ORDER PROHIBITING PUBLICATION OF ANY DETAIL IDENTIFYING MR RADHI'S WIFE OR HIS CHILDREN, OR OF ANY INFORMATION WHICH MIGHT LEAD TO THEM BEING IDENTIFIED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2012-404-000201
[2013] NZHC 163

MAYTHEM KAMIL RADHI
(AKA MAYTHAM KAMIL RADHI)

v

NEW ZEALAND POLICE

Hearing: 11 December 2012

Counsel: R Chambers and S D Withers for the Appellant
J C Gordon QC and W Fotherby for the Respondent

Judgment: 11 February 2013

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 11 February 2013 at 4.30 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] This appeal comes before the Court by way of case stated from Judge JC Moses sitting in the District Court at Auckland.

[2] The New Zealand Police, pursuant to a request from the Commonwealth Police in Australia, are seeking the surrender of the appellant, Mr Radhi, from New Zealand to Australia under s 45 of the Extradition Act 1999. Following a defended hearing, Judge Moses found as follows:[1]

> (a) a warrant for the arrest of Mr Radhi, as required by s 45(2)(a) of the Act, had been produced to the court;
>
> (b) Mr Radhi is an extraditable person in relation to the extradition country (Australia); and
>
> (c) Mr Radhi is eligible for surrender in relation to the offence for which surrender is sought.

[3] Having determined that Mr Radhi was eligible for surrender, Judge Moses issued a warrant for his detention under s 46 of the Act. Mr Radhi then filed a notice of intention to appeal by way of case stated for the opinion of this Court. A case has been stated pursuant to s 68 of the Act. It poses a number of questions for the opinion of this Court. I detail those questions below. First, I set out the factual background in a little more detail.

Factual Background

[4] The appellant, Mr Radhi, is charged in Australia.

[5] The Federal Police in the Commonwealth of Australia allege that in October 2001, Mr Radhi was involved in an attempt to smuggle approximately 300 people

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1 *New Zealand Police v Radhi* DC Manukau CRI 2011-092-011423, 19 March 2011.

into Australia using a vessel that Australian authorities codenamed "SIEV X" (Suspected Irregular Entry Vessel — X).

[6] On 19 October 2001, the SIEV X sank in rough seas off the coast of Indonesia. The majority of the passengers onboard drowned. It is alleged that most of the passengers were of Middle-Eastern origin, that they were not Australia citizens, and that they did not hold visas authorising them to travel to or enter into Australia. It is alleged that Mr Radhi facilitated the proposed entry into Australia of these persons, by being present during negotiations with passengers regarding fares, controlling the movements and activities of passengers while they were in Indonesia, assisting in the transfer of passengers between places of accommodation, and helping passengers to board the SIEV X.

[7] Mr Radhi is now in New Zealand. He was granted refugee status entitling him to enter this country in Indonesia, and he came to New Zealand in 2009.

[8] An arrest warrant was issued for Mr Radhi by a Magistrate, Jude Daly, in the Brisbane Magistrates Court on 16 February 2011. The offence detailed in the warrant alleges that between 1 July 2001 and 19 October 2001, at Indonesia, Mr Radhi facilitated the proposed entry into Australia of a group of five or more people, to whom s 42(1) of the Migration Act 1958 (Cth) applied, and did so reckless as to whether the people had a lawful right to come into Australia. If proved, this is an offence pursuant to s 232A of the Migration Act 1958 (Cth).

[9] On 20 July 2011, the arrest warrant was endorsed by Judge Blackie in the Manukau District Court under s 41 of the Extradition Act 1999, and on 28 July 2011, Mr Radhi was arrested at his home address by the New Zealand Police. The New Zealand Police, pursuant to a request from the Federal Police in Australia, then sought the extradition of Mr Radhi from New Zealand to Australia.

[10] As noted, the application was defended and it came before Judge Moses in the District Court on 14 November 2011 and again on 5 December 2011. After considering further written memoranda filed by the parties on 23 January 2012 and 10 February 2012, Judge Moses issued a reserved decision dated 19 March 2012.

He reached the various determinations which I have set out above.[2] Further, and as noted in the case stated, he concluded as follows:

(a) Australia is an extradition country;

(b) The maximum penalty for the alleged offence under the Migration Act 1958 (Cth) in Australia is 20 years' imprisonment or 2,000 penalty units (valued as at the date of judgment at AUD $220,000);

(c) The alleged offence is punishable under the law of Australia by a maximum penalty of not less than 12 months' imprisonment;

(d) If the conduct constituting the alleged offence, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time, it would, if proved, have constituted the offence, under s 142(fa) of the Immigration Act 1987, of wilfully aiding or assisting any other person to arrive in New Zealand in a manner that did not comply with s 126(1), or to arrive in New Zealand without holding a visa, where the person required a visa to travel;

(e) The wording in s 142(fa) at the relevant time — "whether within New Zealand or otherwise" — indicated that the Immigration Act 1987 did have extraterritorial reach;

(f) Even if the Immigration Act 1987 in this country did not have extraterritorial effect, and there was a requirement of arrival in New Zealand for there to be a "sufficient nexus of conduct constituting an offence", then an attempted offence of the nature set out in s 142(fa) of the Immigration Act 1987 would be sufficient for there to be conduct of an alleged extradition offence;

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2 Supra at [2].

