IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **NO P 50 OF 2013**

BETWEEN: **COMMONWEALTH MINISTER FOR JUSTICE**
Appellant

AND: **ADRIAN ADAMAS**
First Respondent

AND: **COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES**
Second Respondent

APPELLANT'S SUBMISSIONS

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PART I FORM OF SUBMISSION

1. These submissions are in a form suitable for publication on the internet.

PART II THE ISSUES

2. The primary issues on the appeal arise out of the interaction of a statute and a treaty and the respective roles of the executive in administering the statute and the court on judicial review.

3. By way of background, Article 9(2)(b) of the Extradition Treaty between Australia and the Republic of Indonesia, scheduled to the *Extradition (Republic of Indonesia) Regulations 1994* (Cth) (**the Treaty**), provides that:

> *(2) Extradition may be refused in any of the following circumstances:*
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> ...
>
> *(b) where the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive or incompatible with humanitarian considerations... .*

4. In accordance with s 11(1)(a) and (1C) of the *Extradition Act 1988* (Cth) (**the Act**), and reg 5 of the *Extradition (Republic of Indonesia) Regulations*, the Act applies in relation to the Republic of Indonesia subject to the Treaty. Consequently, and in accordance with s 22(3)(e)(ii) and (iv) of the Act, where a provision of the Treaty has the effect that the surrender of an "*eligible person*" may be refused in relation to the "*qualifying extradition offence*" in certain circumstances,[1] that person is only to be surrendered if the Attorney-General is satisfied either that those circumstances do not exist or that they do exist but that nevertheless surrender of the person should not be refused.

5. Therefore, having met the other prerequisites in s 22(3) of the Act, the first respondent was only to be surrendered to Indonesia if the Attorney-General was satisfied that extradition of the first respondent would not be *"unjust, oppressive or incompatible with humanitarian considerations"*; or that surrender should nevertheless not be refused.

6. In reaching a state of satisfaction as to whether or not it would be "*unjust ...*" to surrender the person, a key issue on appeal is whether:

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[1] "*Eligible person*" is defined in s 22(1) of the Act, relevantly, as a person who has been committed to prison by order of a magistrate made under s 19(9) of the Act. "*Qualifying extradition offence*" is defined (in the present context) to mean any extradition offence in relation to which the magistrate determined that the person was eligible for surrender under s 19(2) of the Act.

6.1. as the appellant contends, the Attorney-General is entitled to make a judgment in one single combined operation whereby relevant factors are considered as a whole; or

6.2. in accordance with the majority in the Court below, the Attorney-General must:

6.2.1. follow a staged process of consideration whereby it is necessary to determine whether the circumstances of the first respondent's conviction *in absentia*, right to appeal or review, and sentence are "*unjust ...*", before considering the other factors referred to in Article 9(2)(b); and

6.2.2. within the first stage of that process, translate each of the circumstances of the first respondent to a hypothetically similar set of circumstances in Australia, upon which the determination of whether the surrender would be "*unjust*" is reduced solely to a matter of compliance with Australian law.

7. A related issue concerns the respective roles of the Senior Law Officer, the Attorney-General (or his substitute Minister) and the Court. To what extent does the question of "*injustice*" allow scope for the Attorney-General to choose between competing conclusions; or alternative processes of reasoning and formation of the ultimate value judgment?

8. Finally, a *Wednesbury* issue arises on the Notice of Contention (which will be addressed by the appellant in reply).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

9. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and is of the view that no such notice is required.

PART IV CITATION OF REASONS FOR JUDGMENT

10. The reasons for judgment of the Full Court of the Federal Court are found at *O'Connor v Adamas* (2013) 210 FCR 364 (**FFC**). The reasons for judgment of the primary judge (Gilmour J) are found at *Adamas v The Honourable Brendan O'Connor (No 2)* (2012) 291 ALR 77; [2012] FCA 227 (***Adamas No 2***).

PART V FACTS

General

11. The following statement of facts represents the position as disclosed to, and thus appreciated by, the Minister in the Departmental Submission (**Attachment B**). As the court was conducting judicial review not a trial, it was

not open to it to find facts for itself. The first respondent did not give "evidence" and was not cross-examined.

