition is heightened by the seriousness of the alleged offending. Moreover, while BW has expressed commitment and connection to his culture, we are not satisfied that the consequences of extradition are beyond the inevitable and inherent consequences such that extradition would be oppressive. There is a high degree of comity between New Zealand and Australia, which is compounded by the seriousness of the offending and the "constant and weighty" public interest in extradition.[63] Thus, after having regard to all the circumstances of the case, we conclude it is neither unfair nor oppressive for BW to be extradited to Australia, notwithstanding the delay of Australia in applying to extradite him.

[48] The Court noted that there had been delays since the District Court hearing. Those delays and the effect of s 72(2) of the Extradition Act meant that the Court did not know about any changes in Mr BW's circumstances and also had no current information concerning the best interests of Mr BW's child. In addition, the Court did not know whether the ODPPWA was ready to prosecute Mr BW and, if so, when and whether Mr BW could be bailed to New Zealand should there be a long delay before his trial.[64]

[49] The Court therefore referred the case to the Minister under s 48(1) of the Act.[65] The Court said:

> [72] We prefer to follow the simplified path of referral to the Minister set out in s 48(1) and (3) of the Act. We accordingly refer this matter to the Minister to exercise his discretion under s 30 of the Act and, if he considers it appropriate, to seek undertakings from Australia that address the questions we have posed above. We also think that the Minister could, if he so wishes, seek further information about any changes to BW's circumstances since the hearing in the District Court.

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62 At [65].

63 *H(H)*, above n 49, at [8(4)] per Lady Hale SCJ; and *Curtis*, above n 21, at [30] citing *Mailley v District Court at North Shore* [2013] NZCA 266 at [7].

64 CA judgment, above n 4, at [66].

65 At [72]. The Court noted that, pursuant to s 48(3), the court "is not required" to refer a case to the Minister where the case concerns extradition to Australia. The Court considered this suggested that, in such cases, the court has a discretion to refer the case to the Minister and, if Parliament had intended that a referral under s 48(1) could never be made where Australia is the extradition country, it would have clearly said so: at [69].

**Developments since the Court of Appeal judgment**

[50] In terms of the questions posed by the Court of Appeal in its judgment, we understand that a letter from the Director of Public Prosecutions for Western Australia has confirmed that his office is still ready to prosecute Mr BW, and that any trial would not occur until late 2026 or early 2027. The letter said that "it would be a rare, if not novel, occurrence" for Mr BW to be bailed to reside in New Zealand but this would be a matter for the presiding judicial officer.[66]

**Mr BW's submissions**

[51] Ms Epati KC, for Mr BW, submits that the Court of Appeal erred in three overlapping ways.

*Comity*

[52] Ms Epati first submits that the Court of Appeal superimposed the principle of comity on the s 8 test and, in doing so, tipped "a very finely balanced" case towards surrender. The aspects of comity identified by the Court of Appeal[67] are already reflected in the streamlined statutory scheme in pt 4, which strikes a balance between extradition imperatives and proper restrictions on surrender. It is therefore not appropriate for a court to apply comity as a factor (or "trump card") for the purposes of s 8(1)(c).

[53] Even if comity were relevant to the s 8 exercise, Ms Epati submits that there is real risk both to individual rights and certainty in placing any or any significant (and determinative) weight on it.[68] Ms Epati explains in this regard that there is uncertainty

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66 Counsel for Mr BW did not provide us with this letter and instead summarised it in their written submissions. Counsel for the Commonwealth made passing mention of the letter at the oral hearing but did not elaborate on its contents. There is a real issue as to whether this Court can have regard to the letter in light of s 72(2)(a) of the Extradition Act, although counsel did not raise this issue before us: see above at [7], and see below at [181] per Miller J. According to the summary provided by Mr BW's counsel, the letter does little except confirm that extradition is still sought and that there may be further delays before trial. This would have been obvious to the District Court and it is very unlikely that the District Court contemplated bail to New Zealand.

67 See above at [43].

68 Referring to Kevin W Gray "That Most Canadian of Virtues: Comity in Section 7 Jurisprudence" (2020) 10(1) Western Journal of Legal Studies 1 at 28.

as to the meaning of the term "comity" and its legal effect.[69] In Ms Epati's submission, comity should not be used to read down the words of s 8(1)(c). This section, by using the words "having regard to all the circumstances of the case", requires a fact-specific assessment when determining whether a discretionary restriction on surrender exists. The public interest in extradition is already factored into the threshold set in s 8.[70] New Zealand's international obligations and the Treaty of Waitangi are also relevant to the interpretation of s 8.[71]

*Delay*

[54] Second, Ms Epati submits the Court of Appeal erred in relying on observations in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* to buttress the conclusion that the public interest favoured surrender.[72] She submits that both the factual context and the legal issues for the Court in *H(H)* were very different to those with which the Court was required to engage in BW's case. *H(H)* concerned two requests for the extradition of parents who had fled to the United Kingdom to avoid prosecution in the requesting states. Because the parents were fugitives, they were not entitled to rely upon the passage of time as a bar to extradition under s 14 of the Extradition Act 2003 (UK). However, under s 21 of that Act, the overall length of delay remained relevant to the proportionality check required under art 8 of the European Convention on Human Rights — that is, the right to respect for private and family life.[73] Ms Epati submits that the issue for consideration by the United Kingdom Supreme Court therefore arose under art 8, which requires a different standard from that prescribed in the New Zealand Extradition Act.

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69 Referring to Thomas Schultz and Niccolo Ridi "Comity and International Courts and Tribunals" (2017) 50 Cornell Intl LJ 577 at 578, where the authors note that to "talk of a principle of 'comity'" in international law "is to talk of a principle that does not satisfy the legality threshold". See also Butler, above n 36, at 68–69.

70 *Tukaki*, above n 44, at [31].

71 At [34]–[35].

72 *H(H)*, above n 49.

73 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

[55] Ms Epati submits that other United Kingdom authorities are more relevant than *H(H)*, and that they support the following principles in cases of delay where delay is not caused by the individual fleeing the jurisdiction:[74]

(a) the relevance of delay is significantly different in non-fugitive cases compared with cases where a requested person has effectively brought about the delay by fleeing and evading arrest;

(b) the gravity of the offence is relevant to whether changes in circumstances render extradition oppressive;

(c) relatively commonplace hardship is unlikely to be sufficient to meet the test;

(d) the length of the delay will be of particular importance when assessing whether the impact of extradition would now be oppressive;

(e) a relevant factor will be whether the delay has engendered a sense of security in the requested person from prosecution and punishment;

(f) the extent to which a requested person has laid down family roots and become "deeply entrenched" in their home state will be of particular relevance;

(g) the additional public interest in ensuring that countries are not made "safe havens" does not arise in non-fugitive cases; and

(h) culpable delay by the requesting country is relevant to an overall assessment, and may well be decisive in what is otherwise a marginal case.

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74 Referring to *Kociukow v District Court of Bialystok III Penal Division* [2006] EWHC 56 (Admin), [2006] 1 WLR 3061 at [10]–[11]; *Loncar v County Court in Vukovar (Croatia)* [2015] EWHC 548 (Admin) at [29]; *Geleziunas v Prosecutor General's Office, Republic of Lithuania* [2016] EWHC 16 (Admin) at [35]–[37]; and *Kazaniecki v Regional Court in Torun, Poland* [2016] EWHC 3210 (Admin) at [34].

[56] Ms Epati further submits that the Court of Appeal was wrong to rely on the risk of a safe haven being created — as an argument supporting surrender — when Mr BW was not a fugitive.[75] The Court did not give weight to the false sense of security engendered in Mr BW, nor did it engage with the fact that the delay was solely attributable to the Commonwealth.

*Changed personal circumstances*

[57] Third, Ms Epati submits that the Court of Appeal failed to analyse Mr BW's profoundly changed personal circumstances.

[58] Ms Epati submits that the Court of Appeal failed to undertake a proper, genuine and realistic analysis of the best interests of Mr BW's child and how extradition might serve or undermine that child's interests.[76] The fact a child is very young means that the effects of separation are likely to be "exceptionally severe".[77]

[59] In addition, it is submitted that it is relevant to the s 8(1)(c) exercise in this case to consider the central place that whakapapa, whanaungatanga[78] and cultural reconnection have come to play in Mr BW's life and the family he has created.[79] There is a clear nexus between the passage of time and Mr BW's cultural reconnection. Delay enabled Mr BW to build strong cultural relationships at his marae (where he plays an ongoing role) and within his wider iwi and hapū community.

[60] The letter from the Director of Public Prosecutions for Western Australia confirms that it is very unlikely Mr BW will be bailed to New Zealand while awaiting

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75 See CA judgment, above n 4, at [63] citing *Tukaki*, above n 44, at [39], in turn citing *H(H)*, above n 49, at [8(4)] per Lady Hale SCJ.

76 Referring to *Wan v Minister for Immigration* [2001] FCA 568, [2001] 107 FCR 133 at [25].

77 Referring to *H(H)*, above n 49, at [44] per Lady Hale SCJ. In that case, Lady Hale SCJ said it was not enough to dismiss cases in a simple way by accepting that children's interests will always be harmed by separation from their sole or primary caregiver: at [34].

78 It is submitted that whanaungatanga is relevant by virtue of both the Treaty of Waitangi and because of its cultural and social importance to Māori: see Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.48].

79 Ms Epati also notes that the Court of Appeal in *Tukaki*, above n 44, took judicial notice of whanaungatanga as a relevant value: at [38]. However, in that case there was no specific evidence of particular relationships, responsibilities or hardships relevant to cultural practices that would flow from extradition: at [40]. By contrast, whakapapa and whanaungatanga have impacted Mr BW in two ways: his reconnection with his iwi has deepened the roots he has laid down for his young family; and it has been to the key to his own healing and coming-of-age journey.

trial (we interpolate here that, as noted above, there is a real issue as to the admissibility of this letter).[80] In Ms Epati's submission, there is also a question mark over the possibility of bail altogether given that it would require a suitable address in Western Australia.

[61] Overall, it is submitted that to extradite Mr BW in these circumstances would be oppressive.

**The Commonwealth's submissions**

[62] Mr Lillico, for the Commonwealth, submits that the Court of Appeal was correct in adopting an approach which treated comity as relevant to the application of the s 8(1)(c) test. He submits further that s 8(1)(c) requires a tangible link between the delay and the cause of the alleged oppression. Lastly, Mr Lillico submits that there is a constant and weighty public interest in extradition. For the oppression test to be satisfied, something more is needed than the inherent and inevitable consequences of extradition or commonplace hardship.

*Comity*

[63] First, on the topic of comity, the Commonwealth submits that the fast-track extradition process under pt 4 reflects a high level of mutual trust and respect between New Zealand and Australia. "There is a justified expectation that [Mr BW's] human rights (including [his] right to a fair trial) will be met by Australia."[81] Comity gives rise to the assumption that the requesting state will give the individual a fair trial according to its laws.[82]

[64] The Commonwealth further submits that comity is a constant and weighty public interest consideration in numerous points of decision under the Act, including the injustice limb of s 8(1). United Kingdom caselaw emphasises the importance of

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80 Above n 66.
81 *Mercer*, above n 39, at [18].
82 *Mellino*, above n 43, at 554–555 per Dickson CJ, Beetz, McIntyre, Le Dain and La Forest JJ.

the public interest in extradition and the prosecution of serious crime across borders.[83] The Commonwealth refers in particular to the decision of the United Kingdom Supreme Court in *Norris v Government of the United States of America (No 2)* in support of its submission that it is "only if some quite exceptionally compelling feature … is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves".[84]

[65] Additionally, it is submitted that comity considerations are heightened in cases of serious offending. That is because s 8 contemplates considerations of the seriousness of the alleged offending. Section 8(1)(a) states that "[a] discretionary restriction on surrender exists if", having regard to all the circumstances, "because of … the trivial nature of the case" to surrender the person would be unjust or oppressive.

