

**CASE NOTE: THE EXTRADITION RELATIONSHIP BETWEEN NEW ZEALAND AND CHINA: *KIM V MINISTER OF JUSTICE***

MIKE DOUGLAS\*

I. INTRODUCTION

Having spent over five years in custody in New Zealand, Kyung Yup Kim was released on electronically monitored bail late last year, just a day after Minister of Justice, Amy Adams, signed off on his extradition to China for a second time.<sup>1</sup> The extradition of Mr Kim is sought by the People's Republic of China as he is suspected of committing the murder of a woman in Shanghai in 2009. His case has been the subject of a lengthy history of litigation, which continues following the latest decision to allow his surrender.<sup>2</sup>

The *Kim* situation puts a spotlight on the relationship between New Zealand and China in terms of extradition and mutual assistance in criminal matters. The assistance that New Zealand authorities have offered Beijing in working towards Mr Kim's surrender shows a willingness to work in a synergetic manner with China in transnational criminal matters. In the absence of an extradition treaty between New Zealand and China, a request for the surrender of a suspect like Mr Kim requires not only the establishment of jurisdiction, but relies upon cooperation between the authorities of each State. The Chinese would prefer for the relationship to be further consolidated by way of the implementation of a bilateral extradition treaty with New Zealand.<sup>3</sup> Such a prospect would require an agreement which overcomes the human rights concerns that exist with regard to the Chinese criminal justice system. This is something that the Australian government has recently failed to overcome in attempting to have an extradition treaty with China ratified.<sup>4</sup>

Mr Kim's case can therefore be seen from a New Zealand perspective as a balancing act between the strengthening of diplomatic relations, and the substantive human rights and right to a fair trial of the individual. The following case note: explores the litigation history in the case of Kyung Yup Kim; discusses the laws and processes of extradition and mutual assistance in New Zealand with reference to how they have

---

\* Deputy Registrar, Tauranga District Court.

<sup>1</sup> *Kim v Attorney-General* [2016] NZHC 2235.

<sup>2</sup> At [4].

<sup>3</sup> Demelza Leslie "China Seeks Extradition Treaty with New Zealand" *Radio New Zealand* (online ed, 19 April 2016).

<sup>4</sup> Colin Packham "Australia Cancels Vote on Extradition Treaty with China" *Reuters* (online ed, 28 March 2017).

operated in Mr Kim's case; and investigates the extradition relationship between New Zealand and China in this case and in the future.

## II. THE FACTUAL BACKGROUND TO MR KIM'S CASE

Kyung Yup Kim, who is a citizen of the Republic of Korea, is a permanent resident of New Zealand having moved here in 1989 at the age of 14. Much of his immediate family are either permanent residents or citizens of New Zealand, and Mr Kim regards New Zealand as his home country.<sup>5</sup>

Mr Kim is suspected by Chinese police of killing a 20 year old woman named Pei Yun Chen when he was in Shanghai in late 2009. The evidence on which the Chinese authorities rely on in their application for the extradition of Mr Kim was reviewed in an initial District Court extradition hearing in 2013.<sup>6</sup> This included blood DNA evidence found in Mr Kim's Shanghai apartment that linked him to the murder, and evidence from a former associate of Mr Kim, a Mr Park, who made a statement saying that Mr Kim had told him that he had found a prostitute and may have beaten her to death.

Mr Kim denies the allegations and ever meeting the deceased. He submitted that it would be implausible for a murder to have occurred in his apartment without the neighbours noticing, and that it would be difficult to remove a body from a fourth floor apartment unnoticed. He also claimed that his associate Mr Park must have made a statement under police pressure as part of a cover-up by Chinese authorities.

## III. REQUESTING EXTRADITION FROM NEW ZEALAND AND ESTABLISHING JURISDICTION

Mr Kim's case is a textbook example of how a requesting country attempts to establish jurisdiction and how an extradition request made to New Zealand will proceed. This includes a reliance on mutual assistance between the governmental authorities of each country, and police-to-police assistance between those countries' respective police departments.