(g) There is no principle of law which precludes the words contained in s 142(fa) of the Immigration Act 1987 being read broadly to confer extra territorial jurisdiction over an attempted offence;

(h) At the relevant time, the penalty for a breach of s 142(fa) was set out in s 144(1A) of the Immigration Act 1987, namely "imprisonment for a term not exceeding three months, or to a fine not exceeding $5,000 for each person in respect of whom the offence is committed";

(i) In s 144(1A) of the Immigration Act 1987, the multiplier (the words "for each person in respect of whom the offence is committed") applied equally to the alternative sentences of a fine and imprisonment for a term;

(j) If the conduct constituting the alleged offence had occurred in New Zealand at the relevant time, it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months;

(k) It is not inconsistent with the New Zealand Bill of Rights Act 1990 to interpret the penalty provision in s 144(1A) in this way;

(l) The alleged offence is an extradition offence in relation to the extradition country (Australia);

(m) Mr Radhi is an extraditable person in relation to the extradition country; and

(n) Mr Radhi is eligible for surrender to Australia.

[11] The relevance of a number of these findings will become clearer in the analysis below.

The Case Stated

[12] The case stated poses the following questions for the opinion of this Court:

(a) Was Judge Moses wrong to determine that if the conduct constituting the alleged offence in relation to Australia, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time, it would, if proved, have constituted the offence under s 142(fa) of the Immigration Act 1987?;

(b) Was Judge Moses wrong to determine that the wording in s 142(fa) of the Immigration Act 1987, namely "whether within New Zealand or otherwise", indicates that the Immigration Act 1987 has extraterritorial reach?;

(c) Was Judge Moses wrong to determine that even if the Immigration Act 1987 does not have extraterritorial reach, and there is a requirement of "arrival" in New Zealand for there to be a sufficient nexus of conduct constituting an offence, then an attempted offence of the nature set out in s 142(fa) of the Immigration Act 1987 would be sufficient for there to be conduct of an alleged extradition offence?;

(d) Was Judge Moses wrong to determine that the wording in s 142(fa) of the Immigration Act 1987, namely "whether within New Zealand or otherwise", can be read broadly to confer extraterritorial jurisdiction over an attempted offence?;

(e) Was Judge Moses wrong to determine that the multiplier provision in s 144(1A) of the Immigration Act 1987 (namely "for each person in respect of whom the offence is committed") was intended to apply equally to the fine and the imprisonment term?;

(f) Was Judge Moses wrong to determine that the alleged offence is an extradition offence in relation to Australia?;

(g) Was Judge Moses wrong to determine that Mr Radhi is an extraditable person in relation to Australia?;

(h) Was Judge Moses wrong to determine that Mr Radhi is eligible for surrender in relation to the offence for which extradition is sought?

[13] In the analysis which follows below, I have dealt with these questions in the following order: (b), (a), (c) and (d) together, (e), and (f), (g) and (h) together.

Submissions

[14] Mr Chambers, appearing on behalf of Mr Radhi, emphasised the fact that there was no evidence adduced before Judge Moses that the SIEV X entered Australian waters. He noted that the Australian Federal Police allege that the SIEV X foundered close to the Indonesian coastline, and that it is not alleged that the vessel was in Australian waters at the time. He pointed out that no illegal immigrants arrived in Australia, and that no aspect of the conduct attributed to Mr Radhi is alleged to have occurred within Australia. On this basis, he submitted that the alleged conduct attributed to Mr Radhi would not have constituted an offence under New Zealand law at the relevant time, as is required if a person is to be eligible for surrender under the Extradition Act 1999, because s 142(fa) of the Immigration Act 1987 in this country at the time required arrival into New Zealand. In addition, Mr Chambers argued that the Immigration Act 1987 did not, at the relevant time, have extraterritorial effect. He submitted that if the equivalent New Zealand provisions did not have extraterritorial effect, then no equivalent offence can be said to have been committed pursuant to any provision in force in New Zealand at the time.

[15] Mr Chambers also submitted that Judge Moses erred when he determined that even if the Immigration Act 1987 in this country did not, at the relevant time, have extraterritorial effect, then an attempt to commit the offence set out in s 142(fa) suffices to found the alleged extradition offence. He referred to ss 6, 7 and 9 of the Crimes Act 1961, and argued that they preclude the criminalisation of wholly extraterritorial attempts in the absence of express legislative intent to the contrary.