*Delay*

[66] The Commonwealth submits that, applying the notion of causation to s 8(1)(c), it is insufficient to merely say that a period of delay has created the opportunity for a change of circumstances. There must be some tangible link connecting the delay with the cause of the alleged oppression.[85]

[67] It is submitted that the applicable principles on delay were summarised by the Court of Appeal in *Commonwealth of Australia v Mercer*.[86] These principles include that, if the requesting state has been "inexcusably dilatory" in bringing the offender to justice, that may make the extradition oppressive.[87] Nevertheless, the extradition court should be wary of reviewing the actions of foreign authorities prior to the request.

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83 Referring to *H(H)*, above n 49, at [8(4)] per Lady Hale SCJ; and *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487 at [55] per Lord Phillips P. In addition, the Commonwealth submits that in Canada the same public interest concerns arise: see *MM v Minister of Justice* 2015 SCC 62, [2015] 3 SCR 973 at [149] per McLachlin CJ, Cromwell, Moldaver and Wagner JJ, where it was noted that the Minister of Justice (who is responsible for the oppression or injustice assessment in Canada) must consider the impact on children but also the importance of complying with Canada's international obligations to its extradition partners. See also at [150].

84 *Norris*, above n 83, at [56] per Lord Phillips P.

85 Referring to *Kakis*, above n 15, at 782 per Lord Diplock (Lords Edmund-Davies, Russell and Scarman agreeing).

86 *Mercer*, above n 39.

87 At [53] citing *Kakis*, above n 15, at 785 per Lord Edmund-Davies.

The requesting state will usually be better placed to assess delay and to grant a remedy where appropriate, for instance, a stay for abuse of process. In borderline cases, prosecutorial delay may tip the balance in favour of a finding of oppression but it should not be over-emphasised.[88]

[68] In the Commonwealth's submission, this is not an extreme case of delay which has been so protracted that the Court will be ready to assume that it has given rise to injustice and oppression.[89] It would be incongruous to remove the right of Australia to try Mr BW purely because of the passing of time when that could not justify a stay of proceedings if the prosecution occurred in New Zealand. Such a course would, in effect, censure the officials of a friendly foreign state. The matter must also be considered in light of the fact that there was no fault on the part of the victim.

[69] Moreover, the Commonwealth submits that "safe havens" are not only relevant to cases involving fugitives. A safe haven is not just a place to which a defendant flees in breach of bail: it may simply be a place from which someone who has not evaded the authorities cannot be removed to face trial in another country. There would be the same effect if persons who had not evaded justice could not be extradited, *Tukaki* being a case of that nature.[90]

[70] The Commonwealth further submits that Mr BW cannot rely on having developed a false sense of security since returning to New Zealand. The argument that a defendant has acquired a false sense of security only arises in narrow circumstances — being those where the defendant is aware of the possibility of charge and a delay created or allowed by requesting state has induced in him or her a sense of security from prosecution.[91]

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88 *Mercer*, above n 39, at [53].

89 Referring to *Woodcock*, above n 40, at [29]. In the Commonwealth's submission, there is no substantial difference between this case and *Tukaki*, where the delay was similar and Mr Tukaki made similar submissions about his removal from culture, cultural practices and whānau. He also left Australia well before the complaint was made and was nevertheless surrendered. Like Mr BW, he did not breach bail or escape custody.

90 *Tukaki*, above n 44.

91 Referring to *Curtis*, above n 21; and *Kakis*, above n 15.

*Oppression*

[71] The Commonwealth submits that the threshold for establishing oppression under s 8(1)(c) of the Act is set deliberately high.[92] This high standard reflects public interest considerations deriving from the seriousness of the offending and from comity.

[72] The Commonwealth submits that "oppressive" means "oppressing, harsh or cruel".[93] Extradition by its nature involves a degree of disruption which does not, by itself, make the defendant's return necessarily oppressive. Hardship alone is not enough. Disruption to Mr BW's whānau and reconnection with his community and culture, while undoubtedly qualifying as hardship, cannot meet the threshold of cruelty or harshness. In this respect, the Commonwealth submits that the Court of Appeal's finding that the consequences for Mr BW were "inevitable and inherent consequences" of extradition means it did not in fact consider the case was finely balanced.[94]

[73] Likewise, the Commonwealth relies on *Radhi* (SC) for the proposition that removal from home and separation from family are part and parcel of the extradition process, as is the risk of being subject to imprisonment following trial.[95] The Commonwealth points out that, while UNCROC is relevant in cases involving children, it is necessary to bear in mind that the issue is not whether it is in a child's interests to be separated from his or her parents. Rather, the issue is whether a parent should be extradited, with a consequence being that the parent and child may be separated.[96]

[74] Lastly, the Commonwealth acknowledges that whanaungatanga must be relevant in assessing oppression in this case, but submits that mana, hara, muru, and

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92 Referring to *Mercer*, above n 39, at [52]; *Curtis*, above n 21, at [44]; *Tukaki*, above n 44, at [29]; and *Tukaki v Commonwealth of Australia* [2018] NZSC 109 at [5].

93 Referring to *Mailley* (2016), above n 44, at [58].

94 See above at [45]–[47].

95 *Radhi* (SC), above n 36, at [38] per William Young J. Glazebrook and O'Regan JJ indicated they agreed with that paragraph, although we note that was in the context of agreeing with the point made at [37]–[38] that there was a substantial risk that Mr Radhi would not be able to return to New Zealand if convicted, and that he would be subject to the mandatory detention and immigration limbo outlined in William Young J's reasons: at [61], n 47.

96 Referring to *Radhi* (CA), above n 44, at [34].

utu and ea must also be considered.[97] Several tikanga concepts are engaged and not all of these concepts reinforce a conclusion that surrender would be oppressive to Mr BW.

**Our assessment**

*The law*

[75] This appeal concerns the interpretation of s 8(1)(c) of the Extradition Act. The meaning of that provision "must be ascertained from its text and in the light of its purpose and its context".[98] Relevant aspects of its purpose and context here include:

(a) that there is a "constant and weighty"[99] public interest in extradition to face trial for alleged offending (and in particular serious offending);

(b) the principles behind the simplified procedure in pt 4 of the Extradition Act, including the close and trusting relationship with Australia and the confidence that the Australian criminal justice system will treat an alleged offender in a manner consistent with New Zealand human rights and fair trial requirements;[100] and

(c) the New Zealand Bill of Rights Act 1990,[101] New Zealand's international obligations[102] and the Treaty of Waitangi.[103]

[76] Looking first to the text of s 8(1), there are three gateway considerations: (a) the charge is trivial; (b) the accusation was not made in good faith in the interests of justice; and (c) the time that has passed since the alleged commission of the offence.

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97 Referring to *Foley v R* [2023] NZCA 456, (2023) 31 NZTC ¶26-009 at [33].

98 Legislation Act 2019, s 10(1).

99 *H(H)*, above n 49, at [8(4)] per Lady Hale SCJ referring to *Norris*, above n 83.

100 The Court of Appeal considered these two aspects of "comity" to be relevant in this case: see above at [43]. We note, however, that the Court of Appeal's phrasing of the latter aspect as requiring an assumption the person would be treated "the same" was an overstatement. See also below at [79].

101 Including, relevantly, the right to be tried without undue delay: New Zealand Bill of Rights Act 1990, s 25(b).

102 Including UNCROC, above n 54, as the Court of Appeal recognised: see above at [44(c)].

103 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

If one of these factors is sufficiently engaged then the court must consider whether that factor, in combination with "all the circumstances of the case", means surrender would be unjust or oppressive. Each of these three gateway considerations reveals something as to how the system is intended to work. Triviality suggests the surrender of a person in New Zealand to a foreign jurisdiction is a significant step not to be taken lightly. Bad faith indicates the integrity of the extradition process is important and that the process must not be co-opted for purposes other than law enforcement. The time factor implies the architects of the system understood that, when charges become stale, bilateral cooperation for law enforcement reduces in importance. The passage of time is therefore important in *extradition* terms. It is not merely a nod to the remedy of stay for delay in criminal procedure. Time is important in the same way that triviality and bad faith are, and must be given weight accordingly in the assessment of "all the circumstances of the case".

[77] As to the time factor in s 8(1)(c), this requires consideration of whether, because of "the amount of time that has passed" since the alleged offence and "having regard to all the circumstances of the case", surrendering Mr BW "would be unjust or oppressive".[104] The text therefore requires a causal link between the delay and the oppression or the surrender being unjust. It also requires a holistic assessment of the *combination* of all of the particular circumstances (which must include the circumstances of the alleged offender and the nature and seriousness of the alleged offence). As we discuss further below, this means that the ordinary effects of delay — including getting on with life, establishing housing and undertaking employment — are to be considered as part of this overall assessment, to whatever extent such effects are applicable in the particular case.[105] The law may also require that some circumstances or effects are given particular weight.

[78] The terms "unjust or oppressive" are strong words which in themselves denote a high threshold. That the threshold is high is reinforced by the public interest in

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104 As the Court of Appeal noted, the injustice limb relates to risks of prejudice to a fair trial, whereas "oppressive" refers to hardship arising from changes in circumstances owing to any delay from the time of the alleged offending to when the extradition application is heard: see above at [40]. Mr BW relies only on the oppression limb, although he agrees with the Court of Appeal that the two inquiries can overlap: see above at [40].

105 Below at [81]–[85].

extradition and, in particular, extradition for serious offending. However, the test remains as outlined in s 8(1)(c). Contrary to the approach of the Court of Appeal, that provision does not envisage a balancing of the public interest against private interests.[106] The public interest in extradition is already built into the high threshold. Particular and relevant aspects of the public interest are instead to be treated as part of the circumstances the court should consider in deciding whether or not the high threshold is met. We do not find it particularly helpful to substitute synonyms such as "cruel" or "harsh".[107]

[79] The relevant circumstances could include what the Court of Appeal calls comity.[108] We note, however, that the term comity is not used anywhere in the Extradition Act. Comity might be useful as a shorthand term but this is not a substitute for considering the particular aspects of comity that are relevant.[109] We agree that the two aspects of comity related to pt 4 identified by the Court of Appeal would be relevant to the injustice limb.[110] But we do not consider they would usually be as significant in considering the oppression limb. For example, in this case, the two aspects of comity were not particularly relevant to the issue of oppression, given that the circumstances at issue in that regard — such as Mr BW's cultural connections and the interests of his young son and whānau members — would not be relevant in the Australian criminal proceedings (except, we assume, at sentencing, were he to be convicted). We thus do not accept Mr BW's submission that comity is already built into the pt 4 test and should never be separately considered.[111] Although, as explained below at [92], we do accept the submissions that the Court of Appeal erred in its approach to comity and that comity should not be used to read down the words in s 8(1)(c).[112]

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106 See CA judgment, above n 4, at [65].
107 Contrast above at [72].
108 See above at [43].
109 New Zealand caselaw has yet to produce a clear and serviceable articulation of comity and the question of whether comity is a legal principle or an extra-legal consideration remains to be clarified. The approach we have taken involves considering particular aspects of comity where relevant to the circumstances at issue in respect of either limb of s 8(1)(c) and avoids treating comity as a separate and overriding principle. Comprehensive definition and classification of such a principle is therefore not necessary in this case.
110 As the District Court had found: DC judgment, above n 1, at [25].
111 See above at [52].
112 See above at [53].