### A. *Functions of Governmental Organisations in Extradition Requests*

In its Issues Paper *Extradition and Mutual Assistance in Criminal Matters*, the New Zealand Law Commission usefully sets out the roles and responsibilities of the

---

<sup>5</sup> *Kim v Minister of Justice* [2016] NZHC 1491 (HC) at [5].

<sup>6</sup> *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013 (DC).

various branches of the New Zealand Government in handling extradition requests.<sup>7</sup>  
To summarise:

The Ministry of Foreign Affairs and Trade acts as an initial point of contact for a requesting country, and receives requests before referring them to the Crown. The New Zealand police execute arrest warrants, facilitate the detention of the individual, and convey the surrendered person if an extradition is granted. The Crown Law office advises the Minister of Justice as to whether proceedings should be initiated and whether surrender should occur. The Crown also liaises with the requesting country and appears in Court proceedings. The Minister of Justice decides whether to allow individual extradition requests to proceed, and makes final determinations as to whether extradition should be granted. Involvement from the Courts includes the eligibility decisions made by the District Court and the involvement of the High Court when an appeal, judicial review, or writ of habeas corpus is pursued.

*B. Establishing Jurisdiction*

Because the alleged offending of Mr Kim took place in the city of Shanghai, there is an immediate claim of strict territorial jurisdiction available to China. The enforcement of strict territorial jurisdiction is far more straightforward than if the alleged offending had extra-territorial characteristics. States normally require that an alleged offence occurred within their territory before jurisdiction is exercised. This reflects the practicality that the place where the crime occurred is where the evidence is and where the interest in justice lies.<sup>8</sup> It is then for the country which establishes jurisdiction over a crime to enforce that jurisdiction. In a case like that of Mr Kim's, this is where the difficulty lies. Although China may have established jurisdiction, they are faced with the issue of enforcing that jurisdiction in a situation where the accused has travelled to the jurisdiction of another sovereign state and attained residence status. Enforcement refers to the investigation and trying of the accused to determine whether the elements of the given charge are proved.<sup>9</sup> The enforcement of such jurisdiction relies heavily on the cooperation between the police and governmental agencies of the respective countries involved. In the provisional application for Mr Kim's arrest made to the New Zealand police Interpol Office by Shanghai police, reference was made to the jurisdiction of the People's Republic of

---

<sup>7</sup> Law Commission Extradition and Mutual Assistance in Criminal Matters (NZLC IP37, 2014) at 40.

<sup>8</sup> Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 244.

<sup>9</sup> At 269.

China courts to try Mr Kim, supplemented by a police summary of facts of the suspected homicide at Mr Kim's residence in Shanghai.<sup>10</sup>

*C. Mutual Assistance and Police Assistance in New Zealand*

The Mutual Assistance in Criminal Matters Act 1992 (MACMA) aims to assist New Zealand in providing and obtaining international assistance in criminal matters. This includes locating requested individuals and obtaining and facilitating relevant evidence.<sup>11</sup> MACMA reflects New Zealand's alignment with The Commonwealth Scheme for Mutual Assistance in Criminal Matters, or the 'Harare Scheme', which promotes the notion that countries should co-operate with each other to the widest extent possible for the purposes of criminal matters.<sup>12</sup> MACMA has been described as being the gateway legislation in allowing foreign countries a route through which they can access the tools New Zealand uses when investigating and conducting criminal prosecutions domestically. MACMA also acts in the role of gatekeeper in that it prescribes the requirements imposed on requesting states in seeking assistance and sets out an extensive range of grounds on which a request for assistance should be refused. The Attorney-General will scrutinise requests to New Zealand, and the involvement of the courts also offers a second line of defence in ensuring that foreign assistance is only provided in circumstances where the rights of individuals residing in New Zealand are sufficiently observed.<sup>13</sup>

Assistance under MACMA can be applied for only in respect of criminal matters, which includes criminal investigations and criminal proceedings.<sup>14</sup> Part 2 of MACMA provides guidance as to how requests for mutual assistance should be requested by New Zealand to other countries, and Part 3 of MACMA sets out how requesting countries should approach New Zealand in relation to assistance in criminal investigations and proceedings. This includes assistance in locating or identifying persons,<sup>15</sup> and assistance in obtaining evidence.<sup>16</sup> The types of assistance available under MACMA include both administrative assistance - the locating of requested persons, serving documents, and conveying the attendance of a requested person to a foreign country - and court assistance - the taking of evidence for a criminal proceeding, obtaining and enforcing search warrants and production orders, and

---

<sup>10</sup> *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZCA 471, [2012] 3 NZLR 845 at [10-11].

