

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CRI-2015-404-000429
[2016] NZHC 2043**

UNDER THE	Extradition Act 1999
IN THE MATTER OF	an appeal on questions of law by way of case stated, under s 68 of the Extradition Act 1999
BETWEEN	MATHIAS ORTMANN First Appellant KIM DOTCOM Second Appellant

Cont: .../2

Hearing:	30 August 2016
Appearances:	G Illingworth QC, P Spring and A Hyde for First and Third Appellants R M Mansfield and S L Cogan for Second Appellant J N Bioletti for Fourth Appellant J C Gordon QC, M Ruffin, F R J Sinclair and F G Biggs for Respondent
Judgment:	30 August 2016
Reasons:	31 August 2016

JUDGMENT (No. 1) OF GILBERT J

BRAM VAN DER KOLK
Third Appellant

FINN HABIB BATATO
Fourth Appellant

AND

THE UNITED STATES OF AMERICA
Respondent

Introduction

[1] This proceeding involves an appeal by way of case stated and applications for judicial review of a decision of the North Shore District Court delivered on 23 December 2015 finding that the appellants are eligible for extradition to the United States to face trial on various charges including conspiracy to commit racketeering, conspiracy to commit copyright infringement, conspiracy to commit money laundering, criminal copyright infringement and wire fraud.¹ These charges arise out of the appellants' involvement with a company called Megaupload Ltd, an internet service provider which operated as a cloud storage and file hosting website.

[2] The case has been touted as one of the largest criminal copyright cases ever brought by the United States and it raises a number of issues of considerable public importance. The extradition proceedings, which commenced in New Zealand in January 2012, have also been complex. Some of the issues that have arisen have already been the subject of appeals to the Court of Appeal and to the Supreme Court. The case has attracted significant public interest in New Zealand and overseas and has received widespread media coverage.

[3] At the commencement of the hearing, Mr Dotcom made an application for permission to allow a professional cameraman, Ben McAlister, to film the hearing and live stream the recording on www.youtube.com (YouTube). The application was made in accordance with the *In-Court Media Coverage Guidelines 2015*. Mr McAlister has filed an affidavit in support of the application detailing his qualifications and experience and providing an undertaking to the Court to comply with the standard conditions set out in schedule 2 of the guidelines and any other conditions imposed by the Court.

[4] The application was filed late and accordingly it could not be dealt with prior to the commencement of the substantive hearing on 29 August 2016. It transpired that media representatives, whose interests could be affected, had not been served with the application and it was accordingly adjourned until 30 August 2016 to enable this to occur. The substantive hearing commenced on 29 August 2016, as scheduled.

¹ *United States of America v Dotcom & Ors* DC North Shore CRI-2012-092-1647, 23 December 2015.

[5] The application for live streaming was recalled prior to the resumption of the substantive hearing on 30 August 2016. All media representatives present in Court advised that they supported the application. After hearing submissions from Mr Mansfield in support of the application and from Ms Gordon QC on behalf of the United States in opposition, I granted the application on the terms set out at the conclusion of this judgment. Rather than delay the progress of the substantive hearing, I advised that I would give brief reasons for my decision when time permitted. These are now set out below.

Opposition to application

[6] The only opposition to the application is from the United States. In the written submissions filed on its behalf, the following grounds of opposition were raised:

- (a) Mr Dotcom is not a member of the media and is not subject to a code of ethics or the complaints procedure of the Broadcasting Standards Authority or the Press Council. Unlike the position with dedicated and principled journalists working for recognised media organisations, the Court cannot be confident that Mr Dotcom will comply with its directions. Further, the live stream will be posted to YouTube rather than controlled on the website of a media applicant.
- (b) Because of the nature of live streaming, it will be difficult to ensure compliance with the standard conditions for film in schedule 2 of the guidelines, including, for example, the prohibition on filming of counsel's papers or inappropriate depiction of people in Court.
- (c) Live streaming will mean that the hearing is not edited and will enable a complete report of the proceeding. The United States contends that editing should be viewed as an advantage in that it allows any inappropriate recording to be filtered.

[7] Although not mentioned in the written submissions, Ms Gordon raised an additional concern in the course of her oral argument. She submitted that the present

hearing could include discussion of matters that would be inadmissible and irrelevant for the purposes of any trial of the criminal proceedings in the United States. Her concern was that if these matters were live streamed on YouTube, this could have a prejudicial effect on the pool of potential jurors for any such trial.

Analysis

[8] There is considerable public interest in this case, both in New Zealand and from overseas. The hearing is being conducted in public. Any member of the public is entitled to attend. All media applications, which include print, radio and television, have been granted without opposition. Subject to the standard conditions, there are no restrictions on the extent of this coverage. However, because the hearing is expected to take six weeks, conventional media reporting will inevitably be limited and incomplete. Granting the application to live stream will therefore facilitate public access to the Court proceedings for people who are unable to attend the hearing in person. It will provide an opportunity for anyone to observe the proceedings by means of a virtual seat in the gallery. The application can therefore be seen as serving the interests of open justice and transparency in judicial decision-making.

[9] The hearing is confined to the presentation of legal submissions before a judge sitting alone. The usual concerns that can often arise in trials about the potential adverse effect of live streaming on parties, victims, witnesses or juries do not arise in this case. Nor is there any concern that live streaming could defeat an order excluding witnesses until they are called to give evidence. No concern has been raised that live streaming will be disruptive or distracting. There is no suggestion that it would impose any additional stress on the participants in the hearing. The parties' rights to a fair hearing will not be impeded or compromised if live streaming is permitted. For these reasons, this case is one that appears to be suitable for live streaming so long as appropriate protocols are set in place.