First respondent's conviction in absentia

12. On 25 July 1999, the first respondent first entered Australia (FFC at [146]). On 22 November 1999, he notified the Indonesian Consulate of his Perth address (FFC at [148]). In March 2000, the first respondent travelled to Indonesia before returning to Australia (FFC at [149]). The first respondent subsequently acquired Australian nationality on 11 November 2002.[2]

13. On 18 October 2000 (and later on 7 February 2001), a summons directed to the first respondent was issued by an Indonesian prosecutor for the purpose of an investigation into the collapse of Bank Surya, of which the first respondent was the President Director during the period of 1989-1998 (notices of the preceding summonses were published in the Indonesian media on 4 April 2002) (FFC at [150]-[152]). Later, summonses were issued for the purpose of his appearing in the Central Jakarta District Court, on 16 May 2002, 21 May 2002, 30 May 2002, 25 June 2002 (notices of the summonses were again published in Indonesian newspapers), and 15 July 2002 (FFC at [153], [155]-[156], [158]).

14. Apart from publication of the summonses in the Indonesian newspapers, the step taken to bring the summonses to the first respondent's attention was to send them to his last known address in Indonesia, namely to the Head of his former village.[3]

15. On 24 July 2002, the first respondent's trial commenced in the District Court in his absence (FFC at [159]). On 13 November 2002, the first respondent was convicted of the offence of corruption: namely, misusing bank funds causing serious liquidity problems for the bank, as well as excessive losses to the central bank, Bank Indonesia, and therefore the Republic of Indonesia, in excess of A$113 million in 1998 (FFC at [4], [119]; [143]-[144], [161]). The first respondent was sentenced to life imprisonment and ordered to pay a fine.

16. On the material before the Minister, the summonses had not been served on the first respondent personally, he being absent from Indonesia at the time. Further the Minister was advised that the Department did not have any information which positively established that the steps taken to inform him of his trial (publication in the Indonesian newspapers and service on the Head of his last known village) had been effective to bring the trial to his attention, although it was difficult to accept that this was not so (see further below).

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2 FFC at [146]. See also Submission to the Minister: *Extradition to the Republic of Indonesia: Adrian Adamas (also known as Adrian Kiki Ariawan, Adrian Adams, Andrian Kiki Ariawan, Adrian Adamus) - surrender determination under s 22 of the Extradition Act 1988 (Cth)* – Attachment B: Grounds for Refusal of Surrender under the *Extradition Act 1988* (**Attachment B**) at [177]. The Minister was advised that the first respondent enjoys dual citizenship of Indonesia and Australia (Attachment B at [160]).

3 On 28 May 2002, the Village Head of North Kedoya Village, which was the first respondent's last known place of residence in Indonesia, wrote to the prosecutor advising that the first respondent no longer resided at the address to which the summons had been sent (FFC at [154]).

17. The first respondent's co-accused, Mr Sutrisno, was tried and convicted on the same day for the same offence (FFC at [145], [164]). Mr Sutrisno appealed against his conviction to the High Court of Indonesia, which appeal was dismissed (FFC at [165]-[166]).[4]

18. On 14 November 2002, the day after his conviction was recorded, the first respondent formally changed his name from 'Adrian Kiki Ariawan' to 'Adrian Adams' (FFC at [14]; [162]).[5]

19. On 28 November 2002, the first respondent's conviction and sentence was formally published in an Indonesian newspaper and an announcement of the decision was also placed on information boards in all government offices of the Central Jakarta District (FFC at [161], [163]).

20. On 16 June 2003, the High Court decision dismissing Mr Sutrisno's appeal was notified to the prosecutor, and published through an announcement in the District Court and in a newspaper circulating in Indonesia on 1 July 2003. The first respondent was not served with the appeal process or advised of the dismissal of the appeal proceeding (FFC at [166]).

21. On 3 July 2003, the Central Jakarta District Prosecution Office declared the first respondent to be a "*fugitive*" (FFC at [167]). On 16 December 2004, the first respondent again changed his name, from 'Adams' to 'Adamas', but continued to reside at the Perth address of which he had notified the Indonesian Consulate in 1999 (FFC at [168]). On 20 December 2004, the Central Jakarta District Prosecution Office requested Interpol's assistance to locate and arrest the first respondent. A 'Red Notice' was published on 17 January 2005, alerting Australian authorities to the presence of the first respondent in Australia (FFC at [169]).

