NOTE: THE ORDER MADE BY THE HIGH COURT ON 11 DECEMBER 2012 CONTINUES IN FORCE. THAT ORDER PROHIBITS PUBLICATION OF THE NAMES AND OF ANY DETAIL IDENTIFYING MR RADHI'S WIFE OR HIS CHILDREN, OR ANY INFORMATION WHICH MIGHT LEAD TO THEM BEING IDENTIFIED, OTHER THAN PUBLICATION OF MR RADHI'S NAME AND REFUGEE STATUS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA322/2013
[2014] NZCA 327

	BETWEEN	THE NEW ZEALAND POLICE Appellant
	AND	MAYTHEM KAMIL RADHI (AKA MAYTHAM KAMIL RADHI) Respondent

Hearing:	26 June 2014
Court:	Ellen France, Wild and White JJ
Counsel:	J C Gordon QC and W N Fotherby for Appellant R P Chambers and S D Withers for Respondent
Judgment:	17 July 2014 at 11.30 am

JUDGMENT OF THE COURT

A **We answer the three questions on which leave to appeal was granted thus:**

> ***Question One:*** **Was there a requirement of "arrival" in New Zealand for an offence to be committed under s 142(fa) of the Immigration Act 1987?**
>
> ***Answer*****: No.**

***Question Two*: Was it an offence in New Zealand to attempt to commit the offence set out in s 142(fa) of the Immigration Act?**

***Answer*: Yes.**

***Question Three*: Did the multiplier provision in s 144(1A) of the Immigration Act "for each person in respect of whom the offence was committed" apply both to the term of imprisonment and the fine set out in that section, or only to the fine?**

***Answer*: The multiplier provision in s 144(1A) applies both to the fine and to the period of imprisonment.**

B Pursuant to the powers vested in this Court by s 73(4)(b) of the Extradition Act 1999, we issue a warrant, pursuant to s 46 of that Act, for the respondent's detention.

C Pursuant to s 72(1)(d) of the Extradition Act, we remit the proceeding to the District Court so it may consider whether a surrender order should be issued under s 47 of the Extradition Act, or whether the case should be referred to the Minister of Justice under s 48(4).

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This appeal by the New Zealand Police challenges three aspects of Wylie J's interpretation of two sections in the Immigration Act 1987.[1] Both those sections have long since been amended, indeed the Act has been repealed, so the appeal has relevance only to the respondent. But its importance to him is significant, as will emerge.

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1 *Radhi v New Zealand Police* [2013] NZHC 163 [High Court judgment].

[2] The two sections in issue are:

> **142 Offences** - Every person commits an offence against this Act who -
>
> **…**
>
> (fa) Whether in New Zealand or 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; or
>
> (iii) To complete an arrival card in a manner that the person aiding or assisting knows to be false or misleading in any particular.
>
> …
>
> **144 General penalty for offences**
>
> …
>
> (1A) 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.

[3] Wylie J's judgment reversed a decision of Judge Moses in the Manukau District Court[2] on each of the three questions on which Wylie J, pursuant to s 69 of the Extradition Act 1999, granted the Police leave to appeal to this Court.[3] Those three questions are:

> (a) Was there a requirement of "arrival" in New Zealand for an offence to be committed under s 142(fa) of the Immigration Act 1987?
>
> (b) Was it an offence in New Zealand to attempt to commit the offence set out in s 142(fa) of the Immigration Act?
>
> (c) Did the multiplier provision in s 144(1A) of the Immigration Act "for each person in respect of whom the offence was committed" apply

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2 *New Zealand Police v Radhi* DC Manukau CRI-2011-092-11423, 19 March 2012 [District Court judgment].

3 Wylie J's leave judgment of 14 May 2013 is *New Zealand Police v Radhi* [2013] NZHC 1099.

both to the term of imprisonment and the fine set out in that section, or only to the fine?

Background

[4] The respondent is charged in Australia. The Australian Federal Police allege he was involved in October 2001 in an attempt to "smuggle" about 300 people into Australia on a boat. Not long after the boat left Indonesia it sank in rough seas and most of the people on board drowned. None of those on board would have been entitled to enter Australia: they were not Australian citizens and did not hold Australian visas.

