EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2017-009-9283
[2018] NZDC 3501

IN THEMATTER OF	The Extradition Act 1999
AND	
IN THE MATTER OF	Proceedings to extradite Stacey Priscilla BROOKING
BETWEEN	COMMONWEALTH OF AUSTRALIA Applicant
AND	STACEY PRISCILLA BROOKING Respondent

Hearing: 22 February 2018

Appearances: Ms K South for the Applicant
Ms N Wham for the Respondent

Judgment: 27 February 2018

REASONS FOR DECISION OF JUDGE G S MACASKILL DETERMINING RESPONDENT'S ELIGIBILITY FOR SURRENDER

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[1] This proceeding relates to an extradition request pursuant to the Extradition Act 1999 by the Commonwealth of Australia ("Australia"). At the conclusion of argument, I determined that the respondent was eligible for surrender, a warrant for detention should be issued and a surrender order should be made. I declined to refer the matter to the Minister pursuant to s 48. I reserved my reasons for decision and this judgment provides those reasons.

Material facts

[2] On 5 May 2017, an arrest warrant was issued by Michael Pitcher, a Registrar of the Magistrate's Court at Victoria, in relation to one charge of blackmail laid against

the respondent under s 87 of the Crimes Act 1958 (Victoria). This is an indictable offence with a maximum penalty of imprisonment for 15 years.

[3] The arrest warrant summarises the offending as follows :

> The accused at [location deleted] on [date deleted 2017] did make unwarranted demands namely payment of $300,000 with menaces namely threats to injure and/or kill [victim 1], [victim 2] and [victim 3] with a view to gain for herself.

[4] Further factual information regarding the offending is set out in the affidavit of [constable 1] (Detective Senior Constable of the [location deleted] Crime Investigation Unit).

[5] Extradition is sought by Australia in relation to this offence.

[6] Ms South helpfully sets out the steps required where extradition to Australia is sought :

a. Endorsement of the arrest warrant (s 41) – completed on 13 October 2017 by His Honour Judge Saunders at the District Court at Christchurch;

b. Determination of eligibility for surrender (s 45 hearing);

c. Issue of warrant of detention, if the Court is satisfied that the person is eligible for surrender (s 46);

d. Consideration as to whether the case should be referred to the Minister (s 48(4));

e. The making of a surrender order (unless the case is to be referred to the Minister) (s 47).

[7] Surrender orders (in this context) are governed by s 45, which provides :

> **45 Determination of eligibility for surrender**
>
> (1) Subject to section 44(4), if a person is brought before a court under this Part, the court must determiner whether the person is eligible for surrender in relation to the offence or offences for which surrender is sought.
>
> (2) Subject to subsections (3) and (4), the person is eligible for surrender if –

(a) a warrant for the arrest of the person described in section 41(1) and endorsed under that section has been produced to the court; and

(b) the court is satisfied that –

(i) the person is an extraditable person in relation to the extradition country; and

(ii) the offence is an extradition offence in relation to the extradition country.

(3) The person is not eligible for surrender if the person satisfies the court –

(a) that a mandatory restriction on the surrender of the person applies under s 7; or

(b) that the person's surrender would not be in accordance with the provisions of the treaty (if any) between New Zealand and the extradition country.

(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) In the proceedings under this section, -

(a) the person to whom the proceedings relate is not entitled to adduce, and 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; and

(b) nothing in this section requires evidence to be produced or given at the hearing to establish the matters described in subparagraphs (i) and (ii) of section 24(2)(d).

(6) Without limiting the circumstances in which the court may adjourn a hearing, if –

(a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings are produced; and

(b) the court considers the deficiency or deficiencies to be of a minor nature, -

the court may adjourn the hearing for such period as it considers reasonable to allow the deficiency or deficiencies to be remedied.

[8] The respondent's case turns on one point only, which I shall identify shortly.

Otherwise, the respondent accepts that all the statutory criteria for extradition have been satisfied. In particular, I find that :

(a) A warrant for arrest of the respondent, a person described in s 41(1) and endorsed under that section, has been produced to the Court.

(b) The respondent is an extraditable person in relation to an extradition country.

(c) The offence with which the respondent is charged is an extradition offence in relation to the extradition country.

[9] As those criteria have been met, the respondent is eligible for surrender unless she demonstrates that either a s 7 (mandatory) or s 8 (discretionary) restriction applies. The respondent accepts that no such restriction applies. I am satisfied in any event that no such restriction applies.