Extradition proceedings

22. On 26 November 2008, the Indonesian authorities issued a warrant for the arrest of the first respondent. On 28 November 2008, Indonesia formally requested the extradition of the first respondent (FFC at [170]). A provisional arrest warrant was issued by a magistrate in Western Australia pursuant to s 12 of the Act.

23. On 18 September 2009, another magistrate in Western Australia determined that the first respondent was eligible for surrender, and issued a warrant under

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4 As Lander J indicates (at [16]; cf. [165] per Barker J)), it is not clear whether it was Mr Sutrisno's unsuccessful appeal or the first respondent's failure to appeal which led the Indonesian Ministry of Law and Human Rights to advise the Attorney-General's Department that "*in the deadline provisioned under the law, both the Public Prosecutor and Adrian Kiki Ariawan did not file an appeal, so the decision of the High Court was final and binding*".

5 It is not clear on what basis Barker J finds (at [162]) that this was done "*coincidentally*". This was a point of contention between the parties below. Similarly, it is not clear on what basis the primary judge makes the finding (*Adamas No 2* at [51], [96]), as recited by Barker J at [208], that the first respondent was tried "*without his knowledge*". There is no basis upon which to infer that the Minister made factual findings to this effect or based his decision upon such findings.

s 19(9) of the Act committing him to prison to await surrender or release pursuant to s 22(5) of the Act (FFC at [175]).

24. On 17 December 2010, the appellant (the Minister) made a determination under s 22 of the Act to surrender the first respondent to Indonesia in relation to his conviction in Indonesia for the offence of corruption, and signed the surrender warrant under s 23 of the Act (FFC at [55]; [138]).

25. By Departmental Submission (Attachment B), the Minister was informed of the following circumstances relevant to the first respondent's conviction *in absentia*, sentence and right of appeal or review:

Service & knowledge of proceedings

25.1. Valid service was effected under Indonesian law by virtue of written receipt of the summons by the Village Head on behalf of the accused person. Substituted service is permitted under Australian law in certain circumstances, for example on the happening of any specified event or on the expiry of a specified time period where it is impractical to personally serve a person (FFC at [101]; Attachment B at [45]-[46], [71]).

25.2. In response to the first respondent's claim that Indonesia's description of him as a 'fugitive' is incorrect, while the Department is not in possession of any information which positively establishes that the first respondent was aware of the proceedings and chose to absent himself, it is difficult to accept that the first respondent had no knowledge of potential investigations or criminal proceedings arising from the collapse of Bank Surya after moving to Australia in 1999 (Attachment B at [73]-[75]; [191]-[193]):

25.2.1. The first respondent worked for Bank Surya in a senior position, including for at least a five year period as the President Director, and would have been likely to have some awareness of the dire financial position of the bank before he arrived in Australia in 1999 as it had been declared a "suspended bank" in April 1998 and ordered to cease operations in August the same year.

25.2.2. The Bank was the recipient of Bank Indonesia Liquidity Assistance while the first respondent occupied the position of President Director.

25.2.3. Indonesian media commenced reporting on Bank Surya's collapse and potential criminal investigations in 1998.

25.2.4. The first respondent changed his legal name in Australia which took effect from the day after the District Court handed down its decision on 13 November 2002.

Conviction *in absentia*

25.3. The conviction *in absentia* was permitted in Indonesia law for the offence of corruption, and the trial accorded with Indonesian law (FFC at [109]-[110]; Attachment B at [189]).

25.4. Convictions in a person's absence are rare in Australia and generally only occur for summary offences or where the defendant has deliberately absented himself from proceedings after having appeared initially (FFC at [112]; Attachment B at [197]).

Sentence

25.5. The nature of the offence of corruption and misappropriation of State finances was a very serious one under Indonesian Law, in circumstances resulting in loss of over IDR1.5 trillion (approximately A$113 million in 1998) and a significant effect on Indonesia's State finances (FFC at [119]; Attachment B at [165]-[166]).