<sup>11</sup> Mutual Assistance in Criminal Matters Act 1992, s 4.

<sup>12</sup> Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth [The Harare Scheme] at [1(1)].

<sup>13</sup> NZLC IP37, above n 7, at 140.

<sup>14</sup> Mutual Assistance in Criminal Matters Act 1992.

<sup>15</sup> Section 30.

<sup>16</sup> Section 31.

enforcing foreign restraining and forfeiture orders relating to the recovery of proceeds of crime.<sup>17</sup>

The Crown Law Office notes that mutual assistance is complemented by police-to-police assistance between countries. Police-to-police assistance involves cooperation between police forces in such information sharing matters as providing intelligence and obtaining evidence, and is facilitated by Interpol.<sup>18</sup> The exchange of such information can become problematic where differing organisational arrangements, protocols and cultures exist between police forces in different countries.<sup>19</sup>

Mutual assistance in Mr Kim's case involved a number of actions by the New Zealand authorities. A warrant for Mr Kim's arrest was issued in Shanghai on the 11th of March 2010 under art 50 of the Criminal Procedure Law of the People's Republic of China on the suspicion of Intentional Homicide.<sup>20</sup> This was followed in May 2012 by the issuing of an Interpol Red Notice by Chinese authorities, seeking Mr Kim's location and arrest as his extradition was sought.<sup>21</sup> Shanghai police requested the New Zealand police Interpol Office to apply for the provisional arrest of Mr Kim, noting that they intended to request his surrender for the intentional homicide of Ms Chen.<sup>22</sup> The action taken by the New Zealand police included executing Mr Kim's arrest in New Zealand at the request of Chinese authorities, and searching Mr Kim's Auckland home and car in an attempt to find his passport.<sup>23</sup> It is of note that the High Court held that the police had acted unlawfully in photographing and fingerprinting Mr Kim following his arrest, as s 82 of the Extradition Act 1999 (the EA) provides a constable powers for search and seizure on arrest,<sup>24</sup> but does not provide police powers to photograph and fingerprint a requested person.<sup>25</sup> Regardless, Mr Kim's case provides an example of co-operation between the police departments of both countries in order to locate a requested person so as to initiate extradition proceedings against him. Without the ability to rely on such cooperation, the successful location and extradition of a wanted individual is unimaginable.

---

<sup>17</sup> NZLC IP37, above n 7 at 143-144.

<sup>18</sup> Crown Law *Police-to-police Assistance* (2016) <[www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)>.

<sup>19</sup> Boister, above n 8, at 274.

<sup>20</sup> *Kim v Prison Manager, Mt Eden Corrections Facility*, above n 10, at [4].

<sup>21</sup> At [5].

<sup>22</sup> At [9].

<sup>23</sup> *Kim v Attorney-General* [2014] NZHC 1383 at [34].

<sup>24</sup> Extradition Act 1999, s 82.

<sup>25</sup> *Kim v Attorney-General*, above n 23 at [111].

*D. The Extradition Process in New Zealand*

Extradition is the most important tool of legal assistance in the pursuit of an alleged fugitive criminal because it allows the lawful acquisition of the custody of a criminal suspect so that an established jurisdiction can be exercised.<sup>26</sup> The procedure of extradition in most countries is usually initiated by a request for extradition through diplomatic channels. A lower Court will review the request, although not in deep detail, and it will then be for the executive branch of the government to make a final determination as to whether the extradition will indeed take place.<sup>27</sup> This general process for extradition requests is similar to that used in extradition requests to New Zealand.