[16] Further, Mr Chambers argued that the relevant penalty provisions under the New Zealand legislation prescribe a maximum penalty of three months' imprisonment, regardless of the number of persons involved, and that such penalty is insufficient to constitute an extradition offence as defined in the Extradition Act 1999. He argued that the multiplier (the reference to the number of persons involved) contained in the penalty provision applies only to a fine, and not to the alternative sentence of imprisonment.

[17] In conclusion, it was submitted for Mr Radhi that his alleged conduct does not constitute an extradition offence in relation to Australia, and that, at the relevant time, the alleged conduct would not, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty was imprisonment for not less than 12 months, or any more severe penalty. Mr Chambers argued that it follows that Mr Radhi is not an extraditable person in relation to Australia, because no extradition offence has been made out. Thus, he said that Mr Radhi is not eligible for surrender in relation to the offence for which extradition is sought.

[18] Ms Gordon QC, for the Crown, supported Judge Moses' reasoning in respect of each of the questions posed in the case stated. She submitted that the key question is whether Mr Radhi is alleged to have committed an extradition offence. She noted the relevant definition in the Extradition Act and the principle of double criminality. She argued that at the relevant time, the equivalent offence in New Zealand to that with which Mr Radhi is charged in Australia, was constituted by s 142(fa) of the Immigration Act 1987, and submitted that the provision was extraterritorial in its effect. She further argued that arrival in New Zealand was unnecessary. She put it to me that s 142(fa) of the Immigration Act 1987 made it an offence, whether within New Zealand or otherwise, to wilfully aid or assist any other person to arrive in New Zealand, and that arrival in this country was not required before the offence was constituted.

[19] Ms Gordon went on to argue that, in any event, the Courts in New Zealand have jurisdiction over attempts to commit extraterritorial offences. She argued that if an offence under s 142(fa) could be committed by a person outside New Zealand,

then culpability could attach to a person who attempted to commit the offence outside New Zealand but failed.

[20] Ms Gordon then submitted that the penalty provision contained in New Zealand legislation — s 144(1A) — can and should be interpreted in such a way that the penalty either of imprisonment or a fine could be imposed in respect of each person in respect of whom the offence was committed.

[21] Ms Gordon argued that Judge Moses' decisions on each of the salient points was correct, and that the appeal should be dismissed.

Analysis

The Extradition Act — an "extradition offence"

[22] It was common ground that extradition to Australia is governed by Part 4 of the Extradition Act.[3]

[23] The starting point is s 45 of that Act. Relevantly, it provides as follows:

> **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 determine 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] Extradition Act 1999, s 39(a).

…

[24] As can be seen, the District Court has responsibility for determining whether a person brought before it under Part 4 of the Act is eligible for surrender in relation to the offences(s) for which surrender is sought. A person is eligible for surrender if, subject to submissions (3) and (4) (which are of no relevance in the present case), the matters detailed in s 45(2) are made out.

[25] Here, Mr Radhi was brought before the District Court pursuant to the arrest warrant endorsed by Judge Blackie under s 41(1), which is contained in Part 4 of the Act. Mr Radhi does not dispute that the requirement in s 45(2)(a) is made out. The appeal turns on whether or not the matters detailed in s 45(2)(b) are satisfied. Mr Radhi disputes that he is an "extraditable person" in relation to Australia, because the offence with which he is charged in Australia is not an "extradition offence".

[26] The meaning to be given to the words "extraditable person" is contained in s 3 of the Act. Relevantly, it provides as follows:

> **3 Meaning of extraditable person**
>
> In this Act, a person is an extraditable person in relation to an extradition country if—
>
> (a) the person is accused of having committed an extradition offence against the law of that country; or
>
> …

[27] The meaning to be given to the words "extradition offence" is contained in s 4 of the Act. Inter alia, it provides as follows:

> **4 Meaning of extradition offence**
>
> (1) In this Act, extradition offence means, subject to an extradition treaty,—
>
> (a) in relation to an extradition country, an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty, and which satisfies the condition in subsection (2):
>
> …

> (2) The condition referred to in subsection (1)(a) is that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.
>
> (3) For the purposes of determining whether the condition in subsection (2) is satisfied in relation to a particular application for surrender of a person, the relevant time referred to in subsection (2) is the time at which the conduct is alleged to have occurred.
>
> …

[28] Insofar as I am aware, no aspect of any extradition treaty is in issue in this case.

[29] As can be seen from the definition, the alleged offence must be an offence in the requesting country. It must also be an offence in the requested country. This is the principle of double criminality which is central to extradition law in this country and in other common law countries. The principle serves two purposes. They were discussed by Lord Millett in *R (L Al-Fawwaz) v Governor of Brixton Prison.*[4] His Lordship said as follows:[5]

> In considering this question it is important to bear the objects of the double criminality rule in mind, for its two requirements serve different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, that the offence should also be within our own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction. Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more…

In broad terms, s 4(1)(a) and (2) prevent the extradition of a person for acts that New Zealand, as the requested country, does not view as criminal. They prevent a person's liberty being restricted as a consequence of alleged offences not recognised as criminal in this country.[6]

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4 *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556.