[80] As noted above at [76]–[77], the relevant circumstances to be considered also include the nature and seriousness of the alleged offending. We accept that, in principle, the more serious the offending, the more difficult it will be to show that extradition would be unjust or oppressive.[113] But we also accept the submission that lengthy delay since the offence was allegedly committed can diminish the significance of that factor.[114] Further, we agree that, in marginal or borderline cases where the delay is prosecutorial (including where police are responsible), this could tip the balance towards the high threshold of injustice or oppression being met.[115]

[81] Moving to other relevant circumstances, we do not accept the submission that what can be termed the ordinary results of extradition, for example disruption to family and cultural connections, can never reach the level of oppression.[116] In combination with the triviality of the charge, bad faith or the passage of time, the wider circumstances of the case may well make extradition oppressive or unjust even if some of those circumstances are not exceptional in their own right. It is the whole case that must be considered.

[82] Taking cultural connections first, the Court of Appeal relied on *Tukaki*, where it was held that, if the consequences are "no more than the inevitable consequences of extradition", then the threshold for oppression would not be met.[117] The Court of Appeal in *Tukaki* did, however, go on to recognise that "removal of a person from their culture, cultural practices and whānau" could be relevant factors.[118] In that case, Mr Tukaki could only say that removing him from his cultural connections and support and transporting him to a place without those supports would cause extreme hardship. The Court said that this is a usual incidence of hardship flowing from extradition. But, crucially, the Court then continued:[119]

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113 As Lady Hale SCJ said in *H(H)*, above n 49, at [8(5)], albeit in a different context and applying a balancing approach that is not the proper one under s 8(1)(c) of the New Zealand Extradition Act: see above at [78]. Contrast above at [54].

114 See *H(H)*, above n 49, at [8(6)] per Lady Hale SCJ; and see above at [55(d)].

115 See above at [67].

116 See above at [72]–[73].

117 CA judgment, above n 4, at [63] citing *Tukaki*, above n 44, at [39].

118 CA judgment, above n 4, at [63] citing *Tukaki*, above n 44, at [40].

119 *Tukaki*, above n 44, at [40]. We do not comment on the Commonwealth's submission on other tikanga concepts as there was no evidence in this case as to their relevance on the particular facts: see above at [74].

> Mr Tukaki does not describe any particular hardship that will flow from that disruption, no particular relationship that will be harmed, no particular responsibility that will be foregone which makes the usual incidence of extradition so acute in his case as to reach the threshold of oppression.

[83] Turning to the interests of children, the Court of Appeal rightly recognised that the ratification by New Zealand of UNCROC meant that the best interests of any children are relevant considerations.[120] Under UNCROC, although the best interests of any child is *a* primary consideration, it is not *the* primary consideration and can therefore be overridden.[121] But it is nevertheless a powerful factor which must be given considerable weight, whether or not separation of a parent from their child is one of the ordinary consequences of extradition. To say that the ordinary consequences of separation can be discounted would effectively mean that the threshold can never be reached unless there is something different and exceptional about the child or the family's circumstances.[122] This is not the standard required under UNCROC.

[84] We note that the comments in *Radhi* (CA) and *Radhi* (SC) relied on by the Commonwealth were not made in the context of delay and s 8(1)(c).[123] The *Radhi* proceedings concerned referral of a case to the Minister under s 48 and in particular under s 48(4)(a)(ii) whether there were "compelling or extraordinary circumstances of the person" that meant it would be "unjust or oppressive to surrender the person before the expiration of a particular period".[124] This necessarily means something out of the ordinary. There is no similar wording in s 8(1), which says explicitly that regard is to be had of "all the circumstances of the case" once the court is satisfied that one of the three gateway considerations in s 8(1) is engaged.

[85] This means that, in cases of delay, even the ordinary consequences of extradition are part of the circumstances to weigh when deciding if the high threshold

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120 See above at [44(c)].

121 UNCROC, above n 54, art 3(1); and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ, with whom Elias CJ agreed in this respect: at [1].

122 As the Court of Appeal suggested: see above at [42].

123 See above at [73], and see above n 95.

124 The majority of this Court considered that there were such compelling and extraordinary circumstances in that case: see *Radhi* (SC), above n 36, at [55] per William Young J and [62]–[63] per Glazebrook and O'Regan JJ.

is met. It is the combination of all relevant circumstances that must be considered and not each one individually. These circumstances must be assessed against the background of, and in combination with, the circumstances related to the delay (including any responsibility the defendant bears in relation to that delay and any sense of security engendered by that delay). Where the delay was caused by the defendant, it would have to be very lengthy indeed before it would become oppressive, absent other exceptional circumstances.[125]

[86] A sense of security is more likely to indicate oppression if the person is not responsible for the delay.[126] But we do not accept the Commonwealth's submission that a sense of security is only relevant when it has been engendered by the authorities of the state seeking extradition and the person knows they are wanted for a crime.[127] It can be a relevant factor even if the person did not know they were suspected of a crime.

[87] We do, however, accept the Commonwealth's submission that a concern not to create a safe haven does not arise only in cases of fugitives from justice (although we consider it is more acute in such cases).[128] But the risk of creating a safe haven is one of the reasons for the high threshold in s 8(1)(c) and so it is already built into that section.

[88] Finally, we do not accept the Commonwealth's submission that to refuse to extradite Mr BW when the delay would not justify a stay of proceedings were the prosecution to occur in New Zealand would be to censure the officials of a friendly foreign state.[129] Delay is specifically identified as a trigger for refusing extradition and must be understood in an extradition context.[130] If the high threshold of injustice

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125 See *Loncar*, above n 74, at [29(2)] citing *Kakis*, above n 15, at 782–783 per Lord Diplock and *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038 at [27].

126 At [29(7)] citing *Gomes*, above n 125, at [26] and *La Torre v The Republic of Italy* [2007] EWHC 1270 (Admin) at [37] per Laws LJ, with whom Davis J agreed.

127 See above at [70].

128 See above at [69]. We thus reject Mr BW's submissions in this regard above at [55]–[56].

129 See above at [68]. We accept that the victim in this case has not been well served by the delay but that delay had nothing to do with Mr BW.

130 See the discussion above at [76].

or oppression is met, then the court would merely be applying the statute, as it is bound to do.

*Did the Courts below err in law?*

[89] The High Court found there to have been two errors of principle in the analysis by the District Court. The first was using *Curtis* as a benchmark in too strict a fashion,[131] and the second was not taking into account the interests of Mr BW's child and his family in the analysis of oppression.[132] We agree with the High Court's assessment.

[90] The Court of Appeal considered that the High Court had erred by not balancing comity and the seriousness of the offending against the factors it identified as pointing against extradition.[133] We agree that the High Court did not (at least explicitly) take into account the seriousness of the offending in its analysis of oppression and that this was an error.[134] We do not, however, consider that failing to take into account comity was an error for the reasons set out above at [79].

[91] We have already said that the Court of Appeal erred in holding that s 8(1)(c) required the public interest in extradition to be balanced against the private interests of Mr BW.[135] In terms of the Court's analysis, further errors of law were made as follows.[136]

[92] The Court erred in its treatment of comity in the circumstances of this case by considering it relevant to its assessment of the oppression limb.[137] The Court of

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131 HC reasons judgment, above n 2, at [31], and see above at [32]–[33]. The High Court noted in particular that the Judge had focused on the fact Mr Curtis was a child when the relevant offences were allegedly committed, unlike Mr BW. This ignored the fact Mr BW was still a "young person" as courts in New Zealand understand and apply that term: at [39]–[42], and see above at [35].

132 At [33]–[38], and see above at [34].

133 See above at [45].

134 Given that there was an error of principle in the High Court analysis (failing to take account of a relevant factor), we do not need to decide if there would have been an error of law merely because the Court of Appeal disagreed with the High Court's analysis: see above at [7], [39] and n 8.

135 See above at [78].

136 We do not therefore agree with Miller J when he identifies the error of law as being whether the Court of Appeal was plainly wrong: see below at [130].

137 See above at [79]. As we take a different view from Miller J, we do not comment on his discussion of comity below at [156]–[167]. Nor do we comment on the issue of stay discussed at [168]–[173] of his reasons.

Appeal's approach involves taking comity into account as a separate, heavily weighted principle in the evaluative exercise, even though it is not listed as a mandatory consideration for the court under the relevant sections. This risks distorting the carefully calibrated statutory scheme. As noted above at [79], where comity is relevant either to the injustice limb or the oppression limb in the circumstances of the particular case, it may be considered as part of the assessment of that limb. But, if it is not relevant, comity should not be treated as a thumb on the scales in favour of surrender.

[93] Once the Court had found that Mr BW's case was finely balanced, the fact that it was prosecutorial (or police) delay which engendered in Mr BW a false sense of security should have tipped the balance against surrender.[138] We do not accept the submission of the Commonwealth that the Court of Appeal did not in fact consider the case finely balanced.[139] The Court of Appeal expressly rejected the view of the District Court that it was not a finely balanced case and also referred to its decision being reached "by the narrowest of margins".[140] Indeed, the fact that the case was finely balanced, as well as the lack of up-to-date information, must have been factors in the decision to refer Mr BW's case to the Minister.

[94] Lastly, the Court erred in its explanation of the appellate approach to be taken.[141] The Court's reference to *Taipeti* for the proposition that appeals are to be treated as general appeals was in error.[142] *Taipeti* concerned bail and not extradition. The issue was whether a decision on a grant of bail prior to trial was discretionary, giving rise to limited review, or evaluative, giving rise to a general appeal on the merits. Appeals on bail are not limited to questions of law, unlike determinations under ss 24 and 45 of the Extradition Act. The other case referred to by the Court of Appeal, *Narang*, was not a New Zealand decision.[143]

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138 See above at [80].

139 See above at [72]. This submission was based on the quote set out above at [47] but that is merely an explanation of the reasons that comity and the seriousness of the offending by the "narrowest of margins" outweighed the other factors: see above at [46]. It cannot be interpreted as meaning that the "narrowest of margins" meant nothing of the sort. Nor can it override the express rejection of the District Court's view and the comment that the issues raised in Mr BW's case "are very finely balanced": CA judgment, above n 4, at [64].

140 See above at [45]–[46].

141 See above at [39].

142 *Taipeti*, above n 37.

143 *Narang*, above n 37.

[95] The High Court in this case noted that the Commonwealth had not sought to argue that the grounds relied upon by Mr BW were not questions of law.[144] Nor did the Commonwealth make such an argument before this Court nor, it appears, the Court of Appeal. Given our conclusions as to the other errors made by the Court of Appeal, we need not analyse the effect of the Court of Appeal's error as to the appellate approach to be taken. In any event, the error was not material: despite the Court of Appeal's erroneous statement that appeals in this context are general appeals, it found that the High Court had erred in law by failing to give sufficient consideration to both comity and the seriousness of the offending.[145] As noted above, the Court of Appeal was not correct as to comity but was correct in respect of the High Court's apparent failure take into account the seriousness of the offending.[146]

*Our analysis of Mr BW's circumstances*[147]

[96] First, we accept that the offending in this case was very serious. It was unprovoked and, without surgery, the victim could have suffered permanent damage. We note in particular the dangers of a kick to the head while the victim was already unconscious, even though in this case the victim fortunately did not suffer long-term traumatic brain injury.