The EA sets out the process for extradition requests in New Zealand. It provides that an extraditable person is someone suspected or convicted of committing an extradition offence.<sup>28</sup> An extradition offence is defined as one which is punishable by no less than 12 months' imprisonment in the requesting country. The offence must also have been punishable by no less than 12 months' imprisonment in New Zealand at the time of the alleged offending,<sup>29</sup> which is an example of a requirement for double or dual criminality. This means that for an extradition request to New Zealand to proceed, the conduct alleged in the requesting country must also be criminalised in New Zealand and be punishable by at least 12 months' imprisonment in each country, unless an applicable treaty stipulates otherwise.<sup>30</sup> Dual criminality exists in the case of Mr Kim as intentional homicide is punishable by life imprisonment in New Zealand,<sup>31</sup> and death, life imprisonment or a fixed-term of imprisonment of not less than 10 years in China.<sup>32</sup>

There are two sets of procedure provided by the EA for dealing with extradition requests, which are set out by Parts 3 and 4 of the EA. The procedure under Part 4 of the EA applies only to Australia and any other country designated by an Order in Council.<sup>33</sup> It is a more straightforward process as the extradition decision does not need to be made by the Minister of Justice; rather the decision is made by a District Court Judge.<sup>34</sup> An eligibility hearing is heard by a District Court Judge and a surrender order can subsequently be made if the Court is satisfied that an

---

<sup>26</sup> Boister, above n 8, at 334.

<sup>27</sup> At 335.

<sup>28</sup> Extradition Act 1999, s 3.

<sup>29</sup> Section 4.

<sup>30</sup> NZLC IP37, above n 7, at 54.

<sup>31</sup> Crimes Act 1961, s 172(1).

<sup>32</sup> Criminal Law of the People's Republic of China, art 232 .

<sup>33</sup> Extradition Act 1999, s 39.

<sup>34</sup> Section 41.

extraditable person is being surrendered for an extradition offence.<sup>35</sup> However, the matter should be referred to the Minister of Justice if the requested person is a New Zealand citizen, or if there is concern that the requesting country might use torture or the death penalty against that person.<sup>36</sup> Part 3 of the EA provides an extradition procedure for requests from Commonwealth countries, countries New Zealand has an extradition treaty with, and countries designated by Order in Council. If none of these apply, then individual requests from other countries can be made under s 60 of the EA, which allows the Minister of Justice to decide whether the application for surrender should be dealt with under Part 3 of the EA. Section 60 of the EA provides an opportunity for one-off extradition applications to be made by non-Commonwealth countries if there is no extradition treaty in force between New Zealand and that country or if there is a treaty in force between the two countries, but the offence is not extraditable under the treaty.<sup>37</sup> In dealing with an extradition request under s 60 of the EA, the Minister must consider any undertakings by the requesting country to return the requested person to New Zealand; the seriousness of the offence; the object of the EA which is to allow New Zealand to carry out its extradition obligations and facilitate extradition requests, and; any other matters the Minister considers relevant.<sup>38</sup> Because China is not a Commonwealth country, in the absence of an extradition treaty, their application for Mr Kim's surrender was dealt with under s 60 of the EA. When the Minister of Justice allowed the application, the matter could then be dealt with under the procedure provided by Part 3 of the EA.

Under Part 3 of the EA, a requesting country applies to New Zealand for the extradition of an individual under s 18 of the EA, which requires that the person whose surrender is requested is an extraditable person in relation to that country and is in or on their way to New Zealand, or is suspected of being so. It is also necessary for the requesting country to include a copy of an arrest warrant for the person and details of the offence that is alleged.<sup>39</sup> It is then for the Minister of Justice to either request that a District Court Judge issue a warrant for the arrest of the person whose surrender is sought, or refuse to do so if the surrender application is to be declined. If a District Court Judge is requested to do so, an arrest warrant may be issued for the person if they are either in New Zealand or suspected of being so, and there are reasonable grounds to believe that the person is extraditable to an extradition country for an extraditable offence.<sup>40</sup> Section 20 of the EA also allows a District Court Judge to issue a provisional arrest warrant in circumstances of

---

<sup>35</sup> Section 45.

<sup>36</sup> Section 48.

<sup>37</sup> Section 60.

<sup>38</sup> Section 60(3).

<sup>39</sup> Section 18.