5 At [95].

6 See also *Norris v Government of the United States of America* [2008] UKHL 16, [2008] AC 920 at [88].

[30] In considering s 4(2), s 5 is in point. It enjoins a "broad conduct" approach. Relevantly, it provides as follows:

> **5 Interpretation provisions relating to offences**
>
> (1) A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.
>
> (2) In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand—
>
> (a) the acts or omissions are categorised or named differently; or
>
> (b) the constituent elements of the offence differ.
>
> …

[31] As noted above, Mr Radhi is charged under s 232A of the Migration Act 1958 (Cth). That provision reads as follows:

> **232A Organising bringing groups of non-citizens into Australia**
>
> A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.

[32] As from 18 June 2002, similar legislation came into force in New Zealand.[7] Various relevant provisions are now contained in s 98B to 98F of the Crimes Act 1961 and in s 343 of the Immigration Act 2009. These provisions were not in force however in 2001. It is clear from s 4(3) of the Extradition Act, that the relevant time referred to in subs (4)(2) of the Act is the time at which the conduct is alleged to have occurred — in this case July to October 2001.

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[7] Crimes (Amendment) Act 2002, s 5; Immigration Amendment Act 2002.

[33] At the relevant time, the equivalent provision in New Zealand to s 232A of the Migration Act 1958 (Cth) in Australia, was s 142(fa) of the Immigration Act 1987. It read as follows:

> **142 Offences**
>
> Every person commits an offence against this Act who—
>
> …
>
> (fa) Whether within New Zealand of otherwise, wilfully aids or assists any other person—
>
> (i) to arrive in New Zealand in a manner that does not comply with section 126(1); or
>
> (ii) to arrive in New Zealand without holding a visa, where the person requires a visa to travel to New Zealand…

Section 126(1) detailed the responsibilities of persons arriving in New Zealand. It required them to present themselves to an immigration officer, to surrender to that officer a duly completed arrival card, and to produce their passport on demand.

[34] The history leading to the introduction of s 142(fa) is informative. At the time, the principal legislation dealing with immigration into this country was the Immigration Act 1987. It made it an offence to do various things contrary to the provisions of the Act, but it did not deal with the trafficking of illegal immigrants. Section 142(fa) was first proposed in the Immigration Amendment Bill. The Bill had its second reading on 29 September 1998. The then Minister of Immigration, the Honourable Tuareki John Delamere, listed the principal objectives detailed in the Bill, and noted that, inter alia, it sought "to establish an offence against the illegal trafficking of people into New Zealand".[8] The Immigration Amendment Bill containing, amongst other things, s 142(fa) was passed into law by Parliament. It became the Immigration Amendment Act 1999. It was to come into force on 1 October 1999. However, in June 1999, the New Zealand Immigration Service was advised of the potential arrival of a number of foreign nationals into New Zealand by boat. The Government deemed it necessary to bring into force immediately certain provisions in the new Act. As a result, a further bill, the Immigration Amendment Bill (No.2), was debated under urgency, and it underwent both its second and third

[8] (29 September 1998) 572 NZPD 12789.

readings on 15 June 1999.[9] It passed into law on the same day,[10] and as a result, various sections in the Immigration Amendment Act came into force on 16 June 1999. One of the sections which came into force on that day was s 142(fa). It was later repealed as from 18 June 2002 by the Immigration Amendment Act 2002.

Question (b) in the case stated — extraterritoriality?

[35] I start with the question of whether or not s 142(fa) had extraterritorial reach.

[36] Judge Moses found as follows:[11]

> I find that the wording of s 142(fa) of the Immigration Act 1987, which contain the words "whether within New Zealand or otherwise" clearly indicates that the Immigration Act does have extra-territorial reach…

[37] It is my clear view that the section did apply extraterritorially, and that Judge Moses was correct in his conclusion. My reasoning is as follows:

(a) The words "whether within New Zealand or otherwise" are a clear statement of Parliamentary intent. They make it clear beyond peradventure that the section was intended to have extraterritorial reach.

(b) To so hold is not inconsistent with s 6 of the Crimes Act 1961. Section 6 states that no act done or omitted outside New Zealand is an offence. However, it does not apply where the act done or omitted is an offence by virtue of the Crimes Act or any other enactment. The wording of s 142(fa) made it an offence to wilfully aid or assist another person to arrive in New Zealand, whether the acts done which constituted the aiding and assisting were done within New Zealand or otherwise. While the Courts should not generally treat legislation as having extraterritorial effect, they must do so to the extent that Parliament has made clear by means of express words, or where

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9 (15 June 1999) 578 NZPD 17404.
10 Immigration Amendment Act (No.2) 1999.
11 *New Zealand Police v Radhi*, supra n 1, at [33].

extraterritorial effect flows as a matter of inevitable logic from express terms read contextually in the light of the purposes of the Act.[12]