[97] We do, however, consider that this factor has diminished in importance because of the long delay.[148] While Mr BW has some memory of an incident while he was in Perth, he would have been well justified in thinking that, had he been a suspect, this would have been conveyed to him soon after the incident. This sense of security would have been reinforced when he travelled back to live in Australia and, while there, travelled to Vietnam, and to New Zealand, and back again to Australia without being detained or questioned at the border (except in relation to some fines). It was a sense of security engendered, as noted above, because of the prosecutorial (and police) delay and not by any actions or omissions of Mr BW.[149]

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144 HC reasons judgment, above n 2, at [28].
145 CA judgment, above n 4, at [65].
146 Above at [90].
147 Neither of the parties sought remittal to the District Court. We therefore proceed to conduct our own analysis of the facts, on the evidence before us, in accordance with s 72 of the Extradition Act: see above at [7].
148 See above at [80].
149 Above at [93], and see above at [13]–[19].

[98] Second, we agree with the High Court that, while Mr BW would not have been tried as a youth had he been arrested at the time, he was still a young person in his early 20s. We also agree with the High Court that Mr BW has clearly "grown up" in the interval of the delay,[150] including stopping drinking.[151] This has to be accorded some weight.

[99] Third, some weight has to be accorded to the difficulties Mr BW would have in defending the charge because of the delay.[152] While this factor is not enough to mean extradition would be unjust, it can nevertheless be considered as part of the circumstances to be assessed when deciding whether surrender would be oppressive.[153] It can also be inferred from the circumstances in this case that there is likely to be further delay before trial and that there will be difficulties with bail as we understand Mr BW has no current ties to Western Australia. We consider it unlikely, given the extradition context, that he would be bailed to an address outside Australia.[154] These circumstances weigh towards a finding of oppression.

[100] Fourth, and importantly, there is strong evidence that, during the period of delay, Mr BW moved back to his papakāinga and reconnected with his whānau, hapū and iwi. He supports his widowed mother, regularly contributes time and labour to his marae, helps other kaumātua in the village and has worked for his iwi.[155] In other words, since returning home he has led a prosocial life and become an asset to his people. The evidence of cultural reconnection in this case is therefore significantly stronger than that in *Tukaki*.[156]

[101] Finally, as the Court of Appeal recognised, Mr BW and his partner have made significant changes to their lives during the period of delay on the assumption that they would be able to continue to live together. The most significant was deciding to have

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150 See above at [35].
151 See above at [24].
152 See above at [20].
153 As the Court of Appeal noted, the concepts of injustice and oppression overlap: CA judgment, above n 4, at [25]. See also *Kakis*, above n 15, at 782–783 per Lord Diplock; and *Loncar*, above n 74, at [29(1)].
154 We draw these inferences without reference to the letter referred to above at [50]. As we said above at n 66, the District Court Judge anticipated further delays and was unlikely to have contemplated bail to New Zealand.
155 See above at [25].
156 Contrast above at [82].

a child, on the assumption that Mr BW would be there to provide emotional, physical and financial support to his family.[157]

[102] As s 8(1) requires, these factors must be considered together and holistically. A young man faces serious charges in relation to events that occurred in another jurisdiction in 2014, although the evidence suggests he was unaware of the jeopardy he faced. Delay in seeking his extradition will make mounting a defence more difficult, but more importantly, he has, in the intervening years, found a partner, had a family and built a new life with his whānau, hapū and iwi. These changes in his circumstances have been transformative for him and for those around him. It is clearly not in the best interests of Mr BW's very young son that he be deprived of his father for a long period.[158] We accept Mr BW's submission that the younger the child, the greater the effects of separation.[159] We also accept Mr BW's submission that separation would disrupt the central place that whanaungatanga has come to play in the life of his family, including his son.[160]

[103] Unlike the Court of Appeal, and in agreement with the High Court, we do not consider this to be a marginal case. Taking into account all of the circumstances discussed above we consider that, because of the long and inexcusable delay, to extradite Mr BW would be oppressive.

[104] We therefore consider that Mr BW is ineligible for surrender in terms of s 45(4) of the Extradition Act because the discretionary restriction on surrender under s 8(1)(c) applies.[161]

**Name suppression**

[105] It appears the interim suppression of Mr BW's name and identifying particulars was first granted by the District Court. Ellis J in the High Court asked counsel to

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157 See above at [26].
158 See above n 66.
159 See above at [58].
160 See above at [59].
161 We do not agree with Miller J below at [155], [179], [186] and [191] that there is insufficient evidence to reach this conclusion. Given our conclusion that oppression is made out, there is no need to consider a reference to the Minister. We therefore do not comment on Miller J's analysis of the scheme of the Extradition Act and his analysis of the discretion to refer to the Minister for a surrender decision: see below at [117]–[154].

confer and advise the Court as to the issue of continued suppression,[162] but we do not have any information on the outcome of that. The Court of Appeal also made a suppression order but does not explain the order in its judgment. Neither of the parties make any reference to name suppression in their submissions to this Court.

[106] Memoranda were filed in the District Court and the High Court suggesting the Commonwealth did not oppose interim name suppression until final determination of the surrender of Mr BW and that, if Mr BW was deemed ineligible for surrender and an application for permanent name suppression was made, the Commonwealth would not oppose permanent name suppression.

[107] In light of this, interim suppression should continue until an application for permanent name suppression is dealt with by the District Court. Such an application must be made promptly.

**Result**

[108] The appeal is allowed.

[109] The reference to the Minister under s 48 of the Extradition Act is revoked.

[110] The quashing of the surrender order by the High Court is reinstated.

[111] We make an order prohibiting publication of the name, address and identifying particulars of the appellant until further order of the District Court.

**ELLEN FRANCE J**

[112] I write separately, but very briefly. I do so because, differing from the majority reasoning in this respect, I consider it is appropriate to say a little about the extradition pathways identified by Miller J.

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[162] HC reasons judgment, above n 2, at [48].

[113] As indicated above, I agree with the majority reasoning as to the test for oppression and that it would be oppressive to order Mr BW's surrender. I also agree with the orders made.

[114] I add that I agree generally with Miller J as to the extradition pathways set out below at [134]–[151] of Miller J's reasons.[163] Reiterating the point McGrath J and I made in *Radhi v District Court at Manukau*, a policy choice was made in the statutory scheme to differentiate between those powers exercised by the Minister of Justice and powers exercised by the court.[164] The distinction is an important one. And, as Miller J says, where there is doubt about the existence of a restriction on surrender, or whether anything might be done to alleviate injustice or oppression, the courts should not be reticent about referring a case to the Minister.[165]

[115] Where I differ from Miller J is that I consider there is sufficient information properly before the Court to conclude surrender would be oppressive.[166] In other words, this is not a situation where referral to the Minister is appropriate. It can be inferred that it is highly likely there will be a period of separation for Mr BW from his whānau, including his young child. Given the delay to date, the fact he has turned his life around, and the impact on his young child, his circumstances meet the threshold.

**MILLER J**

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163 I express no view on the availability of s 48(1)(a) as a separate pathway in the present case.

164 *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [89] per Ellen France and McGrath JJ dissenting.

165 Below at [154] and [162] per Miller J.

166 I do not consider the Court should take into account the letter of the Director of Public Prosecutions for Western Australia referred to above at [50] per Winkelmann CJ, Glazebrook and Williams JJ.

[116] I consider that the Court of Appeal reached the correct conclusion, namely that the decision whether to extradite Mr BW ought to be left to the Minister of Justice.[167] In my opinion, the Extradition Act 1999 envisages that the considerations which make extradition potentially oppressive in this case can be addressed by inquiries and assurances that are the Minister's responsibility to make and require.

**The role of extradition and appellate courts under pt 4 of the Extradition Act**

[117] I begin with the respective roles of the Minister and the District Court where Australia is the requesting country under pt 4 of the Extradition Act.

[118] Extradition to Australia is intended to be a straightforward and efficient process. Countries do not attain pt 4 status unless qualifying offences are relevantly similar, reciprocal extradition arrangements are in place, and certain other requirements relating to specialty (exposure to charges other than those for which the person is to be extradited) or extradition to a third country have been met.[168] A backed warrant procedure is employed, in which a District Court judge may endorse an arrest warrant issued in Australia and thereby authorise its execution in New Zealand.[169] Once arrested, the Court must determine whether the requested person is eligible for surrender.[170] To be eligible, they must have been accused or convicted of an offence in Australia (and thus be an "extraditable person"),[171] and the offence must be an "extradition offence" in relation to that country.[172] The first of these requirements

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167 *Commonwealth of Australia v BW* [2025] NZCA 8 (French P, Collins and Hinton JJ) [CA judgment].

168 Extradition Act 1999, s 40(3). I note, however, that pt 4 is deemed to apply to Australia without the need for an Order in Council: s 39(a). As to the principle of specialty, see Clare Montgomery and others *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (4th ed, Oxford University Press, Oxford, 2025) at [5.91]–[5.92]; and Neil Boister *Extradition Law in New Zealand* (Thomson Reuters, Wellington, 2021) at [4.6.7(1)] and [5.5.5].

169 Section 41.

170 Section 45(1).

171 Sections 3 and 45(2)(b)(i).

172 Sections 4 and 45(2)(b)(ii).

establishes that Australia has jurisdiction over both the offence and, once surrendered, the requested person.[173] The second justifies a citizen's surrender to a foreign jurisdiction by establishing that the conduct, if proved, would also be a sufficiently serious offence under New Zealand law.[174]

[119] In most cases these requirements will be easily and obviously met, as they have been here: Mr BW is charged with intentionally causing grievous bodily harm and that is an identical and intrinsically serious offence in both jurisdictions.[175] Australia need not establish a prima facie case, which distinguishes pt 4 countries from others.[176] The Extradition Act positively prohibits the requested person from adducing, and an extradition court from considering, evidence tending to show that the requested person did not commit the offence.[177]

[120] Mr BW's eligibility for surrender rests primarily, as I explain below, on whether a discretionary restriction on surrender applies to him. Under s 45(4), the court may find him ineligible if he satisfies it that such a restriction applies. Mr BW relies on s 8(1)(c):

> **8 Discretionary restrictions on surrender**
>
> (1) A discretionary restriction on surrender exists if, because of—
>
> …
>
> (c) the amount of time that has passed since the offence is alleged to have been committed or was committed,—
>
> and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.
>
> …

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173 See M Cherif Bassiouni *International Extradition: United States Law and Practice* (6th ed, Oxford University Press, New York, 2014) at 362.

174 To qualify as an "extradition offence", the offence must carry a maximum penalty of not less than 12 months imprisonment under the law of Australia, and the offending conduct must correspond to an offence in New Zealand law which is also punishable by a maximum penalty of not less than 12 months imprisonment: Extradition Act, s 4(1)(a) and (2). As to the requirement of double criminality generally, see *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [148].