<sup>40</sup> Section 19.

urgency, even if a request for surrender is yet to be made.<sup>41</sup> Following the issue of an arrest warrant, the Minister of Justice must be notified of this by the applicant for the warrant, along with documentary evidence that was produced to the Court. The Minister may discontinue the extradition proceedings and cancel the warrant if they see fit.<sup>42</sup> Following the arrest of the requested person, a bail application may be made, although the person is not bailable as of right in terms of the EA.<sup>43</sup>

After the execution of an arrest warrant, a hearing to determine the requested person's eligibility for surrender occurs before a District Court Judge. Here, the Court determines whether it is satisfied that the evidence put before it would be sufficient to justify the person's trial if the alleged offending had occurred within New Zealand. This is also an opportunity for the requested person to make submissions as to whether mandatory or discretionary restrictions on surrender as set out in ss 7 and 8 of the EA apply.<sup>44</sup> The mandatory restrictions on surrender provided by s 7 of the EA include: where surrender is sought for a political offence, or; if the extradition appears to be sought because of discriminatory reasons against the requested person, or the requested person is likely to be discriminated against upon surrender, or; if surrender is sought for a military offence rather than one of ordinary criminal law, or; if the person has been tried already for the offence, or; if the requested person is deemed mentally unfit to stand trial.<sup>45</sup> Discretion may be used in restricting a person's surrender because of: the trivial nature of the case, or; the accusation was not made in the interest of justice, or; if the amount of time that has passed since the alleged offence means it would be unjust or oppressive to surrender the person.<sup>46</sup> If the Court determines that the person is eligible for surrender, then the matter is referred to the Minister of Justice to determine whether the requested person should indeed be surrendered.<sup>47</sup> The District Court's decision may be appealed to the High Court on a question of law,<sup>48</sup> or a writ of habeas corpus pursued.<sup>49</sup>

Section 30 of the EA sets out what the Minister of Justice must consider in determining whether to surrender the requested person. The Minister must not surrender the person if they are satisfied that a s 7 mandatory restriction applies, if

---

<sup>41</sup> Section 20.

<sup>42</sup> Section 21.

<sup>43</sup> Section 23.

<sup>44</sup> Section 24.

<sup>45</sup> Section 7.

<sup>46</sup> Section 8.

<sup>47</sup> Section 26.

<sup>48</sup> Section 68.

<sup>49</sup> Section 26.

there is a danger that the person would be subjected to torture or the death penalty in the extradition country, if any s 8 discretionary considerations apply, or if there are any extraordinary circumstances such as the age or health of the person that would make it unjust or oppressive to surrender the person. The Minister may also seek any further undertakings from the requesting country that the Minister thinks fit.<sup>50</sup>

*(i) The Request for the Surrender of Mr Kim*

In March 2011, Chinese authorities issued an extradition request to New Zealand, noting that Mr Kim had travelled from the Republic of Korea to New Zealand in October 2010.<sup>51</sup> Following police investigations and Mr Kim's arrest, the extradition request was dealt with by the Minister of Justice under s 60 of the EA due to the absence of an extradition treaty between New Zealand and China, and it was decided that the process of extradition proceedings provided by Part 3 of the Act would be initiated.<sup>52</sup>

On 29 November 2013 in the District Court, Judge Gibson reviewed the evidence provided by Chinese authorities, received evidence from New Zealand experts and also heard evidence from Mr Kim and his mother. On the evidence, it was determined that there was a prima facie case for Mr Kim's surrender. His case met the criteria under s 24 of the EA, meaning that he could be extradited if the Minister of Justice decided that it would be lawful and right that he should be.<sup>53</sup> The Minister of Justice eventually ordered the surrender of Mr Kim on 30 November 2015 following extensive investigations into assurances from the People's Republic of China regarding the conditions of his surrender,<sup>54</sup> which reflected the mandatory considerations under s 7 of the EA regarding torture and use of the death penalty.

*(ii) Application for Discharge*

Mr Kim applied for a discharge of the extradition proceedings under s 36 of the EA on the basis that the Minister of Justice had not acted in an appropriately timely manner in conveying his surrender to China.<sup>55</sup> Section 36 of the EA allows for an application for the discharge of the requested person if they have not been surrendered within 2 months of the date of issue of the warrant for the detention of the person, unless sufficient cause for delay can be shown.<sup>56</sup> An application under s 36 of the EA had not been dealt with in New Zealand up until this point. Having

---

<sup>50</sup> Section 30.