[5] The Australian Police allege the respondent was involved in negotiations with the 300 people over payment for the voyage, in receiving payment, in transporting and accommodating the people while in Indonesia and in helping them aboard the boat. It is not alleged the respondent was the principal offender.

[6] The respondent is now in New Zealand. He came here in 2009 as a refugee under the auspices of the United Nations High Commissioner for Refugees.

[7] A Magistrate in Brisbane issued a warrant for the respondent's arrest in February 2011. The warrant records that the respondent is charged, between July and October 2001 in Indonesia, with facilitating the proposed entry into Australia of a group of five or more people, reckless as to whether they had a lawful right to come into Australia. This is an offence under s 232A of the Migration Act 1958 (Commonwealth):

> **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.

Currently 2,000 penalty units is AUD 340,000.

[8] In July 2011 the respondent was arrested by the New Zealand Police, after the Australian arrest warrant was endorsed by a Judge of the District Court under s 41 of the Extradition Act. Following a request from the Australian Federal Police, the New Zealand Police then sought the extradition of the respondent.

[9] Following a defended hearing and full submissions Judge Moses granted the extradition request in a decision delivered on 19 March 2012, and issued a warrant for the respondent's detention.[4]

[10] The respondent appealed successfully to the High Court. In Wylie J's view, had the alleged offending by the respondent occurred within the jurisdiction of New Zealand, it would not have constituted an offence punishable under New Zealand law for which the maximum penalty was at least 12 months imprisonment. It followed that the respondent was not extraditable to Australia. Wylie J quashed the warrant for the respondent's detention and discharged him.[5]

The Extradition Act

[11] Under s 4 of the Extradition Act, the respondent is extraditable only if his conduct, when allegedly committed, constituted an offence in Australia and would, had it occurred within the jurisdiction of New Zealand, have constituted an offence here under s 142(fa), punishable under s 144(1A) by not less than 12 months imprisonment. This gives effect to the principle of double criminality.[6] As explained by Lord Millett in *R (Al-Fawwaz) v Governor of Brixton Prison*, that principle has the dual aims of precluding extradition if the country requesting extradition could not try the defendant or if its jurisdiction is "exorbitant" – going beyond the jurisdiction the requested country claims for itself.[7]

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4 District Court judgment, above n 2.
5 High Court judgment, above n 1.
6 This Court applied the principle of double criminality in *Government of the United States v Cullinane* [2003] 2 NZLR 1 (CA) at [50]–[52], albeit in the context of interpreting an extradition treaty.
7 *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556 at [95].

[12] Applied here, s 4 aims to ensure the respondent will actually face a trial in Australia if extradited there, and to prevent his extradition for acts that New Zealand does not view as criminal.

[13] The respondent accepts his alleged conduct constitutes an offence under Australian law. So the only issue is whether his alleged conduct would have constituted an offence had he been charged under New Zealand law.

[14] In inquiring whether the conduct would have constituted an offence within the jurisdiction of New Zealand, s 5 of the Extradition Act requires that it is the totality of the acts alleged which must be taken into account. It does not matter whether they were categorised or named differently or whether the constituent elements of the offence differed. We agree with Randerson J's observation in *Plakas v New Zealand Police*, that:[8]

> … 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 …

Question One: Was there a requirement of "arrival" in New Zealand for an offence to be committed under s 142(fa) of the Immigration Act 1987?

[15] This question arises because Wylie J concluded the conduct attributed to the respondent did not, at the relevant time, constitute an offence in New Zealand under s 142(fa). He considered that arrival in New Zealand was an integral part of the offence created by s 142(fa). In the Judge's view, the offence required the consequence of arrival to flow from the respondent's conduct of wilfully aiding or assisting before the offence was complete. On the other hand, the offence under s 232A of the Migration Act with which the respondent was charged in Australia did not require arrival into Australia of illegal immigrants, and that was not alleged by the Australian Federal Police. All the conduct attributed to the respondent was alleged to have taken place in Indonesia. Accordingly there was not the equivalence between the offences alleged in Australia and New Zealand required by s 4(2) of the Extradition Act.

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8 *Plakas v New Zealand Police* HC Auckland CIV-2008-404-2412, 11 June 2008 at [23].