175 The Criminal Code (WA), s 294(1); and Crimes Act 1961, s 188(1).

176 Extradition Act, s 45(5)(b). Compare s 24(2)(d)(i); and *Ortmann*, above n 174, at [161].

177 Section 45(5)(a).

[121] When applying s 8(1)(c), New Zealand courts have adopted the distinction drawn by Lord Diplock in *Kakis v Government of the Republic of Cyprus*: although "unjust" and "oppressive" overlap, the former refers primarily to the risk of prejudice in the conduct of the trial itself, and the latter to hardship from changes in the requested person's circumstances during the period between their alleged offending and the application for extradition.[178] It is an important feature of this case that Mr BW has not claimed his trial in Australia would be unjust by reason of delay in prosecuting the charge against him. His case is that surrender would be oppressive having regard to his personal circumstances.

[122] Where extradition is requested under pt 3 of the Extradition Act, a court must determine whether the requested person is eligible for surrender.[179] If the requested person is found eligible, the Minister must then decide whether to surrender them.[180]

[123] Where Australia is the requesting country, the court need not refer a requested person whom it has found eligible to the Minister for a decision on extradition to Australia,[181] but it may relevantly do so if it "appears to the court" that a mandatory restriction in s 7 or discretionary restriction in s 8 applies or may apply,[182] or that there are "compelling or extraordinary circumstances of the person" that would make surrender unjust or oppressive before the expiration of a particular period.[183] In such cases the Minister may refuse surrender on any of the grounds specified in s 30(2)–(4).[184] Those relevant here are found in s 30(3)(b)–(e):

> **30 Minister must determine whether person to be surrendered**
>
> …
>
> (3) The Minister may determine that the person is not to be surrendered if—

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178 *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 782–783. For New Zealand adoption of this distinction, see CA judgment, above n 167, at [25]; *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621 at [41]; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [12]; and *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [33], [43] and [51].

179 Section 24(1).

180 That is the effect of ss 26(1)(a) and 30(1).

181 Section 48(3)(a).

182 Section 48(4)(a)(i).

183 Section 48(4)(a)(ii).

184 Section 49(1).

…

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

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

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

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

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

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

(d) without limiting section 32(4), it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person; or

(e) for any other reason the Minister considers that the person should not be surrendered.

[124] The Extradition Act accordingly contemplates that the Minister may be satisfied that a discretionary restriction appears to apply in circumstances where the court was able to say only that it *might* do so.[185] That possibility arises, as Ellen France and McGrath JJ pointed out in *Radhi v District Court at Manukau*, because the Minister enjoys wider powers under the Act than does the District Court.[186] In particular, the Minister is empowered under s 49(2) to make inquires of the requesting country and "seek any undertakings … that the Minister thinks fit". This feature of the legislation reflects policy choices about the decision-making process. It explains the existence of a discretion in s 45(4) to find a person eligible for

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185 In an eligibility hearing, the requested person bears the onus of satisfying the court, on the balance of probabilities, that a discretionary restriction on surrender applies: *Tukaki*, above n 178, at [10] and [44]; and *Mercer*, above n 178, at [29].

186 *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [89] per Ellen France and McGrath JJ dissenting.

surrender even though they have satisfied the court that a discretionary restriction applies.

[125] Further, as the Court of Appeal noted in *Tukaki v Commonwealth of Australia*, personal circumstances under s 8(1)(c) are confined to those connected to the delay.[187] A causal nexus is required, in the sense that the change in circumstances would not have happened but for the delay. That requirement controls the District Court inquiry under s 45. But no such limit applies to the Minister's power to decline surrender under s 30(3). The Minister may do so on the grounds that surrender would be contrary to the interests of justice, or that it would be unjust or oppressive having regard to compelling or extraordinary personal circumstances, or indeed "for any other reason".

[126] An appeal lies to the High Court, confined to questions of law.[188] Having determined the question of law, the High Court may reverse, confirm or amend the determination, remit the proceeding to the District Court or make any other order it thinks fit.[189] The Extradition Act envisages that the High Court may form and act on its own view of the facts at that point, because it provides that the Court may, despite finding an error of law, decline to reverse or amend a determination of eligibility if it considers that no substantial wrong or miscarriage of justice has occurred.[190] Although these procedures are not identical to the former case stated procedure under pt 4 of the Summary Proceedings Act 1957, they are analogous. There is no general appeal from a decision that a person is, or is not, eligible for extradition.

[127] The Extradition Act provides in s 72(2)(a) that when determining a question of law the High Court may not have regard to any evidence of a fact or opinion that was not before the District Court when the determination under appeal was made. The legislative record does not explain why this bar on new evidence was enacted. What is clear is that the Minister is not so constrained when making a decision under s 30. As a matter of fact, events following the District Court hearing may

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187 *Tukaki*, above n 178, at [11] and [20]–[22].
188 Extradition Act, s 68.
189 Section 72(1).
190 See s 73(3); and *Ortmann*, above n 174, at [505] and [532].

sometimes inform a decision about whether extradition would be unjust or oppressive. For example, the requested person's health may have deteriorated. The Minister's capacity to consider new evidence must be capable of informing the High Court's decision, on appeal, whether to refer the determination to the Minister under s 48.

**The question of law in this appeal**

[128] The parties have acquiesced throughout in a general approach to the appeal, focusing heavily on the factual merits. Ellis J appears to have had reservations about this, which I share. She listed the issues argued before her as follows, recording that Australia did not dispute that they were questions of law:[191]

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

[129] The Court of Appeal granted leave to appeal on a single question: did the High Court err in law when it concluded that it would be "oppressive" to require Mr BW to be extradited to Australia?[192] In this Court the approved question is whether the Court of Appeal was correct to reach the contrary conclusion.[193] In his submissions on leave, Mr BW said that the various issues "can be distilled into a single proposed ground of appeal or question of law", namely:

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191 *BW v The Commonwealth of Australia* [2023] NZHC 1587 [HC reasons judgment] at [26].
192 *The Commonwealth of Australia v BW* [2024] NZCA 25 (Collins, Woolford and Mander JJ) at [1].
193 *BW (SC 22/2025) v Commonwealth of Australia* [2025] NZSC 66 (Ellen France, Williams and Miller JJ).

> … did the Court of Appeal err in deciding that the principle of comity and serious nature of the alleged offending outweigh the extraordinary delay and severe impact on BW, his young son, whānau and renewed connection with his hapū and iwi under s 8(1)(c) of the Act?

[130] In the result, this proceeding has assumed the appearance of an appeal on the facts, but it is not. I consider that the question of law is correctly framed as whether the Court of Appeal erred in law because its decision was plainly wrong.[194] That is a high standard.

[131] In my opinion, whether the Court of Appeal's decision was plainly wrong turns on the approach that ought to be taken to the exercise of the power to refer a qualifying case to the Minister under s 48(4) of the Extradition Act. As will already be apparent, I consider that the power is not a mere discretion, but speaks, as a minority of this Court observed in *Radhi*, to the respective decision-making roles (and I would add, competencies) of the extradition court and the Minister. The statutory scheme envisages that the court and the Minister will work in complementary ways to ensure that extradition processes work effectively but not unlawfully, unfairly or oppressively. This case demonstrates, for example, that an extradition court may authoritatively identify, for the Minister's consideration, difficulties that would make extradition unfair or oppressive unless met by adequate arrangements.

**Decision-making pathways in extradition proceedings**

[132] Most extradition cases are decided finally in the District Court and the decisions are not always readily available on the usual databases. Subject to that caveat, my own survey of first instance and appellate decisions suggests that the question whether to refer a case to the Minister under s 48(4) of the Extradition Act arises frequently. A number of appellate decisions, usually on judicial review, address first instance decisions not to refer cases to the Minister.

[133] To recap, in proceedings under pt 4 of the Extradition Act, the power to refer a case to the Minister arises once an extradition court is satisfied that a warrant from the requesting country has been produced and endorsed, that the person is extraditable,

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194 See for example *R v Cleaver* [2020] NZCA 397 at [12]–[13].

and that the offence is an extradition offence in relation to that country.[195] However, at this point, referral to the Minister is only one of several decision-making pathways that may be open to the court, depending on the circumstances. I set out these pathways below.

*Discharge for ineligibility*

[134] First, where the requested person is ineligible for surrender due to a mandatory or treaty restriction under s 45(3) of the Extradition Act, or is found ineligible under s 45(4) on the basis that a discretionary restriction applies, the court must discharge the person under s 46(4), unless a party indicates their intention to appeal the judgment.[196] That is a final decision, subject of course to appeal rights. No question arises of referring the person to the Minister.

*Immediate surrender*

[135] Second, and commonly, if no mandatory or discretionary restrictions are made out the extradition court must move to make a surrender order under s 47(1) of the Extradition Act immediately upon finding the person eligible for surrender, unless it refers the person's case to the Minister under s 48(1) or (4), which I discuss below.

[136] Courts have found it appropriate to make a surrender order without a further ministerial inquiry where all the information relevant to injustice or oppression is before them, they are confident they can evaluate it, and they are satisfied that there are no grounds for the Minister to act.

[137] The leading example is *Tukaki*, in which the District Court found Mr Tukaki eligible for surrender and refused to refer his case to the Minister. He was accused of sexual offending occurring in 1999 but the complaint was delayed until 2009, charges were not laid by Northern Territory police until 2013, and the extradition request was only made in 2016.[197] He had a wife and family.[198] He contended that surrender would

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195 Sections 41, 45(2) and 48(1) and (4).
196 Section 70(1)–(2).
197 *Tukaki v District Court at Tauranga* [2017] NZHC 843 at [6]–[11] as cited in *Tukaki*, above n 178, at [4].
198 *Tukaki*, above n 178, at [5].

be oppressive because he had returned to his whānau, who supported him in a culturally appropriate way.[199] The Court of Appeal acknowledged the special status of a family unit in tikanga Māori and society generally but found that the disruption caused by removal of Mr Tukaki from his whānau and iwi was no more, on the known facts, than a usual consequence of extradition.[200] Significantly for my purposes, the appellant did not argue that more, or current, information might be available to the Minister, nor (notwithstanding that he complained he would be detained pending trial and would face a long sentence) that the Minister might seek undertakings to mitigate hardship. His argument for referral rested on legal considerations: the correct standard for oppression; the weight to be given to tikanga Māori; and the High Court Judge's reliance on "comity", by which he meant "the reciprocal international obligations involved in extradition".[201] These issues the Court of Appeal was able to resolve.

[138] In *Pearson v Commonwealth of Australia*, the Court of Appeal also declined to order a Ministerial referral.[202] Ms Pearson was charged with theft allegedly committed between 2009–2013 as a financial adviser, and in 2018 extradition proceedings were commenced.[203] In the Court of Appeal, Ms Pearson did not contend that this delay would affect the fairness of her trial, nor did she challenge the High Court's finding "that the delay was not substantial given the nature of the investigation involved".[204] Instead, Ms Pearson argued that an alternative, less rights-limiting process was available, which would allow her to participate in pre-trial steps from New Zealand, and voluntarily return to Australia for the trial, rather than being extradited.[205] Given the availability of this alternative process, and the time that had passed since the alleged conduct, she contended that a discretionary restriction on surrender applied under s 8(1)(c) of the Extradition Act.[206] The Court rejected Ms Pearson's argument for two reasons. First, the alternative process was impractical and did not adequately secure the public interest objectives of extradition.[207] Second, it would apply with equal force had there been no delay, so the necessary causal connection between delay

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199 At [5]–[6] and [27]–[28].
200 At [29] and [38]–[40].
201 At [41] and [45].
202 *Pearson v Commonwealth of Australia* [2024] NZCA 447.
203 At [20]–[21].
204 At [105].
205 At [7]–[8], [43], [73] and [76].
206 At [9].
207 At [98].

and oppression was lacking.[208] Ms Pearson provided evidence that surrender would result in loss of employment, legal costs that she was unable to pay and harm to her health, but it was not suggested that the Minister was better placed to decide whether surrender would be oppressive.[209] Nor was it suggested that undertakings might be sought.

