

**IN THE DISTRICT COURT
AT NORTH SHORE**

KIM DOTCOM
Applicant

v

UNITED STATES OF AMERICA
Respondent

Hearing: 23 January 2012

Appearances: Mr Davison QC and Ms Woods for the Applicant
Ms Toohey and Mr Sinclair for the Respondent

Judgment: 25 January 2012

RESERVED JUDGMENT OF JUDGE D J McNAUGHTON
[Opposed Bail Application]

[1] The United States of America is seeking to extradite Mr Kim Dotcom from New Zealand. An indictment has been filed in the District Court for the Eastern District of Virginia charging Mr Dotcom and others with:

- Conspiracy to commit racketeering.
- Conspiracy to commit copyright infringement.
- Conspiracy to commit money laundering.
- Criminal copyright infringement by distributing copyrighted work being prepared for commercial distribution on a computer network and aiding and abetting of copyright infringement.

- Criminal copyright infringement by electronic means and aiding and abetting of copyright infringement.

[2] I record that pursuant to s 20 of the Extradition Act 1999 I issued a provisional arrest warrant for Mr Dotcom and others on 18 January 2012 and then the following day, warrants to search a number of addresses including Mr Dotcom's residential address at Coatsville.

[3] I was prepared to disqualify myself from hearing the bail application if counsel were concerned regarding any possible conflict of interest or actual or apparent bias but all counsel were content for me to deal with the bail application.

[4] Presentation of the indictment follows a lengthy FBI investigation which commenced in March 2010. The FBI alleges that the applicant and others are involved in a worldwide criminal organisation known collectively as the Mega Conspiracy. There are seven persons targeted by the investigation and charged in the indictment. Mr Dotcom and Bram van der Kolk both reside in New Zealand. The remaining five defendants are resident in Europe and Hong Kong. Mr Dotcom is a 68% shareholder in a company called Mega Upload Limited the registered owner of Mega Upload.com allegedly the main website used to facilitate the operation of the Mega Conspiracy.

[5] The prosecution allege the business is run from servers in the Netherlands, Canada and the United States. Charges are laid in the United States on the basis that a large portion of the servers are located there but the prosecution assert the business could be run from any location and the seven alleged conspirators need not be proximate to the servers.

[6] Mega Upload.com claims to account for an estimated 4% of all internet traffic worldwide and to attract 50 million visits a day. The business is also highly profitable. Restraining orders have been issued in the United States for assets including some assets held in New Zealand valued at US\$175 million, allegedly criminal proceeds acquired as a result of criminal offences.

[7] Section 43(1)(b) of the Extradition Act 1999 provides that the provisions of part 1 of the Bail Act 2000 are to apply in respect of proceedings brought under the Act and therefore it is for the Crown to show that there is just cause for continued detention taking into account the mandatory and discretionary factors set out in s 8 of the Bail Act. Bail is opposed by the Crown primarily on the basis that Mr Dotcom is an extreme flight risk and also that there is a risk of reoffending on bail.

Flight Risk

[8] It is submitted that when the police executed the arrest and search warrants on the morning of 20 January 2012 that Mr Dotcom attempted to evade arrest by activating a sophisticated security lock on his bedroom door and then retreating to a second “panic room” hidden within his bedroom again secured by a security locked door and when the police gained entry to this room Mr Dotcom was present and there was a loaded shotgun in a nearby safe.

[9] It is noted that Mr Dotcom does not hold a firearm licence and that his bodyguard Mr Wayne Tempero has been charged in relation to an identical firearm found in a gun safe in a room occupied by him in an adjacent building. Mr Tempero holds a firearm licence, but not to that particular category of firearms.

[10] The firearm is described as a pistol grip shotgun with a removable stock which had been detached and placed in the safe alongside. There were four rounds loaded into the shotgun with another five twelve gauge shotgun rounds attached to the firearm. There was a shell in the breach which was a rubber round and a different colour from the remaining rounds which were all red and contained buckshot.

[11] It is accepted that Mr Dotcom had access to a number of bank accounts including 23 separate bank accounts in Hong Kong, 15 with the DBS Bank and 8 with Citibank exceeding NZ\$26 million.

[12] The FBI allege that Mr Dotcom has registered bank accounts in the Philippines and the United Kingdom, a credit card in Germany and multiple

additional limited liability companies registered under various aliases in different countries. It is asserted that his income for the calendar year 2010 was approximately US\$42 million. In addition the applicant has \$10 million in government bonds in various New Zealand accounts which are also restrained property. The FBI alleges that the various accounts which are known and restrained do not represent all of the funds available to Mr Dotcom and that there is a significant possibility that other financial resources are available to him.

[13] In 1998 the applicant was convicted in relation to computer hacking committed in 1994 and was sentenced to two years imprisonment suspended for two years. In 2003 in Germany he was convicted of insider trading and breach of trust committed in 2001 and sentenced to one year eight months imprisonment suspended for two years. Finally there is a conviction in 2011 in Hong Kong for failing to publically disclose the number of shares acquired in 2009. Mr Dotcom was fined a total of HK\$8,000 and ordered to pay investigation costs of HK\$17,421 to the Securities and Futures Commission.

[14] The prosecution placed considerable emphasis on events leading up to the 2003 conviction in Germany alleging that Mr Dotcom fled Germany in a response to an investigation there in 2001 and 2002 to Thailand and was later arrested and eventually deported to Germany. The prosecution submitted that this demonstrated that the applicant is a considerable flight risk.

[15] Mr Dotcom holds a number of passports. One is a German passport in the name of Kim Schmitz which is his original name. That passport was issued in 2002 and expires in May 2012. He holds another passport issued in Finland in the name of Kim Tim Jim Vestor in 2005 which expires in July 2015 and finally another passport issued in Finland in the name of Kim Dotcom in 2010 which expires on 12 February 2015.

[16] One of the applicant's New Zealand accounts ASB account no. 12-3170-0066521-00 is in the name of Kim Tim Jim Vestor. The FBI alleges that the applicant is actively maintaining alternative identities complete with funds and travel documentation.

[17] An affidavit was filed by Malcom Spence a detective with the Asian Crime Unit explaining how a Chinese national sought for extradition to the United States and subject to daily reporting, and surrender of travel documents had disappeared prior to the hearing of the request for surrender for extradition.

[18] I record that the respondent had also filed an affidavit from a senior customs official explaining the availability of false passports and travel documentation at a price. The affidavit described porous nature of New Zealand's borders should the applicant chose to leave the country by boat or an airport or airstrip outside the main centres and the mechanics of organising travel to Australia or other South Pacific countries by small aeroplane, yacht or commercial vessel.

[19] The respondent was concerned that this material not fall into the public domain and I heard submissions in relation to the affidavit in closed Court. The prosecution were concerned that this material might be accessed from the Court file and so the original affidavit was returned to the prosecutor.

[20] It is submitted that Mr Dotcom maintains residences in both New Zealand and Hong Kong and that his address at Suite 3608, Grand Hyatt Hotel, Hong Kong is a permanent address.

[21] It was submitted that Mr Dotcom has in the past used chartered private jets, helicopters and yachts including leasing a helicopter for a month in 2010 together with a pilot on a retainer.

Risk of Offending on Bail

[22] It is submitted that the applicant's business is compact involving the seven alleged conspirators and a total worldwide staff of 30. A computer server is required to maintain the various websites and the business is able to be run at a distance given that the various alleged conspirators reside in Hong Kong, New Zealand, Germany, Estonia and Slovakia whilst the websites themselves are operated through servers in the United States of America, Netherlands and Canada.