(c) It is consistent with the purpose of the Immigration Act 1987 (as amended in 1999) to hold that the section had extraterritorial effect. The Act as a whole was intended to reform the law relating to immigration. It permitted persons who were not New Zealand citizens to be in this country only if they held a permit, or were exempt from such requirement. Otherwise, they were in New Zealand unlawfully. One of the purposes of the Immigration Amendment Act 1999 was to improve the effectiveness of the removal regime for persons unlawfully in New Zealand. The power of a State to patrol and protect its borders is one of the most widely recognised powers of a sovereign state. So too is the power to annex whatever conditions the state pleases to the ability to enter.[13] Generally, it is to be expected that immigration law will carry a significant extraterritorial dimension. In my judgment, it is consistent with the purpose of the Immigration Act that those who seek to offend against New Zealand's immigration laws from overseas should be penalised for doing so.

[38] Accordingly, I answer question (b) posed in the case stated as follows — Judge Moses did not err when he determined that the wording in s 142(fa) of the Immigration Act, namely, "whether in New Zealand or otherwise", indicated that the Immigration Act had extraterritorial reach.

Question (a) in the case stated — arrival?

[39] I now turn to consider question (a) in the case stated — was Judge Moses wrong to determine that, if the conduct constituting the alleged offence in relation to Australia, or equivalent conduct, had occurred within the jurisdiction of

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12 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [15], [30], [31], [46], [62] and [78].

13 *R (on application of European Roma Rights Centre) v Immigration Officer of Prague Airport* [2004] UKHL 55, [2005] 2 AC 1 at [11].

New Zealand at the relevant time, it would, if proved, have constituted the offence constituted by s 142(fa) of the Immigration Act?

[40] The question depends upon whether or not arrival in New Zealand was necessary in terms of s 142(fa).

[41] Judge Moses held as follows:[14]

> …In this case, the issue raised by the respondent is that that particular section goes on to state it is only an offence if a person "arrives in New Zealand". I am of the view that there is sufficient nexus between the totality of the acts and omission comprising of the respondent's alleged conduct in assisting illegal immigrants to board the SIEV X. Here I find the focus in respect of the Australian and New Zealand offences is on assisting in the illegal trafficking of persons into their respective countries. I do not believe that the focus should be on the difference between the words "proposed entry" and "arrival" in the respective pieces of legislation. This approach I find to be consistent with ss 4 and 5 of the Act and the approach of the courts taken in the *Plakas* decision.

[42] I have set out above ss 4 and 5 of the Act.

[43] The reference in Judge Moses' reasoning to the *Plakas* decision, is a reference to the decision of Randerson J in *Plakas v New Zealand Police.*[15] In that case, the Judge observed as follows:

> [23]…Sections 4 and 5 make it clear that it is unnecessary for there to be any precise correspondence between the offence alleged in the extradition country and the comparable offence pending in New Zealand. The focus is not on the precise terms or ingredients of the offences in the extradition country and in New Zealand. Rather, the statutory focus is on the conduct of the person in question viewed in a broad way…
>
> [24] There are, as the Judge noted, some differences in the ingredients of the offence alleged against Mr Plakas under s 240(1)(d) Crimes Act in New Zealand and the offences under s 81(1) of the Victorian Crimes Act. However, the essential elements are deception or dishonesty resulting in a gain to the perpetrator or a loss to the victims. In both cases, deliberate or reckless conduct may be relied upon to constitute the offence. Like the Judge, I am satisfied that the conduct of Mr Plakas which is alleged to constitute an offence in Victoria would, if perpetrated in New Zealand, have constituted an offence here.

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14 *New Zealand Police v Radhi*, supra n 1, at [33].

15 *Plakas v New Zealand Police* HC Auckland CIV 2008-404-2412, 11 June 2008.

[44] I accept the respondent's argument that there is significant and high authority to the effect that extradition laws should be liberally construed to achieve their purpose of bringing to justice those accused of serious crimes, and that extradition laws should be given a broad and generous approach.[16] I also accept that precise equivalence between the offence alleged in each country is not required, and that s 5 enjoins that the Court take what has been called a "broad conduct approach" — that is the Court should examine all of the conduct on which the requesting state relies.

[45] I have summarised Mr Radhi's alleged conduct above.[17] It is important to record that it is not alleged by the Federal Police in Australia that there was any arrival into Australia (or Australian waters) of illegal immigrants. All of the alleged actions attributed to Mr Radhi are said to have taken place in Indonesia.

[46] Mr Radhi is not entitled to adduce, and the Court is not entitled to receive evidence, to contradict the allegation that he has engaged in conduct that constitutes the offence for which his surrender is sought.[18] Mr Chambers, on Mr Radhi's behalf, has not sought to do so.

