New Zealand – Extradition, human rights protections, diplomatic assurances and China's criminal justice system – *Kim v Minister of Justice* [2019] NZCA 209

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In *Kim v Minister of Justice,* New Zealand's Court of Appeal refused to allow a Korean man to be extradited to the People's Republic of China to face a murder charge because of human rights concerns.[1] The court quashed the Minister of Justice's decision to allow the man to be surrendered to China, finding that the minister's assessment of the risks of torture and an unfair trial was flawed and ruling that diplomatic assurances did not provide sufficient protection.

In the absence of an extradition treaty, the Extradition Act 1999 reserves the final discretion to allow extradition to the minister, following a district judge confirming eligibility for extradition. Extradition is forbidden if there is a substantial risk of torture. Otherwise a relatively broad discretion applies. However, in accordance with long-standing interpretative principle, the discretion must be exercised consistently with human rights protections at domestic and international law – relevantly, fundamental principles of criminal justice under the New Zealand Bill of Rights Act 1990, the International Covenant on Civil and Political Rights and the Convention against Torture.[2] The minister determined that although there were risks of torture and an unfair

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1 *Kim v Minister of Justice* [2019] NZCA 209.

2 *Kim* (CA), at [10]-[21].

trial, diplomatic assurances from the Chinese government were adequate to ameliorate these risks.[3]

On judicial review, in a unanimous judgment written by now Chief Justice Winkelmann, the Court of Appeal ruled the assessment was flawed and quashed the decision to allow the extradition.[4] First, the court accepted that the standard of review should be "heightened scrutiny" because of the importance of the rights at risk, thereby allowing the court to more closely scrutinise the factual foundation and reasoning than usual.[5] This is the clearest endorsement from an appellate court about the need to calibrate the depth of scrutiny in this way. Lower courts have commonly applied ideas of anxious scrutiny (or less extreme forms of unreasonableness) for a number of years but there has been some reticence on the part of appellate courts to embrace this technique.[6] The clear signal on this point will be welcomed. Eyebrows might be raised about the depth of forensic examination applied in practice though – despite reassurances otherwise, it is almost irresistible to conclude the court formed its own view on the key factual findings and discretionary questions.

Secondly, the court ruled that the diplomatic assurances provided by China were inadequate to ameliorate the serious risks that existed. The court said the minister failed to reflect on China's general human rights culture and attitude to the rule of law before accepting the assurances about how Mr Kim would be treated; failing to do so risked a "falsely reassuring picture as to the effectiveness of assurances".[7] The court also observed that, while illegal, "torture remains widespread and confessions obtained through torture are regularly admitted in evidence" – something that the minister had failed to grapple with.[8] Similarly, assurances about fair trial processes and rights were inadequate, especially because there was material suggesting political influence in the criminal justice system, harassment of criminal defence lawyers and

3 *Kim* (CA), at [39]; this assessment was a reconsidered assessment after the High Court quashed an earlier assessment: *Kim v Minister of Justice* [2016] NZHC 1490; [2016] 3 NZLR 425.

4 The court below had found that there was no reviewable error in the reconsidered assessment: *Kim v Minister of Justice* [2017] NZHC 2109; [2017] 3 NZLR 823.

5 *Kim* (CA), at [45].

6 See for example *Wolf v Minister of Immigration* [2014] NZAR 414 (HC) and generally Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP, Cambridge, 2018) at ch 4.

7 *Kim* (CA), at [74].

8 *Kim* (CA), at [128], [129] and [275].

interrogation without lawyers being present.[9] This close examination of the factual material before the minister raised "serious issues", the court said, "as to whether a decision to surrender Mr Kim could be made in a manner compliant with New Zealand's international obligations".[10]

The minister was directed to reconsider the matter again.[11] While the court did not exclude the possibility that further information and inquiry may "show a different picture", the damning appraisal of China's criminal justice system probably leaves little room for the minister to conclude extradition remains appropriate.[12] And this judicial denunciation of China's criminal justice system may also prove to have ramifications within the broader diplomatic sphere, especially as New Zealand and China have been looking to negotiate an extradition treaty.

9 *Kim* (CA), at [217], [239] and [275].

10 *Kim* (CA), at [274].

11 The Supreme Court has since granted leave to appeal: *Minister of Justice v Kim* [2019] NZSC 100.

12 *Kim* (CA), at [274].