<sup>51</sup> *Kim v Prison Manager*, above n 10, at [6].

<sup>52</sup> At [8].

<sup>53</sup> *Re Kim*, above n 6.

<sup>54</sup> *Kim v Minister of Justice*, above n 5, at [50].

<sup>55</sup> *Kim v Attorney-General*, above n 1.

<sup>56</sup> Extradition Act 1999, s 36.

interpreted s 36(3) of the EA, and having been assisted by looking to similar cases heard in the United Kingdom, Canada and Australia, the Court held that the Minister needed to show cause by accounting for such a delay.<sup>57</sup> The focus of s 36 of the EA is on the period from the final determination of legal proceedings through until the date of the person's actual surrender. The overall period of detention is also relevant, and the Court expressed concerns about how long Mr Kim had been detained.<sup>58</sup> However, the application for discharge was dismissed as it was held that the Minister and her officials had proceeded expeditiously, and the main reason for delay was the time taken to obtain assurances from China regarding the conditions of surrender, which was to the benefit of Mr Kim.<sup>59</sup>

*(iii) Judicial Review*

Following the first determination by the Minister of Justice that Mr Kim was to be surrendered, an application for judicial review of the decision was made on a number of grounds. They included that the Minister considered irrelevant information, failed to consider relevant information, made errors of law, and failed to provide adequate reasons in coming to what was submitted to be an unreasonable decision.<sup>60</sup> There was also a claim of bias from the Minister of Justice following public statements made by the Prime Minister of New Zealand, and concerns regarding Mr Kim's treatment in prison.<sup>61</sup> The Court granted the application to review the order to surrender Mr Kim.<sup>62</sup> The Minister of Justice was ordered to reconsider the decision to extradite Mr Kim because there had been no explicit address as to why she was satisfied that the assurances given by Chinese officials were sufficient, and that more information about the risk of Mr Kim potentially being tortured or ill-treated should be obtained.<sup>63</sup> Concern regarding Mr Kim's inability to have a lawyer present during pre-trial interrogations in China was also identified as being problematic. The Chinese authorities had offered to provide New Zealand representatives recordings of these interrogations on request as an alternative. However, it was held that the Minister had not specifically addressed whether that was an adequate substitute for the right to the presence of a lawyer, as is the case in New Zealand.<sup>64</sup>

Following the ordered reconsideration of the first extradition decision, Minister of

---

<sup>57</sup> *Kim v Attorney-General*, above n 1, at [105].

<sup>58</sup> At [111].

<sup>59</sup> At [111-113].

<sup>60</sup> *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [3].

<sup>61</sup> At [4].

<sup>62</sup> At [262].

<sup>63</sup> At [259].

<sup>64</sup> At [260].

Justice, Amy Adams, once again ordered Mr Kim's surrender to China in September 2016.<sup>65</sup> Mr Kim was finally released on electronically monitored bail the day after the second extradition decision was made. The Court held that because his passport had now expired, and because electronic bail monitoring technology had improved since the previous bail applications were made, Mr Kim's flight risk could be managed through restrictive bail terms.<sup>66</sup> This second decision to extradite Mr Kim is once again subject to a judicial review application, which was heard in the Wellington High Court on 3 April 2017. Mr Kim's counsel, Tony Ellis, further submitted that the extradition order should be overturned for concerns over human rights and the ability to obtain a fair trial. Mallon J reserved her decision on the matter.<sup>67</sup>

#### IV. MODERNISATION OF NEW ZEALAND'S EXTRADITION LAWS

It is worth noting that the Law Commission has made recommendations for reform of New Zealand's extradition arrangements. The proposed Extradition Bill offered by the Law Commission suggests a modern, fit-for-purpose extradition regime, which would create a Central Authority for dealing with extradition requests. Such a move would be aimed at streamlining what can be an at times complicated and prolonged process for requesting countries who seek assistance from New Zealand in extradition requests.<sup>68</sup> The proposed update of New Zealand's extradition statute would also place an emphasis on strengthening the protection of the human rights of the requested individual. This would be achieved through the role of the proposed Central Authority in making judgments consistent with the New Zealand Bill of Rights Act 1990 as to whether extradition requests should be granted, and by tasking the Court with the responsibility of deciding nearly all of the grounds for refusing surrender which would nullify the role of the Minister of Justice and promote a more transparent hearing process.<sup>69</sup>