[10] Live streaming of court proceedings is not new. It is routine in some courts in other jurisdictions and is not unprecedented in New Zealand. In its written submissions, the United States did not oppose live streaming of the hearing as a

matter of principle. Rather, its submissions focus on the risk of non-compliance with the Court's directions, including the standard conditions in the guidelines, because the application is made by Mr Dotcom and not a media representative. I consider that this concern is overstated. Mr McAlister is an independent professional cameraman. He has provided an undertaking to the Court to comply with the standard conditions and any other conditions imposed by the Court. He will be present in Court at all times while filming is occurring and will be in full view of counsel and the Court. If there is any breach of the guidelines and conditions, this will become apparent and is likely to result in permission to continue filming being withdrawn. Although Mr Dotcom is the applicant, the Court is relying on Mr McAlister's professionalism and the written undertaking he has given to the Court to ensure compliance with its directions.

[11] Ms Gordon did not provide any examples of the evidential material that will be discussed in this hearing and which could infect a jury pool in the United States. This proceeding concerns an appeal from a publicly available judgment and will largely be confined to a reconsideration of the same material that was traversed in the District Court in a hearing open to the public. There has already been considerable publicity about the events to be discussed during this hearing and there has been no opposition to coverage by print, radio and television media. The concern Ms Gordon raises can be addressed if and when it arises.

[12] A very limited amount of the material to be discussed during the hearing is the subject of suppression orders made in the District Court and by the Court of Appeal. Counsel have agreed to notify the Court prior to referring to any such material so that these orders can be complied with. Mr McAlister will not film or record these parts of the hearing. There will be a 20 minute delay between filming and live streaming as an additional safeguard.

[13] I consider that these arrangements are also sufficient to mitigate the risk of publication of any material that may give rise to legitimate concerns relating to any eventual trial in the United States. Counsel for the United States will be able to raise any issue of concern so that it can be dealt with off camera and appropriate arrangements made.

Result

[14] Pending further order of the Court, the application to live stream the proceeding on YouTube is granted subject to the following conditions:

- (a) Where applicable, the standard conditions for film set out in schedule 2 of the *In-Court Media Coverage Guidelines 2015*, a copy of which is attached to this judgment, shall apply, save as amended by this order.
- (b) The 10 minute delay on publication referred to in standard condition 14 is increased to 20 minutes. Standard condition 15 does not apply.
- (c) Standard condition 18 is modified by deleting the words “except by an applicant who received permission to film”.
- (d) There is to be no filming or recording of private conversations between counsel or between counsel and their clients.
- (e) The “allow comments” and “enable live chat” features on YouTube shall not be enabled for the live stream.
- (f) There is to be no filming or recording of any material that is subject to the existing suppression orders. Counsel are to notify the Court before referring to any such material in their submissions to enable this condition to be complied with.
- (g) Counsel are conferring on the form of an appropriate condition to address the issue identified in standard condition 16. Pending any further order, Mr McAlister is to retain possession of the recording.

[15] I reserve leave to any party to apply on short notice to vary the terms of this order.

M A Gilbert J

Schedule 2 – Standard conditions for film

1. Only one camera may be situated in the courtroom, regardless of how many people are given authority to film. It is recognised that a Judge on application might in special circumstances permit a second camera. In the event there is a dispute between those authorised to film as to whose camera will be situated in the courtroom, the Judge will rule.
2. The camera must be situated in a position approved by the Judge.
3. Any person wishing to instruct the camera operator during a court session must sit next to the camera operator and must give any instructions as unobtrusively as possible and in such a manner as not to interfere in any way with the running of the trial.
4. While the Judge is sitting in court for chambers or in closed court, no filming can take place.
5. No juror may be deliberately filmed and no publication may show the jury or juror.
6. Members of the public attending the trial must not be filmed in any way that could lead to their identification.
7. Counsel's papers must not be filmed.
8. Exhibits must not be filmed without leave of the Judge.
9. Subject to any protection granted to the defendant as a witness under guideline 12, the defendant may be filmed only:
 - a. when giving evidence;
 - b. when sitting in the dock for the first 15 minutes of any sitting day, but not when during that period a verdict is being taken or a sentencing is underway; or
 - c. at any time during the trial, including the time when the jury is taking a view or delivering its verdict, if the defendant consents in writing through his or her counsel or in person and the Judge does not prohibit such filming.
10. Filming of any party, witness, counsel or the Judge must not involve a close-up showing less than the head and shoulders of the person filmed, and must not focus on any particular feature of the person being filmed such as fingers, hands, mouth or eyes.
11. No filming can take place in court during sentencing or when the Judge is not present, except with prior leave of the Judge.
12. No filming can take place if the camera does not have an operator, and the camera should be switched off at all such times.
13. The media applicant and representatives of the media applicant must at all times conduct themselves in court with courtesy and decorum.
14. Film taken must not be published until at least 10 minutes have elapsed.
15. Despite clause 14, film taken may be published at any time:
 - a. if the trial is an appeal; or
 - b. on the taking of a jury's verdict; or
 - c. on a sentencing; or
 - d. if it is the Judge's summing up ;or
 - e. if the Judge grants leave.
16. The media applicant must maintain a copy of all publications or broadcasts using film taken in court or at a view for 10 years and must supply a copy to the court if requested by the Judge.

17. While the trial continues, film taken must not be published or used other than in the programme or on the website nominated in the application form. It cannot be made available to third parties without the Court's permission.
18. Once the trial is over film or recordings may not be published or used, except by an applicant who received permission to film. Any other use can only be with the Court's permission.