[16] Wylie J's succinct reasoning can be summarised in this way:

(a) The ordinary meaning of the words "to arrive" used in s 142(fa) is "to reach" or "to land" or "to come to". The section did not use words such as "to travel to" which would have indicated that it mattered not whether the intended illegal immigrant arrived in New Zealand.

(b) That interpretation is consistent with the rest of s 142(fa), for example subclause (i) which refers to s 126(1) which details the responsibilities of persons arriving in New Zealand.

(c) The interpretation is also consistent with other provisions in the Immigration Act, for example the definition in s 2(1) of "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".

(d) What was criminalised was not simply wilful aid and assistance given to a person outside New Zealand who intended to come here, but for whatever 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.

(e) Section 142(fa) was subsequently amended following this recommendation by the relevant Parliamentary Committee:[9]

> 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).

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

The clause substituted for s 142(fa) provided that a person committed an offence who:[10]

> … 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 …

[17] We do not agree with Wylie J's interpretation of the words in s 142(fa) "to arrive". Textually and in the light of the purpose of the subsection, the words mean "so as to arrive" or "in order to arrive". The offence is wilfully aiding or assisting another person so they can arrive in New Zealand. The physical element of the offence is the aiding or assisting, while the mental element is doing so "wilfully". Arrival is the aim of the aiding or assisting. The words "to arrive" look forward to something that may – or may not – happen.

[18] We readily accept the word "arrive" has the dictionary meanings Wylie J set out. We note that the Penguin Dictionary also gives the word the meaning "to come".[11] That meaning does not require actual arrival. However, dictionary meanings of the word "arrive" are not the answer here. The critical words are "to arrive" and they are to be construed in the way prescribed by s 5(1) of the Interpretation Act 1999.

[19] The fact that the offence can be committed outside New Zealand is supported by the opening words of s 142(fa) "whether within New Zealand or otherwise …". Wylie J agreed with Judge Moses that the subsection has extraterritorial application. On this appeal, counsel for the respondent took issue with that. Their argument was two-fold. First, they relied on ss 6 and 7 of the Crimes Act 1961, particularly s 6 which provides:

> **6 Persons not to be tried in respect of things done outside New Zealand**
>
> Subject to the provisions of section 7, no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

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10 Immigration Act 1987, s 142(eb).

11 Robert Allen (ed) *The Penguin Dictionary* (2nd ed, Penguin Books, London, 2004).

[20] The answer is that s 142(fa) does create an offence outside New Zealand's jurisdiction. The opening words of the subsection "whether in New Zealand or otherwise" could not be clearer.

[21] Section 7 of the Crimes Act provides:

> **7 Place of commission of offence**
>
> For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

Section 7 would apply only if actual arrival in New Zealand is an "event necessary to the completion of" the s 142(fa) offence, which we have held is not the position.

[22] The respondent is not assisted, in terms of s 7, by his reliance on the High Court's decision in *Tipple v Pain*.[12] From Sydney, Mr Tipple had consigned an explosive to New Zealand. Section 38 of the Explosives Act 1957 made that an offence if done "without the prior consent in writing of the Chief Inspector …". Hardie Boys J held that Mr Tipple's omission to get the Chief Inspector's consent was an omission that had occurred in New Zealand prior to consignment. The case thus came within the first limb of s 7 of the Crimes Act and the District Court had jurisdiction to deal with the charge.

[23] Secondly, counsel for the respondent relied on the wording of s 142(fa)(i) and (ii), the two clauses invoked by the Police. In essence, the respondent submits those clauses contemplate actual arrival in New Zealand. For example, clause (i) refers to arrival in New Zealand in a manner not complying with s 126(1), which spells out the "responsibilities of persons arriving in or leaving New Zealand".

[24] We do not find this second argument persuasive. The people smuggling enterprise the respondent is alleged to have assisted aimed altogether to circumvent compliance with any of clauses (i), (ii) or (iii). Ultimately, Mr Withers accepted the respondent's two arguments against the extraterritorial reach of s 142(fa) failed if we

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[12] *Tipple v Pain* [1983] NZLR 257 (HC).

held – as we have – that there was no requirement that the person or persons assisted actually arrived in New Zealand.