25.6. The life sentence, which may be the subject of an application for a fixed term (with a maximum of 20 years, with time already served taken into account), upon which the person becomes eligible for remission, may still be viewed as disproportionately heavy in accordance with Australian standards (FFC at [116]; Attachment B at [241]-[243]).

Australian standards

25.7. It was open to conclude that the trial was not conducted in accordance with, and the sentence excessive by, Australian standards (FFC at [113]; Attachment B at [255]).

Review

25.8. A form of review of conviction and sentence would be available to the first respondent. Notwithstanding the claim of limited appeal rights, there is no information to suggest Indonesia would not be capable of conducting a review of the first respondent's case that accorded with fair trial rights under Article 14 of the International Covenant on Civil and Political Rights (FFC at [104]-[105]; Attachment B at [225]-[230], [239]).

26. In addition to the nature of the offence, the circumstances of the case, including the first respondent's age, health and other personal circumstances, Attachment B brought to the Minister's attention, in the context of the interests of the Requesting State, Indonesia's efforts to eradicate corruption, where the first respondent has been identified by Indonesia's corruption eradication Commission as one of its most important targets for law enforcement (FFC at [120]; Attachment B at [166]-[167]). The Department also noted one of the principal objects of the Act, stated in s 3, to enable Australia to carry out its obligations under extradition treaties, and thereby to facilitate the administration of criminal justice in Australia and other countries by ensuring that persons

accused or convicted of serious offences cannot escape justice by not being present in the jurisdiction (FFC at [121]; Attachment B at [162]).

The decision of the primary judge

27. On 20 December 2010, the first respondent applied to the Federal Court of Australia for judicial review of the Minister's determination under s 22 of the Act (FFC at [56]; [196]).

28. On 15 March 2012, the primary judge (Gilmour J) ordered that the s 22 determination, and the surrender warrant issued under s 23 of the Act, be quashed (*Adamas No 2*). The primary judge upheld two grounds of the judicial review application: namely, (i) the Minister took into account irrelevant considerations and failed to take account of a relevant consideration in determining that the first respondent's extradition would not be "*unjust, oppressive or incompatible with humanitarian considerations*" under Article 9(2)(b) of the Treaty (at [76]); and (ii) the Minister's determination that the applicant's extradition would not be "*unjust, oppressive or incompatible with humanitarian considerations*" (as jurisdictional facts) was unreasonable in the *Wednesbury* sense (at [99]).

29. On 12 April 2012, the primary judge refused the first respondent's application for bail: *Adamas v The Honourable Brendan O'Connor (No 3)* [2012] FCA 365.

The decision of the Full Court

30. On 15 February 2013, the Full Court ordered that both the appeal and the notice of contention be dismissed. The Court was unanimous in its decision that the primary judge had erred in finding that the Minister's decision under s 22 of the Act was unreasonable in the *Wednesbury* sense (FFC at [72]; [127]; [441]). The Court was divided on the question whether the Minister had taken into account irrelevant matters or failed to take into account relevant matters in determining whether the extradition of the first respondent would be "*unjust, oppressive or incompatible with humanitarian considerations*" pursuant to Article 9(2)(b) of the Treaty (FFC at [124]-[125]; [127], [136]; [142], [428]).

The appeal and notice of contention

31. On 12 September 2013, this Court granted to the appellant special leave to appeal from part of the judgment and order[6] of the Full Court of the Federal Court given and made on 15 February 2013.

32. The appellant filed the notice of appeal on 26 September 2013.

33. The first respondent filed a notice of contention on 3 October 2013, on the basis that the Full Court erred in failing to hold that the decision of the appellant (either that the extradition of the first respondent would not be "*unjust,*

6 Namely, the order dismissing the appeal before the Full Court.

oppressive or incompatible with humanitarian considerations" or that surrender of the first respondent should nevertheless not be refused) was unreasonable.

PART VI ARGUMENT

Summary of Key Contentions

34. The majority of the Full Court's construction of Article 9(2)(b) of the Treaty, and their review of the determination of the Minister, is not supported by the terms of the Treaty.

35. The assessment of whether it would be "*unjust, oppressive or incompatible with humanitarian considerations*" to surrender a person to the Requesting State must be made by reference to Australian standards applied in the context of all the factors prescribed in Article 9(2)(b) of the Treaty, which constitutes a bilateral treaty obligation.