[139] In *Mailley v District Court at North Shore*, the requested person cited his age (64), mental and physical ill health, family unit and loss of social and medical support networks.[210] The Court of Appeal was not satisfied that referral was warranted. It reasoned that these matters were not out of the ordinary and some of them, notably mental and physical health issues, could be dealt with in the requesting country, Australia.[211] His wife and daughter were Australian citizens and there was no evidence that they would remain in New Zealand if he were surrendered.[212]

[140] I mention several other first instance decisions to illustrate the kinds of circumstances that have led courts to order immediate surrender.

[141] *United Kingdom v Schaapveld* concerned a New Zealand citizen whose surrender to the United Kingdom (a pt 4 country) was sought to face serious drugs charges.[213] He returned to New Zealand shortly after he was released on pre-charge bail, which he subsequently failed to answer.[214] There was an unexplained delay of about two and a half years in the United Kingdom making a formal surrender request.[215] Mr Schaapveld relied on evidence that he had become the carer for his elderly and very ill mother, from whom the separation might well be permanent.[216] The District Court was satisfied that it was able to decide whether

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208 At [105].
209 At [44].
210 *Mailley v District Court at North Shore* [2016] NZCA 83 at [61]–[63] and [65]–[66].
211 At [64] and [66].
212 At [65].
213 *United Kingdom of Great Britain and Northern Ireland v Schaapveld* DC Christchurch CRI-2016-009-5221, 21 December 2017.
214 At [10], [13] and [18].
215 At [73].
216 At [78]–[82].

surrender would be oppressive having regard to these personal circumstances and refused to refer the case to the Minister.[217]

[142] To similar effect are *New Zealand Police v Smith* and *Commonwealth of Australia v Craig*.[218] The decision in *Commonwealth of Australia v Brougham* bears some similarities to this case; the requested person had a young family who apparently were unable to accompany him to Australia, although they had lived there in the past, and his wife was expecting another child.[219] He also had mental health difficulties.[220] The District Court was satisfied that these circumstances did not warrant referral.[221]

*Referral to the Minister where a restriction appears to apply*

[143] Third, the court may under s 48(4)(a)(i) of the Extradition Act refer the case to the Minister on the ground that, although it has not been persuaded that a s 7 or s 8 restriction applies for the purpose of determining eligibility under s 45, it appears to the court that such a restriction applies or *may* apply, so justifying referral to the Minister for further inquiry and a decision under s 30. I observe that the Minister may refuse surrender on the basis that a discretionary restriction in s 8 "appears" to apply to the requested person,[222] whereas a court may only find a person ineligible for surrender if they discharge their burden of "satisfy[ing] the court" that a discretionary restriction in s 8 applies.[223]

[144] As an illustration of circumstances fitting within this pathway, in *The Commonwealth of Australia v McGrath* the requested person was referred to the Minister where the District Court was unsure whether his return to Australia to face historical charges might amount to persecution.[224] He had already served a term of imprisonment for similar charges and rehabilitated himself, and there had been a long delay in bringing the charges.[225] (I note that the Judge also relied on personal

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217 At [89]–[101].
218 *New Zealand Police v Smith* DC Hamilton CRI-2013-019-3542, 24 October 2013 at [38]–[50]; and *Commonwealth of Australia v Craig* [2022] NZDC 5215.
219 *Commonwealth of Australia v Brougham* [2009] DCR 753 at [5] and [10]–[11].
220 At [4] and [6]–[7].
221 At [16].
222 Extradition Act, s 30(3)(b).
223 Section 45(4).
224 *The Commonwealth of Australia v McGrath* DC Christchurch CRI-2012-009-13556, 8 April 2014.
225 At [27].

circumstances, notably age and family circumstances, and cited s 48(4)(a)(ii) (my fourth pathway) as the basis for her decision.[226] I nonetheless classify it as a third pathway case because these personal circumstances were permanent in nature and hence not likely to resolve within a particular period as s 48(4)(a)(ii) requires.)

[145] I observe that s 48(1)(a) of the Extradition Act also provides that the court must refer the case to the Minister where the requested person is a New Zealand citizen. However, s 48(3) creates an exception, providing that the court "is not required" to refer the case if the requesting country is Australia or a country designated under s 40 for which the Order in Council specifies (as in the case of the United Kingdom, for example)[227] that a Court "must not" refer the case of a New Zealand citizen to the Minister. The Court of Appeal relied on s 48(3) to refer Mr BW in this case.[228] However, it seems arguable that in this context "not required" means strictly that the requirement to refer that would otherwise apply to a New Zealand citizen under s 48(1)(a) is excluded. Otherwise, s 48(3)(b) would allow an extradition court to refer a case to the Minister despite an Order in Council providing that it "must not" do so. This interpretation also explains why s 48(3) applies to Australia although it is included in pt 4 by statute, not by Order in Council. For these reasons I have not treated s 48(1)(a) as a separate pathway for an extradition court on an Australian request for extradition of a New Zealand citizen.[229]

*Referral to the Minister where personal circumstances appear to make surrender unjust or oppressive*

[146] The fourth pathway is that the court may refer the case to the Minister under s 48(4)(a)(ii) on the ground that compelling or extraordinary circumstances of the person appear to make it unjust or oppressive to surrender them before a particular period expires.[230] In this case the Court of Appeal found it arguable that it might also

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226 At [30] and [32].

227 See Extradition (United Kingdom and Pitcairn Islands) Order 2003, cl 5.

228 CA judgment, above n 167, at [69] and [72].

229 The court must always refer the case to the Minister if any of the considerations in s 48(1)(b)–(d) apply, even where the requesting country is Australia.

230 As to the requirement that the circumstances are temporary, see *Radhi*, above n 186, at [26] per William Young J, [60], n 46 per Glazebrook and O'Regan JJ and [77] per Ellen France and McGrath JJ dissenting; and compare *Mailley v District Court at North Shore* [2013] NZCA 266 at [64].

have referred Mr BW under this provision, identifying the particular period as the period needed to make inquiries of Australian authorities and seek assurances.[231]

[147] In *Radhi*, William Young J (with whom Glazebrook and O'Regan JJ agreed) held that s 48(4)(a)(ii) must be read in conjunction with ss 49 and 51(3)–(5), which contemplate that the Minister may defer surrender in reliance on objections that may or may not be resolved within a particular period.[232] Section 49(2) provides, as noted earlier, that the Minister may seek undertakings from the requesting country, and s 51(4) authorises the Minister to make a surrender order that is to come into effect after a specified period.

[148] Following a referral from an extradition court, the Minister may decide under s 30(3)(d) not to surrender a requested person where it "appears" that compelling or extraordinary circumstances of the person, including without limitation their age or health, would make surrender unjust or oppressive. Alternatively, if the Minister is not satisfied that surrender should be permanently refused under s 30(3)(d) of the Extradition Act, but nevertheless believes that there are compelling or extraordinary circumstances of the person which would make surrender unjust or oppressive before the expiration of a particular period, the Minister may order that the requested person be surrendered after the expiration of that particular period.[233]

[149] In *Radhi* this Court held, by majority, that referral was appropriate in circumstances where it was possible that extradition would result in the appellant becoming an essentially stateless person held in "immigration limbo" in the requesting country, Australia, following the criminal proceeding there.[234] That possibility largely depended on whether he would be granted a visa to return to New Zealand at that time.[235]

[150] I record that Ellen France and McGrath JJ dissented on the ground that the temporal requirement under s 48(4)(a)(ii) was not met and the possibility of

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231 CA judgment, above n 167, at [71].
232 *Radhi*, above n 186, at [27] per William Young J and [60], n 46 per Glazebrook and O'Regan JJ.
233 Extradition Act, s 51(3)–(4).
234 At [14], [50] and [55] per William Young J and [62]–[63] per Glazebrook and O'Regan JJ.
235 At [6]–[7], [51] and [56] per William Young J and [62]–[63] per Glazebrook and O'Regan JJ.

administrative detention (and related need for ministerial intervention) was necessarily speculative.[236] As Mr BW is a New Zealand citizen who can return to this country as of right, that problem does not arise here. I rely on *Radhi*, including the minority judgment, for the proposition that the legislature took a clear policy choice to differentiate Ministerial powers from judicial ones.

[151] Also by way of example, in *Crown Solicitor v Moore* the case was referred to the Minister because of a possibility that the requested person (a non-citizen) might not be able to re-enter New Zealand, where he had lived for many years and cared for his elderly mother.[237] In *R v Jones*, the alleged offending was serious (indecent assault of a child in Thailand, charged in the United Kingdom) but the requested person and his wife cared for a severely disabled grandson with very intensive needs.[238] The case was referred to the Minister to decide whether to delay surrender while ascertaining what alternative care was available for the child. The question which the Judge posed for the Minister was whether the State could or should attempt to substitute for the extraordinary care provided by the requested person and his wife.

*Observations about an extradition court's approach to referral*

[152] The authorities demonstrate that the correct choice of pathway under ss 45(4) (eligibility for surrender) and 48(4) (referral to the Minister) is highly dependent on the particular circumstances of the case, or of the person, that are said to make surrender unjust or oppressive. Particular circumstances explain some apparently divergent outcomes.

[153] In my view, an extradition court must take into account not only the criteria in s 8 but also the Minister's grounds for refusing surrender under s 30(3)(d) and the Minister's powers to make inquiries, to seek assurances, and to defer a decision for a period. As this Court pointed out in *Minister of Justice v Kim*, the Minister's power to seek undertakings or assurances is important; it underpins the Extradition Act.[239]

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236 At [92] and [95]. Ellen France and McGrath JJ also pointed to the belated and unsatisfactory nature of the evidence about the immigration position: at [93].

237 *Crown Solicitor v Moore* [2023] NZDC 22690 at [95]–[99].

238 *R v Jones* [2019] NZDC 24314.

239 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [104]–[107] and [115] per Glazebrook, Ellen France and Arnold JJ and [478] per O'Regan and French JJ.

The extradition court should also recognise that it must take the circumstances as it finds them at the hearing before it, while the Minister may consider updating evidence. The gap in time between the date of the court's decision and a ministerial decision may matter where, for example, personal circumstances have changed in the interim.

[154] It is appropriate to order immediate surrender where the court can be satisfied that there are no grounds to justify declining surrender. But the statutory scheme makes plain that courts should not hesitate to refer a case to the Minister where there is doubt about either the availability of a restriction on surrender or anything that might be done to alleviate injustice or oppression. My incomplete survey of the delay cases suggests that in practice courts may sometimes have been too willing to order immediate surrender, usually by discounting altogether delay-related or personal hardships as no more than the ordinary incidents of extradition.

*This case*

[155] I consider, respectfully differing from the majority, that this is not a first pathway case (discharge for ineligibility).[240] It is a third pathway case (referral on the basis that a discretionary restriction may apply).[241] That is so because, as I explain below, oppression in this case rests on family separation during the period of time in which Mr BW must remain in Western Australia before and after trial. That is a question of fact about which we know almost nothing on the evidence before us. Inquiries made of Australian authorities might clarify matters.