[25] Counsel referred at some length to the legislative process that led to the enactment of s 142(fa). Little if any assistance in interpreting s 142(fa) is to be gleaned from that process. All that can be said is that Parliament intended "to establish an offence against the illegal trafficking of people into New Zealand".[13] While counsel for the respondent are correct (we think) in submitting that no boat smuggling people had ever reached New Zealand, Parliament undoubtedly had that eventuality in mind when it enacted s 142(fa). For the Police, Ms Gordon QC pointed out that s 142(fa) was ultimately enacted urgently, after Parliament was informed that a boat carrying over 100 Chinese people had sailed from the Solomon Islands believed to be headed for New Zealand.[14] We consider that a neutral point. Indeed, on one view, it supports Wylie J's interpretation of the words in s 142(fa) "to arrive".

[26] There is some force in the point Wylie J made about the subsequent amendment of s 142(fa) in 2002, to make it an offence "whether or not the other person in fact enters New Zealand". The Committee which recommended that change, at least, did not share our view of the interpretation of s 142(fa). But as Wylie J acknowledged, subsequent amendment to legislation is seldom a reliable interpretative aid.[15] And, ultimately, Parliament's task is to enact legislation; the Court's to interpret it.

[27] We answer this question "No".

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13 (29 September 1998) 572 NZPD 12789.

14 The Immigration Amendment Bill (No 2) was thus debated under urgency and received both its second and third readings on 15 June 1999. Section 142(fa) was one of several provisions that came into force on 16 June 1999 as the Immigration Amendment Act (No 2) 1999.

15 *Databank v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC) at 394; *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [110]–[111] and J F Burrowes and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 250 and 644.

Question Two: Was it an offence in New Zealand to attempt to commit the offence set out in s 142(fa) of the Immigration Act?

[28] Strictly, given our answer to Question One, we need not answer this question. So we will be brief.

[29] Wylie J answered this question 'No' because, in his judgment, there was no offence of attempting to traffic in illegal immigrants in July/August 2001. Again, the Judge's reasoning is admirably succinct:

(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. Although s 72 of that Act defines the essential elements of an attempt, it does not of itself create offences.

(c) Section 311(2) of the Crimes Act does not assist either. It deals with the situation where a person has incited or attempted to procure another person to commit an offence, when that offence is not in fact committed. The respondent is not alleged to have incited anyone to engage in conduct sufficient to breach s 142(fa).

(d) In other jurisdictions there is authority that inchoate crimes (that is, attempted crimes) should be prohibited in the same way as their choate equivalents.[16] But in New Zealand, s 9 of the Crimes Act provides that no-one is to be convicted of any offence at common law.

[30] Wylie J erred at step (b) in his reasoning. Parliament surely intended that the offences in s 142, including in s 142(fa), be capable of attempt in the ordinary way.

[31] Section 72 of the Crimes Act provides:

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[16] For examples, *R v Hamilton* 2005 SCC 47, [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 (CA).

> **72 Attempts**
>
> (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
>
> …

[32] At the time relevant here, s 2 of the Crimes Act defined "offence" thus:

> [O]ffence means any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction.

[33] Delivering this Court's judgment in *R v Hapur*, Chambers J said this about the reach of s 72:[17]

> [13] The breadth of s 72(1) and the looseness of the language employed suggest that Parliament intended the Courts to apply the provision flexibly and in accordance with the justice of the case, without undue constraint from the Legislature. Its "hands-off" approach was and is entirely understandable. After all, s 72 can be linked with virtually every offence in the statute book. It potentially applied therefore to hundreds of offences and an infinite variety of factual situations, the metes and bounds of which were impossible for Parliament to predict.

[34] The correct position is thus as Ms Gordon crisply outlined it to us:

(a) Section 72 of the Crimes Act criminalises attempting to commit an "offence".

(b) Section 2 of the Crimes Act defines "offence" as meaning offences under the Crimes Act or any other enactment.

(c) Section 142(fa) of the Immigration Act creates an offence.

(d) Section 142(fa) is an offence under "any other enactment".

(e) It is thus an offence to attempt the crime in s 142(fa).

[35] We answer Question Two "Yes".

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[17] *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.

Question Three: Did the multiplier provision in s 144(1A) of the Act "for each person in respect of whom the offence was committed" apply both to the term of imprisonment and the fine set out in that section, or only to the fine?