[47] While the issue is finely balanced, I have reached the conclusion that the conduct attributed to Mr Radhi did not, at the relevant time, constitute an offence in New Zealand under s 142(fa). In my judgment, arrival in New Zealand was an integral part of the offence created by s 142(fa), and the offence required the consequence of arrival to flow from the accused's conduct of wilfully aiding or assisting before the offence was complete.[19] The section used the words "to arrive in New Zealand". The words "to arrive" were not defined in the Act. They bore their ordinary meaning. To arrive meant no more or less than "to reach", or "to land", or "to come to".[20] This interpretation is consistent with the rest of the subsection. It went on to make express reference to s 126(1) which, as I have noted, detailed the responsibilities of persons arriving in New Zealand. The interpretation is also consistent with other provisions in the Immigration Act 1987. For example, it

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16 See for example, *Norris v Government of the United States of America*, supra n 5, at[88].
17 At [4]–[6].
18 Extradition Act 1999, s 45(5)(a).
19 Similarly, see *Tipple v Pain* [1983] NZLR 257 (HC), where it was held that the arrival of goods in New Zealand was an event necessary for the completion of the offence there charged.
20 *Shorter Oxford English Dictionary on Historical Principles* (5th ed, volume 1) at 121.

defined the related term "arrival hall" as "a place licensed under s 12 of the Customs and Excise Act 1996 for the processing of persons arriving in New Zealand".[21] Section 142(fa) did not use the words "to travel to", or otherwise indicate that it did not matter whether or not the intended illegal immigrant arrived in New Zealand or not. What was criminalised was not simply wilful aid and assistance given to a person outside New Zealand, who intended to, but for some reason, did not arrive in New Zealand; rather, what was criminalised was wilful aid and assistance given, whether or not within or outside New Zealand, to a person who subsequently arrived in New Zealand without the requisite entry documentation. In my view, the New Zealand offence at the time required the persons aided or assisted to arrive in this country, before the offence was constituted. That is the natural meaning to be given to the phrase "to arrive in New Zealand".

[48] Although I am alert to the dangers of using subsequent amendments to legislation as an interpretative aid,[22] it is nevertheless instructive to consider the legislative history which followed on from the rather speedy introduction of s 142(fa) into the Immigration Act. In a report by the Foreign Affairs, Defence and Trade Committee, on the Transnational Organised Crimes Bill, the following recommendation was made:[23]

> We recommend broadening the existing section 142(fa) of the Immigration Act by providing that an offence is committed where a person, whether within or outside New Zealand aids, abets, incites, counsels or procures, any other person to enter New Zealand unlawfully, knowing that the entry was unlawful or being reckless as to whether that entry was unlawful. We also recommend the offence apply whether or not the other person actually enters New Zealand, and for current section 142(f)(i), (ii) and (iii) to provide examples of unlawful entry. This is done by the deletion of existing section 142(fa) and inclusion of new sections 142(eb) and 142(ec).

The Transnational Organised Crimes Bill became the Immigration Amendment Act 2002. It repealed s 142(fa), and introduced new subsections — s 142(eb) and (ec) — as from 18 June 2002. Section 142(eb) read that a person committed an offence, who:

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21 Section 2(1).

22 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [38].

23 Transnational Organised Crimes Bill 2002 (201-2) (select committee report) at 15.

> …whether within or outside New Zealand, and whether or not the other person in fact enters New Zealand, aids, abets, incites, counsels or procures, any other person to enter New Zealand unlawfully…

[49] In my view, the conduct alleged against Mr Radhi is not sufficient to amount to an offence under s 142(fa), which was the applicable provision at the relevant time. Accordingly, I answer question (a) in the case stated as follows — Judge Moses did err when he determined that, if the conduct constituting the alleged offence in relation to Australia, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time, it would, if proved, have constituted the offence under s 142(fa) of the Immigration Act.

Questions (c) and (d) in the case stated —attempted offence?

[50] I now turn to consider whether an attempted offence of the nature set out in s 142(fa) is sufficient for there to be conduct of the alleged extradition offence, and whether the wording of s 142(fa) can be read broadly to confer extraterritorial jurisdiction over an attempted offence.

[51] Judge Moses stated as follows:[24]

> If, however, I am incorrect and there is a requirement of "arrival" in New Zealand for there to be a sufficient nexus of conduct constituting an offence, then I am of the view that an attempted offence of the nature set out in s 142(fa) Immigration Act 1987 is made out and that an attempt would be sufficient for there to be conduct of an alleged extradition offence. Whilst the respondent submits that the criminalisation of extra-territorial attempts would require express legislative statement, I find that there is no principle of law which precludes the words contained in s 142(fa) Immigration Act 1987 from being read broadly to confer extra-territorial jurisdiction over an attempted offence. This approach is consistent with the approach taken in *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, where the Privy Council said, inter alia,
>
> > "Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England in inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England".

[24] *New Zealand Police v Radhi*, supra n 1, at [34].

