

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 101/2018
[2019] NZSC 27**

BETWEEN	KIM DOTCOM Applicant
AND	DISTRICT COURT AT NORTH SHORE First Respondent
	DEPUTY SOLICITOR-GENERAL (CRIMINAL) Second Respondent
	MINISTER OF JUSTICE Third Respondent
	UNITED STATES OF AMERICA Fourth Respondent
	DEPUTY SOLICITOR-GENERAL (CROWN LEGAL RISK) Fifth Respondent
	ATTORNEY-GENERAL Sixth Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	R M Mansfield and S L Cogan for Applicant D Sothieson for First Respondent (abiding) P J Gunn for Second, Third and Sixth Respondents F R J Sinclair and Z A Fuhr for Fourth Respondent K L Kensington for Fifth Respondent (abiding)
Judgment:	14 March 2019

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs of \$2,500 to the fourth respondent.**
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REASONS

[1] The fourth respondent, the United States of America, seeks the extradition of the applicant, Mr Dotcom, and three others. The District Court found them eligible for extradition¹ and their appeals to the High Court² and Court of Appeal³ were dismissed. They have been granted leave to appeal to this Court and their appeals are set down for hearing in early June.⁴

[2] The United States wishes to put the applicant and his colleagues on trial on charges of conspiracy to commit and commission of criminal copyright infringement, racketeering, money laundering and wire fraud.

[3] The present application for leave arises from a separate judicial review proceeding commenced by the applicant. It contains eight causes of action challenging various aspects of the process leading up to, or related to, the extradition proceedings.⁵ The United States applied to strike out the first seven causes of action.⁶ In the High Court, Brewer J struck out the seven causes of action.⁷ The Court of

¹ *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015 (Judge Dawson).

² *Ortmann v United States of America* [2017] NZHC 189.

³ *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475.

⁴ *Ortmann v United States of America* [2018] NZSC 126. In *Ortmann v United States of America* [2018] NZSC 125, this Court held that it had jurisdiction to hear the proposed appeals.

⁵ These are summarised in the judgment of the Court of Appeal to which the present application relates: *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 (Kós P, French and Miller JJ) [CA judgment] at [9].

⁶ The eighth cause of action related to a decision of the Deputy Solicitor-General to direct that clones be made of the electronic devices seized from Mr Dotcom's homes and that the clones be sent to the United States. The other three defendants in the extradition proceedings are also seeking judicial review of the decision of the Deputy Solicitor-General.

⁷ *Dotcom v District Court at North Shore* [2017] NZHC 3158 [HC judgment].

Appeal dismissed the applicant's appeal from that decision.⁸ The applicant seeks leave to appeal against the decision of the Court of Appeal.

[4] The background to the decision of Brewer J is that there has been considerable litigation involving the applicant and the respondents or other New Zealand public entities in relation to the steps taken in the leadup to the extradition proceedings being commenced and, in some cases, after the commencement of those proceedings. These are summarised in the judgment of Brewer J.⁹ The application to strike out was advanced on the basis that the seven causes of action were not reasonably arguable and were abuses of process.¹⁰ Brewer J accepted that they were an abuse of process¹¹ and that four disclosed no reasonably arguable cause of action.¹² In upholding the decision of Brewer J, the Court of Appeal found that the seven causes of action were either not reasonably arguable,¹³ or were abuses of process because:

- (a) they were an attempt to re-open earlier litigation;¹⁴ or
- (b) they amounted to a collateral attack on an earlier judgment of this Court¹⁵ or the Court of Appeal.¹⁶

[5] The applicant argues that the criteria for the grant of leave to appeal in s 74 of the Senior Courts Act 2016 are met in relation to the present application either because the application raises matters of general and public importance or because a substantial miscarriage of justice may occur if leave is not granted.¹⁷

[6] We are not persuaded that the proposed appeal raises matters of general and public importance. The matters identified by the applicant and our comment on them are listed below:

⁸ CA judgment, above n 5.
⁹ HC judgment, above n 7, at [5]–[8].
¹⁰ At [1] and [18]–[19].
¹¹ At [49], [59], [63], [76], [80], [90] and [91].
¹² At [62], [72], [86] and [91].
¹³ CA judgment, above n 5, at [25] and [37].
¹⁴ At [34].
¹⁵ At [42].
¹⁶ At [44], [47] and [50].
¹⁷ Senior Courts Act 2016, s 74(2).

- (a) The interpretation of s 131 of the Copyright Act 1994. However, that issue arises already in the eligibility proceedings for which leave has been given.
- (b) The effect of non-compliance with certain sections of the Extradition Act 1999 on the jurisdiction of the extradition court. However, raising that issue in collateral proceedings, having not raised them in the eligibility proceedings, raises the obvious issues of abuse of process identified in the Courts below.
- (c) The availability of judicial review in extradition proceedings. We do not see the findings by the Courts below that the present proceedings are an abuse of process as saying anything about the availability of judicial review in circumstances that do not constitute an abuse of process. And, in any event, the applicant did, in fact, commence judicial review proceedings in relation to the eligibility decision, as well as appealing against that decision. The applicant could have raised the points he now wishes to pursue in those proceedings but failed to do so.
- (d) The precedent effect of the Court of Appeal decision. The applicant says that decision will be a binding precedent for almost all future extradition cases in New Zealand. We do not consider that to be the case. Rather, it will provide guidance that points that are to be raised in opposition to a finding of eligibility for extradition should be raised in the eligibility proceedings, not in satellite litigation.

[7] The applicant also argues that a miscarriage of justice will occur if leave is not granted. We are not persuaded that this is correct either. The applicant is seeking to challenge concurrent findings in the Courts below on almost every point that would be in issue if leave were granted. We do not see the arguments foreshadowed by the applicant in his application for leave and the submissions in support of that application as having sufficient prospects of success to justify the grant of leave.

[8] The application for leave is dismissed. The applicant must pay costs of \$2,500 to the fourth respondent.

Solicitors:

Anderson Creagh Lai Limited, Auckland for Applicant

Crown Law Office, Wellington for Second to Sixth Respondents