**Comity**

[156] The literature is replete with statements that comity is ill-defined, but fortunately I need not attempt a comprehensive definition. In this context the term refers to bilateral cooperation between nations to ensure that justice may be done and countries do not become safe havens from criminal justice. Cooperation matters at the operational level, as it were, because extradition is not based on any overarching

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240 Discussed above at [134].
241 Discussed above at [143]–[145].

obligation under international law[242] and it is a two-way process; to refuse a request for surrender may be to invite refusals in return.[243]

[157] In the extradition context comity entails (a) recognition of the requesting country's laws, institutions and processes, and (b) restraint in the exercise of powers to refuse surrender so as to avoid unjustifiable interference in the requesting country's criminal proceeding. The legislature, extradition courts and the Minister are all responsible for giving effect to comity in ways appropriate to their designated roles. The legislature has played its part in this case by designating Australia a pt 4 country, with all that that entails.

[158] A House of Lords Select Committee outlined in its 2015 report on the law of extradition what it described as essential principles underpinning extradition law:

(a) extradition is based on comity and cooperation between countries, and it is inherent that each country accepts, to a certain degree, the criminal justice systems of other countries;[244]

(b) extradition proceedings are not concerned with establishing innocence or guilt—that decision is for the courts of the requesting country;[245]

(c) the process of extradition may be considered harsh and distressing, but that need not mean that surrender is unjust;[246] and

(d) because extradition exists so justice may be done in relation to (serious) crimes committed overseas, it is important not to overlook the effects of offending on victims, as well as the overall importance of supporting the rule of law.[247]

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242 For example, Australia and New Zealand do not have an extradition treaty but rather rely on reciprocal domestic legislation: Extradition Act; and Extradition Act 1988 (Cth).

243 *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487 at [5] per Lord Phillips P; and House of Lords Select Committee on Extradition Law *Extradition: UK law and practice* (10 March 2015) at [6]–[7]. See also William S Dodge "International Comity in American Law" (2015) 115 Colum L Rev 2071 at 2074 and 2085–2086.

244 House of Lords Select Committee on Extradition Law, above n 243, at [6]–[7].

245 At [8].

246 At [8].

247 At [9].

[159] The final principle bears emphasis in this case because there is in extradition proceedings a natural tendency to focus on the circumstances of the requested person and the court may not know much about the victims of the alleged conduct in the requesting country.

[160] It is usual in extradition arrangements to fix limits upon a country's own preparedness to surrender a citizen to another country for trial.[248] Relevantly, under New Zealand and Australian law there is no requirement to surrender a citizen (or non-citizen) for trial in the other jurisdiction where doing so would be unjust or oppressive by reason of the amount of time that has passed since the alleged offending.[249]

[161] The presence of these limits in the legislation, in both jurisdictions, establishes that they are compatible with comity. Specifically, the legislation presumes that reciprocity of practice should survive a Ministerial decision that compelling or extraordinary circumstances of the requested person would make surrender unjust or oppressive, or a judicial decision that the passage of time means that surrender would be unjust or oppressive. That expectation will be borne out in practice provided the legislation is appropriately administered by the courts and the Minister when making eligibility and surrender decisions.

[162] I have indicated that the Extradition Act treats surrender as ultimately a Ministerial decision (and that remains true where Australia is the requesting country, notwithstanding that referral to the Minister is very rarely mandatory). Relevantly, the extradition court ought to leave a final decision about a discretionary restriction on surrender to the Minister if, on the information before it, the court is in doubt about what will happen following surrender.

[163] Comity may also be a highly relevant consideration for a court which is considering whether a discretionary restriction on surrender applies. That is so because s 8 contemplates that a domestic court may inquire into processes and circumstances in the requesting nation's courts to satisfy itself whether surrender

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248 Montgomery and others, above n 168, at [1.02].
249 Extradition Act, s 8(1)(c); and Extradition Act (Cth), s 34(2)(c).

would be unjust or oppressive in "all the circumstances of the case". Similarly, the domestic court may find that the case is trivial, or the accusation against the requested person was not made in good faith.[250] Decisions of this kind entail scrutiny of the requesting country's systems and processes and standards.

[164] The extradition court must make its own decision. It need not base its findings on the requesting country's standards and it does not seek the opinion of requesting country courts.[251] But it should accept, within reasonable limits, differences in the criminal justice system of the requesting country.[252] And of course it must assume that the New Zealand criminal justice system may be subjected to similarly exacting scrutiny when New Zealand is the requesting country.[253]

[165] New Zealand courts have accommodated comity in two ways when making eligibility determinations vis-à-vis Australia. First, they have adopted the rule of non-inquiry, albeit without using that term. The rule has been defined as a principle that "it is neither necessary nor appropriate for courts to investigate the operation of criminal justice systems in requesting countries".[254] So, for example, in *Commonwealth of Australia v Mercer* the Court of Appeal held that as a matter of comity an extradition court should be wary of reviewing the actions of foreign authorities leading up to the request and added that the requesting country's authorities are usually in a better position to assess delay and grant a suitable remedy.[255]

[166] Second, New Zealand courts have emphasised that the threshold for oppression is high because of the public interest in ensuring that people accused of crimes should

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250 Extradition Act, s 8(1)(a)–(b).

251 See *Minister for Justice of the Commonwealth of Australia v Adamas* [2013] HCA 59, (2013) 253 CLR 43 at [34].

252 See *MM v Minister of Justice Canada on behalf of the United States of America* 2015 SCC 62, [2015] 3 SCR 973 at [119]–[120] per McLachlin CJ, Cromwell, Moldaver and Wagner JJ.

253 In a 2017 article, Rynae Butler pointed to evidence that Australian courts have been willing to subject extradition requests from New Zealand to scrutiny and that such cases are not confined to the oppression ground or the conduct of prosecuting authorities but extend to the conduct of criminal proceedings by New Zealand courts: Rynae Butler "Imbalance in Extradition: The Backing of Warrants Procedure with Australia Under Part 4 of the Extradition Act 1999" [2017] NZCLR 63 at 85–94. The leading example is *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417, in which surrender was refused on the ground that New Zealand law permits representative charges: at [29].

254 Sally Kennedy and Ian Warren *Reforming International Extradition: Fairness, Individual Rights and Justice* (Anthem Press, London, 2024) at 23.

255 *Mercer*, above n 178, at [53] and [59].

face trial and that there should be no safe havens to which they may flee in the belief that they will not be sent back.[256]

[167] This case demonstrates that there is a third respect in which comity may influence an eligibility determination. As I explain below, it is reasonable to assume that a court in a pt 4 requesting country would respect assurances given to the Minister in connection with an extradition request.

[168] That brings me to the comity issue in this case. As indicated above, Mr BW does not contend that a trial in Australia would be unjust by reason of delay. No criticism is made of Western Australian courts. Nor is there any dispute about the delay or its several causes. There has been unreasonable delay in the conduct of the prosecution by Western Australian authorities. They point to other contributing causes but do not try to excuse the prosecutor. We may assume that Western Australian courts have essentially similar processes for dealing with delay; for example, a permanent stay of prosecution or an allowance in the choice of sentence type and duration.[257]

[169] These considerations might suggest that comity has little work to do in this proceeding. But that is not the case. Mr BW resists surrender although there is no doubt that he would be required to stand trial, on the facts known to us and notwithstanding his personal circumstances, were he being tried in New Zealand. Indeed, he does not argue that he would be granted a stay here. He assumes, for present purposes, that Western Australian courts would not grant him a stay either. His case that it would be oppressive to stand trial relies entirely on the fact that the trial is to be held in Western Australia. This requires us to focus on what exactly it is about the expected behaviour of Western Australian authorities and courts that would be oppressive.

[170] Before addressing those considerations, I draw attention to the assumption that Mr BW would not be granted a permanent stay (in either jurisdiction). A permanent stay in the requesting country obviously is not the same thing as a decision that

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256 See for example *Tukaki*, above n 178, at [29]–[31] citing *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [8(4)] per Lady Hale SCJ.

257 See *Mercer*, above n 178, at [43(c)–(d)].

New Zealand will refuse surrender and become a permanent haven for the alleged offender, but the parallel is appropriate because the justification—prosecutorial delay—is the same and the outcome is practically identical, at least in this case; Mr BW has made clear that he is settled in his Tairāwhiti community and intends to remain there.

[171] The New Zealand stay cases follow the New Zealand Bill of Rights Act 1990 in recognising a distinction between pre-charge and post-charge delay.[258] The latter is what we are concerned with here.[259] The question is whether Mr BW's right to be tried without unreasonable delay has been breached and a stay is a reasonable and proportionate remedy.[260] The totality of the delay is relevant.[261] Considerations may include the reasons for the delay, any resulting prejudice, any contribution by the defendant to delay and any impact on the defendant of living under the shadow of trial.[262] A stay is rarely granted where a fair trial is still possible.[263] Alternative remedies, such as a reduction in sentence, may be more appropriate.[264]

[172] It follows that, for present purposes, we must approach the question of oppression by assuming that, although the delay was unreasonable, it was not so extensive or culpable to make a permanent stay a reasonable and proportionate remedy. Were Mr BW being tried in New Zealand, the delay would be met by an appropriate adjustment to his sentence.

[173] Although we need not defer to Western Australian authorities—especially in circumstances where there is no evidence about how they would deal with Mr BW—we may also recognise that they are better placed to assess the contribution

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258 As to pre-charge delay, see s 25(a); and *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465. As to post-charge delay, see s 25(b); and *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750. New Zealand law also permits a stay for prosecutorial misconduct, which is not in issue here: *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40(b)] per William Young, Glazebrook, Arnold and Blanchard JJ.

259 The offence is alleged to have occurred on 8 November 2014, an arrest warrant was issued on 17 June 2015, the extradition request was made on 10 June 2021, and Mr BW was arrested and first made aware of the charge on 5 October 2022.

260 *Williams*, above n 258, at [18].

261 *R v B* [1996] 1 NZLR 385 (CA) at 387.

262 *Williams*, above n 258, at [11]; *M (CA427/2011) v R* [2012] NZCA 270 at [81]–[83]; and *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 at [16] per Lord Bingham as cited in *Mazidabadi v R* [2012] NZCA 315 at [10].

263 *Williams*, above n 258, at [18]–[19]; and *R v Vaihu* [2010] NZCA 145 at [34] and [54]–[55].

264 *Williams*, above n 258, at [18]–[22].

to delay made by prosecutorial neglect.[265] The COVID-19 pandemic made what must have been a substantial contribution. I note too that were Mr BW to seek a stay in Western Australia, it appears authorities there might claim that he fled the jurisdiction, so causing much of the delay. He says he knew nothing of his legal jeopardy and the courts below have been prepared to accept that, properly so on the evidence before us.[266]

**What justifies intervention in this Australian proceeding?**

[174] There appear to be two justifications for an extradition court to intervene in Mr BW's Australian prosecution. I accept that both are important.

[175] The first is bail. It is a reasonable assumption that were Mr BW being tried in New Zealand he would be bailed to live at home pending trial. He appears to pose no risk of flight or reoffending, and none of interfering with witnesses. If surrendered to Western Australia, where he appears to have no close connections, he might be remanded in custody. I do not think we can assume, as a matter of fact, that he would be remanded in custody. (I note the Court of Appeal in *Pearson* appeared to have some information about Western Australian processes and did not make that assumption, although the requested person there appeared to be a flight risk.)[267] On the material before us, we simply do not know whether Mr BW would be bailed following surrender.