[52] In my judgment, Judge Moses erred when he concluded that an attempted offence of the nature set out in s 142(fa) was made out and that this was sufficient for there to be conduct of the alleged extradition offence. My reasoning is as follows:

(a) The Immigration Act 1987 did not make it an offence to attempt to breach s 142(fa).

(b) The Crimes Act 1961 does not assist. Section 72 of that Act deals with attempts. It defines the essential elements of an attempt, qualified in terms of impossibility. The section does not of itself create offences.

(c) Section 311(2) of the Crimes Act does not assist. It provides as follows:

> **311 Attempt to commit or procure commission of offence**
>
> …
>
> (2) Every one who incites, counsels, or attempts to procure any person to commit any offence, when that offence is not in fact committed, is liable to the same punishment as if he had attempted to commit that offence, unless in respect of any such case a punishment is otherwise expressly provided by this Act or by some other enactment.

Mr Radhi is not alleged to have incited anyone to engage in conduct sufficient to breach s 142(fa), and the Immigration Act 1987 did not make it an offence to arrive in New Zealand in a manner that did not comply with s 126(1). Nor was it an offence to arrive in New Zealand without holding a visa. [25]

[25] Immigration Act 1987, s 142.

(d) In other jurisdictions, there is authority to the effect that inchoate crimes should be prohibited in the same way as their choate equivalents.[26] As Judge Moses noted, the Privy Council has held that there is nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.[27] In this country, however, s 9 of the Crimes Act provides that no-one is to be convicted of any offence at common law. As is noted in *Adams*, the elimination of common law offences is a fundamental provision of the Crimes Act in this country.[28] The Courts do not possess a residual power to superintend offences prejudicial to the public welfare.

[53] In my judgment, there was no offence of attempting to traffic in illegal immigrants in July/October 2001. It follows that in my view, question (c) in the case stated must be answered as follows — Judge Moses erred when he held that, even if the Immigration Act 1987 did not have extraterritorial reach, and there was a requirement of arrival in New Zealand for there to be a sufficient nexus of conduct constituting an offence, an attempted offence of the nature set out in s 142(fa) of the Immigration Act 1987 would be sufficient for there to be conduct of an alleged extradition offence.

[54] Because there was no offence of attempting to traffic illegal immigrants, question (d) contained in the case stated does not arise. I have already expressed the view in relation to question (b), that s 142(fa) did have extraterritorial reach.

Question (e) in the case stated — the multiplier provision?

[55] Question (e) in the case stated asks whether or not Judge Moses was wrong to determine that the multiplier provision in s 144(1A) of the Immigration Act 1987,

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[26] See for example, *R v Hamilton* [2005] 2 SCR 432 at [25]; *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 (PC); *R v Sansom* [1991] 2 QB 130 (CA); *R v Naini* [1999] 2 Cr App R 398.

[27] *Liangsiriprasert v Government of the United States of America*, supra n 25.

[28] *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA 9.01].

(namely the words "for each person in respect of whom the offence is committed") was intended to apply equally to the alternative sentences of a fine or a term of imprisonment.

[56] Judge Moses held as follows:[29]

> …I find that the multiplier provision in the penalty provision of s 144(1A) of the Immigration Act 1987 was intended to apply equally to the fine and imprisonment term.

[57] At the relevant time, the penalty for breach of s 142(fa) was set out in s 144(1A) of the Immigration Act 1987. Section 144(1A) was another provision enacted under urgency on 15 June 1999, and it also came into force on 16 June 1999, as part of the Immigration Amendment Act (No.2) 1999 and in response to the possible imminent arrival in New Zealand of illegal nationals from another country. It read as follows:

> A person who commits an offence against section 142(fa) is liable to imprisonment for a term not exceeding 3 months, or to a fine not exceeding $5,000 for each person in respect of whom the offence was committed.

[58] The multiplier, and its phraseology, is unusual. There is a comma after the reference to the term of imprisonment. There is no comma after the reference to a fine not exceeding $5,000. On the face of it, the comma seems to have been used to separate two independent but related penalties, the maximum term of imprisonment allowable for the offence under s 142(fa), and the alternative sentence of a fine not exceeding $5,000. The grammar employed suggests that the multiplier — "for each person in respect of whom the offence was committed" — applied only to the fine, and not to the term of imprisonment.

[59] Again, the matter is finely balanced, and it is unfortunate that it falls to be decided, at least in part, by the location, and absence, of commas. The Courts generally will endeavour to avoid undue focus on grammar and punctuation in seeking to arrive at the correct interpretation of a statutory provision.[30] Rather, they must ascertain the meaning of an enactment from its text and in light of its purpose.[31]

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29 *New Zealand Police v Radhi*, supra n 1, at [65].
30 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA) at [69] and [70].
31 Interpretation Act 1999, s 5.

[60] Unfortunately, there is little to be gleaned from the text of the Immigration Act. The penalties imposed for breach of other provisions in the Act, including other subsections in s 142, did not contain multiplier provisions. The penalties available were either a term of imprisonment not exceeding three months, or a fine not exceeding $5,000. The general penalty provision applicable, where no other penalty was provided for, was a fine not exceeding $2,000.