#### V. THE EXTRADITION RELATIONSHIP BETWEEN NEW ZEALAND AND CHINA

Currently, as noted, there is no extradition treaty between New Zealand and China. Media reports suggest that Chinese authorities have been persistent in raising the proposal of a formal extradition treaty arrangement with New Zealand as part of a

---

<sup>65</sup> *Kim v Attorney-General*, above n 1, at [4].

<sup>66</sup> At [37-39].

<sup>67</sup> John Weekes "Organ Harvesting Fears Raised as Murder-Accused Awaits Extradition Decision" *Stuff* (online ed, New Zealand, 4 April 2017).

<sup>68</sup> Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at 5.

<sup>69</sup> At 6.

future upgrade to the Free Trade Agreement between the two nations.<sup>70</sup> Former Prime Minister John Key acknowledged that the issue was raised in April 2016 when he met with Chinese Premier Li Keqiang in Beijing. Key said he was not opposed to entering an extradition treaty arrangement with China regarding serious cases, provided there were assurances individuals would not be tortured or face the death penalty if convicted.<sup>71</sup> One of the main reasons China has pinpointed New Zealand as a country with which an extradition treaty would be useful is because it is said to have become a destination favoured by fugitive former officials being pursued by Chinese authorities on corruption charges.<sup>72</sup> There are also claims of many individuals living in New Zealand who the Chinese authorities wish to extradite on allegations of fraud and embezzlement.<sup>73</sup>

It is of note that New Zealand is not the only target for China in attempting to have a bilateral extradition treaty ratified. The Treaty on Extradition between Australia and the People's Republic of China was concluded in September 2007.<sup>74</sup> This treaty was signed but not ratified by Australia, because of concerns regarding China's use of the death penalty, which required further investigation by Australian authorities.<sup>75</sup> In March 2017, the Australian government cancelled a vote to finally ratify the treaty with China, as it conceded that it would fail to gain the required support from opposition politicians controlling the Senate in order to achieve ratification.<sup>76</sup> The reasons for opposition to ratification of the treaty in Australia relate to concerns regarding deficiencies in the Chinese legal system. In a report following an inquiry by the Law Council of Australia into the China Extradition Treaty, it was commented that China does not act in accordance with procedural fairness and rule of law standards in criminal proceedings.<sup>77</sup> The conclusion of the report was that there was doubt about an individual's ability to access a fair trial under the Chinese criminal justice system, as it lacks transparency.<sup>78</sup> There were also concerns that there needed to be more done to take into consideration the conditions existing in the Chinese system regarding allegations of the ill-treatment and torture of prisoners,

---

<sup>70</sup> Stacey Kirk Free "Trade Agreement Upgrade Talks at G20 as China Extends Trade Invite" *Stuff* (online ed, New Zealand, 19 May 2016).

<sup>71</sup> Leslie, above n 3.

<sup>72</sup> Jamie Smyth "Australia and China to Sign Crime-fighting Treaty: Extradition: Diplomatic Drive" *Financial Times* (online ed, 23 December 2016).

<sup>73</sup> Leslie, above n 3.

<sup>74</sup> Stephen Tully "International law: Facing the death penalty: Under a China-Australia Extradition Treaty" (2016) 22 *Law Society of NSW Journal* 90 at 90.

<sup>75</sup> At 91.

<sup>76</sup> Packham, above n 4.

<sup>77</sup> Joint Standing Committee on Treaties "Nuclear Cooperation-Ukraine; Extradition-China" (Report 167, December 2016, Canberra) at [3.11].