[176] The second is sentence. On the facts known to us, the alleged offending was intrinsically serious and unprovoked, involving two kicks and one punch to the victim's head and two more kicks to the body, causing multiple fractures, a scalp haematoma, and bruising. Medical reports indicate that these injuries were likely to cause permanent damage without surgery. So far as we know, however, the victim has suffered no long-term injury. On that assumption, and given Mr BW's now prosocial circumstances and otherwise good record, we may reasonably assume that he likely would receive a community-based sentence in New Zealand notwithstanding that the

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265 See *Mercer*, above n 178, at [53] and [59].

266 *Commonwealth of Australia v [BW]* [2023] NZDC 5941 (Judge Cathcart) [DC judgment] at [38]; HC reasons judgment, above n 191, at [3]; and CA judgment, above n 167, at [59].

267 *Pearson*, above n 202, at [87].

offence attracts a very long maximum penalty.[268] We do not know whether that is a reasonable possibility in Western Australia. In the absence of family and community support and employment there, it seems reasonably possible that he might be sentenced to imprisonment. This, it may be assumed, would not change his long-term future in New Zealand; his whānau would continue to embrace him in the same ways that they do now. But he would be substantially deprived of their support during the term of a custodial sentence served overseas, and separation could also have longer term consequences for his relationships, notably that with his child.

[177] A reasonable worst-case scenario for Mr BW might involve being remanded in custody for perhaps a year before trial, sentenced to a term of several years' imprisonment, and required to serve a substantial part of that term before being released, possibly to serve a period of supervision in Western Australia.

[178] Were this to be the outcome, I agree with the majority that it would be oppressive to surrender him in all the circumstances. Mr BW has reconnected with his iwi and hapū, and has rehabilitated himself following a difficult period overseas. He has become a valued member of his community and is raising a family within it. The causal connection between delay and oppression is not especially strong—one would normally attribute to Mr BW himself his decisions to return home, obtain employment and become a family man—but it suffices here. Extradition courts normally apply a but-for test of causation.[269]

**Relevant information is missing from the record, but available to the Minister**

[179] But as I have just explained, we know very little about how Mr BW would be dealt with in fact, should he be surrendered. This requires evidence, and the record is so bare as to risk the inference that Australian authorities expected New Zealand courts would apply the rule of non-inquiry notwithstanding the admitted delay and obvious potential for oppression. This case should be contrasted with *Pearson*, in which the extradition court at first instance received affidavit evidence from experts on

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[268] The maximum penalty is 14 years' imprisonment: Crimes Act, s 188(1). The starting point might be around five years' imprisonment: *R v Taueki* [2005] 3 NZLR 372 (CA) at [31(a), (c) and (e)] and [36]–[37].

[269] *Tukaki*, above n 178, at [22].

Australian criminal procedure about alternative means of dealing with the criminal proceeding that would not require Ms Pearson's immediate surrender.[270] It ought to have been obvious that requesting country processes and timing were in issue immediately after Mr BW and his partner filed their evidence in the District Court.

[180] Such information as we have was supplied in response to questions posed by the Court of Appeal in its judgment;[271] that is, after the hearing in that Court. The Court's point in posing these questions was that the absence of information about whether and how long Mr BW would be detained in Western Australia was very unsatisfactory and pointed to a need for Ministerial inquiries.[272] We were told from the bar that this led to the Crown making inquiries of Western Australian authorities. Before the hearing in this Court the Crown properly shared with the appellant a letter from the Director of Public Prosecutions for Western Australia, which we have not seen. Ms Epati KC informed us that the letter anticipated a trial would not be held until at least late 2026 or early 2027 and that it would be rare, if not novel, for Mr BW to be bailed to New Zealand.

[181] The parties have acquiesced in the informal supply of this information,[273] but it is in the nature of evidence of fact (or opinion) and, because it was not before the District Court, is prima facie inadmissible under s 72(2)(a) of the Extradition Act. The Court of Appeal recognised this.[274]

[182] Section 72(2)(a) is problematic insofar as it may force an appellate court to decide a case on evidence that is demonstrably incomplete or inaccurate. It appears to assume that appeals will be narrow and swift, which (as this case demonstrates) is not always so. I observe that in *P v Commonwealth of Australia*, Palmer J suggested that it does not preclude appellate courts from receiving updating evidence about facts or

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270 See *Pearson*, above n 202, at [45].
271 See CA judgment, above n 167, at [66].
272 At [67]–[68].
273 The Crown made no reference to the letter in its written submissions, but did not object to the Court receiving it through the appellant's submissions.
274 CA judgment, above n 167, at [66].

opinions that were before the District Court.[275] In *Mailley* the Court of Appeal appears to have overlooked the section altogether.[276]

[183] As noted above at [127], the restriction is addressed to information used by an appellate court when hearing and determining a question of law, so it may not preclude evidence going to the subsequent disposition of the appeal under s 72(1) of the Extradition Act, which allows an appellate court to exercise broad powers of disposition. This interpretation would allow an appellate court to take notice of new information for the purpose of deciding how to dispose of an appeal, including whether to refer the case to the Minister.

[184] Even on that view, s 72(2)(a) presents an obstacle in this case, having regard to my framing of the question of law (see above at [130]). Fortunately it is not necessary to examine the section's reach on the view that I take of the case. The information supplied by counsel about what will happen in Western Australia points to a need for further inquiries and undertakings or assurances, all of which is the Minister's business. For example, Mr BW might be permitted to enter his plea remotely and surrender, or be surrendered, to Western Australia when trial is imminent.[277] Or Western Australian authorities might support bail, having regard to Mr BW's cultural connections and personal circumstances, and/or offer assurances about an early trial. Legal aid might be assured. The authorities might indicate what sentence would be sought in the event he is found guilty, having regard to the delay and his substantial mitigating circumstances. Some of these assurances would not bind the trial court, but as noted above, we may reasonably assume that comity would lead it to respect them. If imprisonment was a real possibility, the authorities might indicate when he would be eligible for parole and whether he would be permitted to return to New Zealand at that time.

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275 *P v Commonwealth of Australia* [2022] NZHC 1525 at [16].

276 *Mailley*, above n 210, at [3].

277 There was evidence tending to confirm this is a possibility in *Pearson*: see *P*, above n 275, at [8(b)]; and *Pearson*, above n 202, at [87]. It is not evidence in this proceeding. I mention it only to show that the possibility of Mr BW remaining at liberty in New Zealand before trial merits investigation.

**The statutory pathway preferred by the Court of Appeal**

[185] The Court of Appeal found by a very narrow margin that a discretionary restriction does not apply,[278] but as noted above at [145] referred Mr BW to the Minister in the exercise of discretion under s 48(1)(a) and (3) of the Extradition Act.[279]

[186] As explained above, I prefer the view that a discretionary restriction may apply (the third pathway), depending on how long Mr BW may be detained in Western Australia before and after trial, and he should therefore be referred under s 48(4)(a)(i) of the Extradition Act. This is a case about the effects of time that has elapsed in prosecuting Mr BW and would elapse following his surrender. It has also been some time since the extradition hearing in the District Court, and for that reason the possibility of new information about personal circumstances should not be excluded.

**Observations on the majority reasons**

[187] I record that I agree with the majority in a number of respects.

[188] Notably, I agree that a decision to surrender a requested person or refer them to the Minister is not an exercise in proportionality, but rather an application of statutory criteria in which a balance has already been struck.[280] The doctrine of proportionality in extradition has its roots in English law, which differs from ours for reasons explained by the Court of Appeal in *Pearson*.[281] Relevantly, the New Zealand legislation has no equivalent to the right to private and family life found in the European Convention on Human Rights[282] and incorporated into English law by the Human Rights Act 1998 (UK) and ss 21, 21A and 87 of the Extradition Act 2003 (UK) (and was at issue in *Norris v Government of the United States of America (No 2)* and *H(H) v Deputy Prosecutor of the Italian Republic, Genoa*, the leading decisions

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278 CA judgment, above n 167, at [65].
279 At [72].
280 Above at [78] per Winkelmann CJ, Glazebrook and Williams JJ.
281 *Pearson*, above n 202, at [107]–[109].
282 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 8.

of the United Kingdom Supreme Court).[283] Nor does the New Zealand legislation have an equivalent to s 21A(1)(b) of the United Kingdom extradition statute, which directs judges to consider whether extradition would be disproportionate, having regard to the seriousness of the alleged offending, the likely penalty in the requesting country and the existence of less coercive alternatives to extradition.

[189] It will be apparent from what I have said above, but bears emphasis, that I also agree with the majority that the ordinary consequences of extradition may be sufficient, in combination or extent, to amount to oppression.[284] The rights of children under the United Nations Convention on the Rights of the Child are relevant,[285] although those rights do not enjoy a higher status than other considerations,[286] and even under the English authorities they are not determinative.[287] As I have explained, I accept that family separation is among the circumstances of the case that would make Mr BW's surrender oppressive in the reasonable worst-case scenario should he be returned to Western Australia. I do not agree with the majority, however, that Judge Cathcart failed to take the interests of Mr BW's child and family into account.[288] He expressly recognised family separation but discounted it as an ordinary incident of extradition, consistent with several of the authorities that I have cited above.[289]

[190] Because the Extradition Act does not adopt a proportionality standard the seriousness of the offence strictly is not weighed in a balancing exercise. Rather, the Extradition Act establishes a threshold; all other criteria having been met, the person is eligible if the offence is non-trivial.[290] I agree with the majority, however, that the seriousness of the offence is one of the "circumstances of the case" for the purpose of s 8, and as such it may be taken into account when gauging oppression.[291]

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283 See *Norris*, above n 243, at [1] per Lord Phillips P; and *H(H)*, above n 256, at [2] per Lady Hale SCJ.
284 Above at [77] and [81] per Winkelmann CJ, Glazebrook and Williams JJ.
285 Above at [83] citing United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
286 See for example *Chief Executive of the Ministry of Business, Innovation and Employment v Nair* [2016] NZCA 248, [2016] NZAR 836 at [38].
287 *H(H)*, above n 256, at [15] and [34] per Lady Hale SCJ.
288 Above at [89] per Winkelmann CJ, Glazebrook and Williams JJ.
289 DC judgment, above n 266, at [45]–[48], [60] and [69].
290 Section 8(1)(a); and *Pearson*, above n 202, at [109].
291 Above at [77] and [80] per Winkelmann CJ, Glazebrook and Williams JJ.

[191] However, I have reservations about the majority view that the nature of the case, which turns on a visual identification, and the difficulties that Mr BW may have in mounting a defence after all this time are circumstances of the case that may be taken into account when considering oppression.[292] I recognise that in a 2017 article Rynae Butler asserted that Australian courts have sometimes, but not invariably, been willing to entertain arguments that surrender would be unjust or oppressive because the likelihood of conviction is very low.[293] Whether or not that is so, New Zealand courts do not appear to have taken that approach. The orthodox approach is that New Zealand courts assume Australian courts will afford the requested person a fair trial according to their own processes and that those processes can adequately address the consequences of delay.[294] We have too little information about the facts of this case and state of the evidence to form an opinion about these matters. And as noted above, an extradition court may not receive evidence tending to show the requested person did not commit the offence.[295]

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292 Above at [99] per Winkelmann CJ, Glazebrook and Williams JJ.
293 Butler, above n 253, at 89–94.
294 *Mercer*, above n 178, at [42]–[43]. See also at [53] and [59].
295 Extradition Act, s 45(5)(a).