[36] With some misgivings, Wylie J decided this question, at least in part, by the location of the comma in s 144(1A). For ease of reference we set that subsection out again, along with the preceding subsection:

> **144 General penalty for offences**
>
> (1) Every person who commits an offence against any of the provisions of sections 126(4), 142(c), 142(d), 142(e), 142(f), 142(g), and 142(j) of this Act is liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding $5,000.
>
> (1A) 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.

[37] Wylie J considered the comma had been used to separate the two independent but related penalties in s 144(1A). The positioning of the comma suggested the multiplier – "for each person in respect of whom the offence was committed" applied only to the fine.

[38] For four reasons we consider Wylie J erred in giving any force to the comma. First, the author of *Bennion on Statutory Interpretation,* says this about punctuation as a guide to the interpretation of an Act:[18]

> Punctuation is a device not for making meaning, but for making meaning plain.[19] Its purpose, as Bouvier said, is to denote the stops that ought to be made in oral reading, and to point out the sense.[20] Drafters are instructed that they should on no account allow the meaning to turn on the presence or absence of a punctuation mark. The good drafter consciously drafts every clause with an eye to what its sense would be if all such marks were removed.

[39] We agree, as did this Court in the judgment *Bennion* cites, though the 5th edition of *Bennion* was current at the time. For that reason, reinforced by doubt as to whether or not the comma was meant to be there, or whether a second comma was

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[18] Oliver Jones and FAR Bennion *Bennion on Statutory Interpretation*: *A Code* (6th ed, LexisNexis, London, 2013) at 699.

[19] This sentence has been judicially approved: *Official Bay Heritage Protection Society Inc v Auckland City Council* [2007] NZCA 511, [2008] NZRMA 245 at [33].

[20] *A Law Dictionary* (1839) vol 2, tit 'Punctuation'.

meant to be there, s 144(1A) is best interpreted without the comma. The doubt arises because the Explanatory Note in the Amendment Bill had no comma:

> Clause 48 amends s 144 of the Act to specify a penalty for the new offence of aiding or assisting persons 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 is committed.

[40] That doubt is heightened by the urgency with which the subclause was ultimately enacted, and by the considerations we refer to below.

[41] Second, Wylie J was erroneously influenced by the fact that applying the multiplier to the imprisonment as well as the fine could result in a very long term. As the Judge pointed out, for the respondent it could be 75 years (300 people x 3 months imprisonment). Although Wylie J acknowledged the totality principle would preclude a manifestly excessive term, he did not see that as the answer. It is. Further, as Ms Gordon pointed out, an 18 year old convicted in New Zealand of double murder and sentenced to two terms of life imprisonment potentially faces a term longer than 75 years.

[42] Third, Wylie J erred in seeing this logic in his interpretation of s 141(1A):[21]

> … 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.

[43] In two respects, this is incorrect. First, as this Court explained in *R v Brough* in relation to the Proceeds of Crime Act 1991:[22]

> … Requiring [the proceeds of criminal activity] to be paid cannot in any way be regarded as a penalty. Rather, it is simply a recognition that the law should not permit a person to retain the profits of criminal activity.

[44] The second respect emerges from this Court's judgment in *R v Chechelnitski* in which it dismissed an appeal against sentences of imprisonment imposed by the

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21 At [64].

22 *R v Brough* [1995] 1 NZLR 419 (CA) at 423.

trial Judge on Mr Chechelnitski who had been convicted on three charges under s 98C(1) of the Crimes Act of smuggling migrants.[23] That charge, introduced in 2002, carries a maximum sentence of 20 years imprisonment or a fine not exceeding $500,000 or both. This Court agreed with the trial Judge's rejection of Mr Chechelnitski's offer to pay a fine of $10,000 in lieu of a sentence of imprisonment. This Court observed:[24]

> … It would be completely inappropriate and exceptional for a people smuggler to be able to pay a fine as the only penalty. That fine could then be seen by potential offenders as no more than a business expense to be taken into account when people smuggling and one to be passed onto the potential migrants.

[45] The Court in *Chechelnitski* also said this of sentencing where both a sentence of imprisonment and a fine are available (which is not the position with s 144(1A)):[25]

> … In such a case … the sentencing Judge must still follow the hierarchical structure of penalties set out in the Sentencing Act. Accordingly, where a sentence of imprisonment is imposed, it will be because a fine does not fulfil the purposes of sentencing. We remark too that it would only be in extremely rare cases that the imposition of a fine for offences of this nature would result in a reduced term of imprisonment. We would see a fine as being, in most cases, additional to the sentence of imprisonment.