[61] There was a reference to what became s 144(1A) in the explanatory note to the Bill. It summarised the clause in the following way:[32]

> Clause 48 amends s 144 of the Act to specify a penalty for the new offence of aiding or assisting a person to arrive in New Zealand unlawfully. The penalty is imprisonment for up to three months or a fine of up to $5,000 for each person in respect of whom the offence was committed.

That discussion is equivocal.

[62] Again, there are dangers in looking at subsequent legislative provisions, but it is helpful to note that when s 142(fa) was repealed in 2002, and replaced with a new subsection, a new s 144(1A) was also substituted. The new section contained the following penalty provision for the same type of offending:

> A person who commits an offence against s 142(1)(eb) or s 142(1)(ec) is liable to imprisonment for a term not exceeding seven years, a fine not exceeding $100,000, or both, for each person in respect of whom the offence was committed.

[63] The Crown submitted that I should adopt a purposive approach to the legislation, and hold that the wording in s 144(1A) allowed flexibility in sentencing, whether by way of imprisonment, or a fine. Ms Gordon submitted that instead of creating a higher maximum term of imprisonment, and a higher maximum fine, without reference in either case to the number of people assisted, Parliament instead created a lower maximum penalty that was able to be adjusted by reference to the number of people involved.

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[32] Immigration Amendment Bill 1998 (183-1) (explanatory note) at xvii.

[64] Such an approach is speculative. Moreover, it leads to difficult results. In Mr Radhi's case, approximately 300 people were involved. If the multiplier applies to the term of imprisonment, that would mean that Parliament potentially imposed a maximum term of imprisonment in respect of Mr Radhi's alleged offending of some 75 years. Recourse to the totality principle would, of course, reduce such sentence, but it is noteworthy that no other offence in New Zealand carries a potential maximum term anywhere near 75 years. In contrast, tailoring a fine by reference to the number of people involved has some attraction. People who assist in the trafficking of illegal immigrants will generally do so for profit. If a fine is to be a proper deterrent, it should be more than a simple business expense, which can be passed on to potential migrants. Hitting offenders in the pocket and stripping them of their gains, by reference to the number of people involved, might be considered to be the appropriate response to the offending.

[65] Again, I have not found this issue particularly easy. Ultimately, I am driven by the wording used in the section. As the section stands, it compels the conclusion that the multiplier applies only to the fine, and not to the term of imprisonment.

[66] Accordingly, I answer question (e) in the case stated as follows — Judge Moses erred when he held that the multiplier provision in s 144(1A) of the Immigration Act 1987 was intended to apply equally to the fine and the imprisonment term.

Questions (f), (g) and (h) in the case stated — was the alleged offence an "extradition offence", was Mr Radhi an "extraditable person" and was Mr Radhi eligible for surrender?

[67] The answer to these questions follows on from the scheme of the Extradition Act 1999, and answers I have given to earlier questions. In my view, Judge Moses erred when he held that the alleged offence is an extradition offence in relation to Australia. It follows, that the Judge also erred when he held that Mr Radhi is an extraditable person in relation to Australia, and when he held that Mr Radhi is eligible for surrender in relation to the offence of which extradition is sought.

Summary

[68] I summarise my findings as follows:

(a) The equivalent provision in New Zealand to that under which Mr Radhi is charged in Australia, was, at the relevant time, s 142(fa) of the Immigration Act 1987.

(b) Section 142(fa) of the Immigration Act 1987 had extraterritorial reach.

(c) If the conduct attributed to Mr Radhi, constituting the alleged offence in relation to Australia, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time, it would not have constituted an offence under s 142(fa) of the Immigration Act 1987.

(d) There was no attempted offence of the nature set out in s 142(fa) of the Immigration Act 1987.

(e) The multiplier provision in the penalty section — s 144(1A) — did not apply to the fine and the imprisonment term. It only applied to the fine. The maximum term of imprisonment for any breach of s 142(fa) was three months.

It follows that Mr Radhi is not an extraditable person in relation to Australia, because, if conduct constituting the alleged offence in relation to Australia, or equivalent conduct, had occurred within the jurisdiction of New Zealand, it would not have constituted an offence punishable under the law of New Zealand for which the maximum penalty was imprisonment for not less than 12 months. Mr Radhi is therefore not eligible for surrender in relation to the offence for which extradition is sought because he is not an extraditable person pursuant to the provisions of the Extradition Act 1999.

[69] The appeal is allowed. Judge Moses' decision that Mr Radhi is eligible for surrender is reversed in accordance with s 72(1) of the Extradition Act 1999. The warrant for Mr Radhi's detention issued by Judge Moses under s 46 of the Extradition Act 1999 is set aside, and Mr Radhi is discharged under s 73(1)(a).

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Wylie J

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