[10] In reaching these conclusions, I accept and adopt the very careful and helpful reasoning set out in Ms South's submissions. It is unnecessary that I repeat it.

Referral to the Minister under s 48

[11] The sole point raised by the respondent is that the Court should refer the matter to the Minister under s 48. Section 48 relevantly provides :

> **48 Referral of case to Minister in certain circumstances**
>
> (1) If the court is satisfied that the grounds for making a surrender order otherwise exist but –
>
> (a) the person is a New Zealand citizen; or
>
> (b) it appears to the court that –
>
> (i) there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or

(ii) the person has been sentenced to death or may be sentenced to death by the appropriate authority in the extradition country; or

(c) in the case of a person whose surrender is sought for an extradition offence of which the person has been convicted, the person is liable to be detained in a prison because of a sentence of imprisonment imposed for an offence against the law of New Zealand; or

(d) it appears to the court that another request has been made under this Act for the surrender of the person, and a final decision on the surrender of the person in relation to that request has not been made, -

the court must refer the case to the Minister in accordance with subsection (5).

(1A) For the purposes of subsection (1)(d), ***request*** includes a warrant produced for endorsement under this Part.

(2) Subsection (1)(a) applies even if the person is a citizen of both New Zealand and the extradition country.

(3) The court is not required to refer the case to the Minister under subsection (1)(a) if –

(a) Australia is the extradition country; or

(b) the extradition country is a designated country and the relevant Order in Council under section 40 contains a provision described in section 40(5).

(4) If –

(a) it appears to the court in any proceedings under section 45 that –

(i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or

(ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but

(b) in every other respect the court is satisfied that the grounds for making a surrender order exist, -

The court may refer the case to the Minister in accordance with subsection (5).

> (5) if the court refers the case of the Minister under subsection (1) or subsection (4), the court must send to the Minister a copy of the warrant of detention together with a copy of all other documents before the court in the case, and such report on the case as the court thinks fit.

[12] The respondent is a New Zealand citizen. Section 48(3) provides that Ministerial referral is not mandatory where the country seeking extradition is Australia. The matter therefore cannot be referred to the Minister unless section 48(4) is engaged. The respondent's case is that para (ii) of s 48(4) is engaged, that is, that "because of compelling or extraordinary circumstances of the [respondent] ... it would be unjust or oppressive to surrender the [respondent] before the expiration of a particular period", the Court ought to refer the case to the Minister.

[13] Ms Wham appeared for the respondent, she advised, on the very recent request of Mr Starling, who had filed written submissions. Ms Wham was obliged to adopt Mr Starling's submissions.

[14] The following statements of fact relating to the respondent's circumstances appear from Mr Starling's written submissions :

> 1. The Respondent is a New Zealand citizen living in Christchurch.
>
> 2. She has 2 children aged 10 and 7 years old who attend school.
>
> 8. The respondent lived in Australia for approximately 11 years before leaving to return to New Zealand on 9 May 2017.
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> 9. She instructs that she returned to New Zealand so that she could look after her sister's children. [details deleted] so the respondent came back to Christchurch to help.
>
> 10. She instructs that at the time she returned to New Zealand that she was unaware that she had been charged with a criminal offence.
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> 11. The respondent first because aware of the charge when approached by Police in New Zealand.
>
> 12. If extradited she will have to return to a part of Australia where she has no friends or family and no ability to support herself and her family. She is not entitled to an unemployment benefit and will not be able to afford to rent a property whilst waiting trial on the charge. This will mean that she will inevitably be remanded in custody even though the final outcome, even if convicted, will not necessarily be a prison term.

[15] Mr Starling then submits :

> 26. It is submitted that at least some of the facts of this case are extraordinary given that those matters are not the only matters the Minister may find relevant it is submitted that the case for the Respondent is even stronger for referral.
>
> 27. It is submitted that the age of the Respondent's children, her inability to get an unemployment benefit or family support in Australia, and the inevitability of her being remanded in custody for nothing other than her impecuniosity are relevant circumstances.

[16] The flaw in Mr Starling's approach is that none of the facts asserted are supported by admissible evidence. The respondent has not filed any affidavit. When alerted to this deficiency, Ms Wham proposed that the respondent give oral evidence, or that the proceeding be adjourned to enable her to file an affidavit. Ms South opposed. I determined that the respondent should not be permitted to give oral evidence because Ms South would have had no opportunity to cause enquiries to be made or otherwise to prepare her cross-examination. The respondent and her counsel have had more than sufficient time within which to prepare and file an affidavit as to the facts thought to be material. Finally and decisively, even if the facts asserted by Mr Starling were verified by affidavit, that not affect the outcome.