[46] As Ms Gordon pointed out, on Wylie J's interpretation of s 144(1A), and assuming the offence was committed in respect of 300 people, the maximum penalty would be three months imprisonment or a $1,500,000 fine. A sentencing judge might conclude that the least restrictive sentence was imprisonment, although that sentence sits at the top of the sentencing hierarchy stipulated by s 10A of the Sentencing Act 2002. In other words, that result would rather tip the sentencing hierarchy upon its head.

[47] Fourth and last, the interpretation adopted by Wylie J is also difficult to reconcile with the view this Court took in *R v Wright*.[26] That case concerned s 90 of the Summary Proceedings Act 1957 which allowed a court to substitute a penalty of imprisonment for unpaid fines. Mr Wright had $95,000 in unpaid fines. His counsel

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23 *R v Chechelnitski* CA160/04, 1 September 2004.
24 At [23].
25 At [56].
26 *R v Wright* CA45/06, 6 July 2006.

submitted that s 90 restricted the substituted penalty of imprisonment to three months, irrespective of the level of unpaid fines. The Court rejected that as "ludicrous":[27]

> … An interpretation that would permit offenders to incur substantial fines safe in the knowledge they could not be imprisoned for any greater period than three months would defeat this clear purpose.

[48] The respondent advanced an argument, not put to Wylie J, that the multiplier cannot apply to imprisonment as there was, at the time, no right to elect trial by jury. That argument must be confronted by assuming the multiplier applies to the imprisonment alternative in s 144(1A). On that assumption, the answer is that s 66 of the Summary Proceedings Act did at the time give a right to trial by jury where the prosecution was commenced summarily. In *Tutu v R* this Court held:[28]

> [19] Section 66 of the Summary Proceedings Act provides for the right to trial by jury. In effect, any person charged summarily with an offence which is punishable by imprisonment for a term exceeding three months (whether or not that is a summary or indictable offence) is entitled to elect to be tried by a jury. Thus, for example, a person charged with the summary offence of common assault or assaulting a constable in the execution of his duty, each of those being offences which attract a maximum sentence of six months imprisonment, may elect trial by jury: that is trial on indictment.

[49] We answer this question "The multiplier provision in s 144(1A) applies both to the fine and to the period of imprisonment".

Result and relief

[50] We answer the three questions on which the Police were given leave to appeal as follows:

(a) *Question One:* Was there a requirement of "arrival" in New Zealand for an offence to be committed under s 142(fa) of the Immigration Act 1987?

Answer: No.

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[27] At [34].
[28] *Tutu v R* [2012] NZCA 294.

(b) *Question Two*: Was it an offence in New Zealand to attempt to commit the offence set out in s 142(fa) of the Immigration Act?

Answer: Yes.

(c) *Question Three*: Did the multiplier provision in s 144(1A) of the Immigration Act "for each person in respect of whom the offence was committed" apply both to the term of imprisonment and the fine set out in that section, or only to the fine?

Answer: The multiplier provision in s 144(1A) applies both to the fine and to the period of imprisonment.

[51] Wylie J set aside the warrant for the respondent's detention which Judge Moses had issued under s 46 of the Extradition Act. Pursuant to the powers vested in this Court by s 73(4)(b) of the Extradition Act, we issue a warrant, pursuant to s 46, for the respondent's detention in prison.[29]

[52] Pursuant to s 72(1)(d) of the Extradition Act, we remit the proceeding to the District Court so it may consider whether a surrender order should be issued under s 47 of the Extradition Act, or whether the case should be referred to the Minister of Justice under s 48(4).

[53] Any application pursuant to s 46(2) of the Extradition Act for bail pending exercise of the District Court's powers under s 47 of the Extradition Act is to be made to the District Court.

Solicitors:
Meredith Connell, Auckland for Appellant

[29] We have been advised by counsel for the Police that the High Court in its inherent jurisdiction granted the respondent bail on 2 July 2013, pending the outcome of this appeal. That bail expires upon delivery of this judgment.