<sup>78</sup> At [3.48].

and the continuing imposition of the death penalty.<sup>79</sup> The decision not to ratify the treaty, coupled with Australia's signing of a diplomatic letter alongside ten other countries questioning Beijing's treatment of human rights lawyers, has resulted in tense diplomatic relations between the two nations. Since these events, the Chinese government has cancelled a proposed visit to China by Australian lawmakers, who were due to meet Chinese law enforcement officials – possibly a direct response to Australian criticism of the Chinese legal system and failure to ratify the extradition treaty.<sup>80</sup>

The situation faced by Australia is of interest because, just like Australia, New Zealand counts China as its largest trading partner. New Zealand was the first Western country to sign a Free Trade Agreement with China eight years ago, and is currently working with China to upgrade the agreement. This was the prominent focus of Li Keqiang's most recent visit to New Zealand in March of this year.<sup>81</sup> The ratification of a bilateral extradition treaty between China and New Zealand will no doubt be high on the agenda for the Chinese when negotiations of an updated Free Trade Agreement begin. This presents as a difficult balancing act for the New Zealand government, which will want to strengthen ties with China, but will be asked to again consider signing an extradition treaty with a country notorious for using torture and the death penalty in criminal proceedings.<sup>82</sup> The Chinese on the other hand will contend that New Zealand can be reassured that any human rights concerns are unjustified. China recently sought that New Zealand citizen William Yan return to China to face trial on fraud charges. Mr Yan returned to China voluntarily for two months to face trial with his lawyer Marc Corlett QC, and returned to New Zealand safely afterwards.<sup>83</sup> Although the outcome of his trial has not been disclosed, Chinese authorities are likely to point to cases such as this one as evidence that an individual can return to China and receive a fair trial and not be subjected to human rights breaches. It will be of interest as to how New Zealand approaches the likely request for an extradition treaty with China as trade negotiations progress. And it will be of particular interest to see how China reacts if New Zealand refuses to agree to such a treaty or voices criticism of their legal system.

---

<sup>79</sup> At [3.46].

<sup>80</sup> Associated Press "China Cancels Australian Lawmakers' Trip as Tensions Deepen *New Zealand Herald* (online ed, Auckland, 6 April 2017).

<sup>81</sup> Demelza Leslie "Work begins Next Month on Upgrading China FTA" *Radio New Zealand* (online ed, 28 March 2017).

<sup>82</sup> See Amnesty International, *Annual Report China 2016/17*, which records widespread use of torture abuse of process and ill treatment </www.amnesty.org/ >.

<sup>83</sup> Jared Savage "William Yan safely returns to New Zealand after Fraud Trial in China" *New Zealand Herald* (online ed, Auckland, 17 January 2017).

## VI. CONCLUSION

Kyung Yup Kim's case provides an insight into the process involved in the handling of an extradition request by New Zealand, particularly in cases where no bilateral extradition treaty exists. In Mr Kim's case, the New Zealand government and police have shown a willingness to offer assistance in an instance where jurisdiction is clearly established by the requesting country. However, the lengthy and ongoing litigation history shows that the establishment of jurisdiction is just the beginning of what can be a lengthy process. Mr Kim's case has become particularly lengthy due to the direction by the Court that the Minister of Justice reconsiders the decision to grant extradition. The litigation continues following the decision of the Minister of Justice to order the extradition of Mr Kim for a second time. It will no doubt continue to be submitted by Mr Kim's counsel that the assurances from the Chinese that they will not subject Mr Kim to torture or the death penalty cannot be relied upon. Mr Kim's case is a timely example of the difficulty New Zealand faces in terms of offering assistance to China in extradition requests. The diplomatic relationship between the two countries is of vital importance to New Zealand, as China is our largest trading partner. Cases like this, and the ongoing pressure from Chinese authorities for New Zealand to enter into a bilateral extradition treaty, mean that a balancing act is required to maintain diplomatic relations and promote New Zealand's economic interests, while at the same time protecting the human rights of the individual residing in New Zealand. The final decision in Mr Kim's case against the Minister of Justice will give an indication as to how the judiciary believe New Zealand should approach Chinese extradition requests in criminal matters. It will then be of interest to see how the New Zealand government approaches the question of whether to enter into a bilateral extradition treaty with China when the matter is inevitably raised once again.