[17] In *Mailley v District Court at North Shore*[1] the Court of Appeal held that :

> "Extraordinary circumstances" are out of the ordinary, unusual, uncommon or striking; while "compelling circumstances" are very persuasive or very strong.

[18] As to the expression "unjust or oppressive", Ms South rightly relied upon *Police v Thomas*[2] where Fisher J considered the meaning of these words in the Fugitive Offenders Act and held :

> "Unjust" generally signifies prejudice to the accused in presenting a defence to the charge, the prejudice being of a kind that cannot safely be left to be dealt with by the trial Court.
>
> "Oppressive" generally signifies hardship to an accused resulting from changes in his circumstances that have taken place during the period under consideration.

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[1] *Mailley v District Court at North Shore* [2013] NZCA 266 at [62].
[2] (1989) CRNZ 454 (at p 458).

[19] Ms South also referred to the judgment of Potter J in *Wolf v Federal Republic of Germany*[3] where Her Honour referred to a leading English authority :

> In *Kakis v Government of Cyprus* [1978] 2 All ER 634 where the Court considered very similar wording to that in s 8, under s 8(3) of the Fugitive Offenders Act 1967, at page 638 Lord Diplock stated –
>
> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.

[20] Ms South also referred to paragraph [54] of Her Honour's judgment :

> "Interesting to observe that in *Lewis v Wilson*[4] (1987) 32 A Crim R 118, the Court described oppression as a word of considerable strength implying –
>
> 'Very harsh or grossly unfair conduct crushing or trampling down another person, and derogation of that person's rights.' "

[21] The essential facts, therefore, are that the applicant says that the respondent committed the serious crime for which she is now charged. While the respondent denies it, it is not for this Court to enquire into the strength of the prosecution case.

[22] Whether or not she was aware that she was charged or to be charged, within a month of the alleged offending the respondent returned to New Zealand, after having spent 11 years in Australia. While the respondent denies through her counsel that she fled the jurisdiction to avoid prosecution, it seems improbable that she was motivated solely by an alleged need to care of her sister's children.

[23] The prospect of her being remanded in custody pending trial should not be given weight by this Court. Such a remand would be an ordinary consequence of such alleged offending, especially as the respondent so promptly left for New Zealand.

[24] I find it inherently unlikely that, if returned to Australia, the respondent will be as isolated and disadvantaged as she claims. There is no suggestion that she will be

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[3] *Wolf v Federal Republic of Germany* [2001] NZAR 536 at [47].
[4] *Lewis v Wilson* (1987) 32 A Crim R 118.

any worse off than she would have been had she had remained in Australia and had been arrested there.

[25] The respondent's obligations to her own two children, aged 7 and 10 years, are no different, whether she is in Australia or New Zealand. In neither jurisdiction can alleged offenders avoid or delay trial by sheltering behind their parental obligations.

[26] As modified by Ms Wham, the respondent's argument is now for a postponement of her return to Australia so that she can arrange for the care of her children before her removal to Australia and not to avoid extradition altogether. Ms Wham recognised that the respondent could not realistically expect the Minister to defer the respondent's extradition indefinitely. She acknowledged that the respondent had done nothing while this proceeding has been pending, since 12 October 2017 or thereabouts. No indication was given, however, as to what arrangements needed to be made or how long they would take to implement. In the absence of any evidence, I think it reasonable to infer that the respondent's family will assist and will do so promptly and before the extradition warrant is executed.

[27] For these reasons, I am satisfied that the circumstances relied upon by the respondent are neither compelling nor extraordinary and would not make it unjust or oppressive to surrender the respondent in the ordinary course of events.

[28] Finally, I note that Mr Starling submitted that the threshold for referral to the Minister is "relatively low" and that "the 'burden of proof to be applied is very low being appearances rather than proof or even satisfaction". Those submissions are incompatible with the cases referred to by Ms South and explain why his arguments were so dismally unpersuasive. Ms Wham's end position was much more realistic,

but failed because, in short, a reference to the Minister for a short postponement of the respondent's surrender to enable her to make custody arrangements for her children is not necessary.

G S MacAskill
District Court Judge