36. Justice Lander correctly decided the matter on the basis there was no legal error once fair regard was had to the whole of the briefing document provided to the Minister.

37. By contrast, the majority of the Full Court mandated the application of a staged approach, which focused singularly on whether a conviction occurs as a result of procedures inconsistent with Australian criminal law and procedure. This led to the following errors:

    37.1. the majority did not apply Article 9(2)(b) of the Treaty according to its terms;

    37.2. the majority misconceived the court's role in undertaking judicial review; and

    37.3. the majority wrongly found error in how the Minister addressed the circumstances of the first respondent's conviction *in absentia*.

The difference in approach between Lander J and the majority

38. It is well established that the terms of a treaty are to be interpreted in accordance with their ordinary meaning, in their context and in light of the object and purpose of the treaty: Article 31(1) of the Vienna Convention on the Law of Treaties [1974] ATS 2 (**Vienna Convention**).[7]

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[7] Australian courts have accepted that the interpretation of treaties is governed, at least, by Article 31(1) and (2), and 32 of the Vienna Convention: see, for example, *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 93.2 (Gibbs CJ); 177.6 (Murphy J); 222.9 (Brennan J). *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-252 (McHugh J); *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [61] (Callinan, Heydon and Crennan JJ); *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at [17]-[19] (French CJ).

39. The appellant accepts that the standard of what is "*unjust, oppressive or incompatible with humanitarian considerations*" must ultimately be assessed by reference to Australian standards (FFC at [129]-[130]; [332], [356]-[357], [402], [427]). That is, what is "*unjust...*" is to be assessed as a matter of what the "*Requested State considers*" to be unjust. For the purposes of the determination under s 22 of the Act, this *consideration* is to be undertaken by the Attorney-General (or relevant Minister). The precise content to be given to the role of Australian standards, particularly in the context of the bilateral nature of the Treaty obligation, which operates in relation to both extradition to and from Australia, will be explained below.

40. However, what is immediately relevant is that it is not a legally required step in forming the ultimate conclusion that the Minister regard an extradition as *prima facie* unjust whenever the subject of it can identify any respect, or even any material respect, in which the law which has been applied (or will likely, after extradition, be applied) to the person in the Requesting State is less favourable to the person than the equivalent Australian law. That is, a hypothetical non-compliance with Australian criminal law and procedure does not dictate a *prima facie* conclusion that the extradition of the person would be "*unjust*". (Just as in the reverse situation any non-compliance by Australia with the standards of Indonesian criminal law and procedure would not dictate a *prima facie* conclusion that the extradition of a person to Australia would be "*unjust*".) This is the critical error of the majority, which infects its analysis and causes the majority to misconceive the question posed by Article 9(2)(b) of the Treaty.

41. Justice Lander decided the matter on the correct legal basis that there was no legal error in the Minister's decision, once fair regard was had to the whole of the briefing document before the Minister (FFC at [98]-[121]), which invited him to undertake what was a single holistic judgment as to injustice (FFC at [124]), and to the proposition that the Attorney-General or Minister for Justice would have adequate knowledge of Australian law (FFC at [122]-[123]).

42. By contrast, the majority prescribed both the content and the manner of the consideration which the Minister had to give to the question, and then found that his actual consideration was bad in law, to the extent that it did not follow the prescribed formula.[8]

43. Specifically, the majority held that the consideration required by Article 9(2)(b) of the Treaty mandated the following staged approach, where an *in absentia* conviction is involved:

    43.1. First, identify each circumstance in which the conviction was entered in the Requesting State, a right of review or appeal was or would be afforded, and the likely sentence imposed; then hypothetically translate

[8] Justice McKerracher agreed with the conclusions reached by Barker J and the reasons for them (FFC at [127]), and offered additional observations. The additional observations do not offer a discrete legal route to success for the first respondent immune from the errors of Barker J.

those circumstances to Australia and ask what Australian law would provide for in those circumstances;

43.2. If the answer to 43.1 is (in any part) that the law of the Requesting State would apply less favourably than that of the Requested State (from the perspective of the person sought), then those circumstances should be regarded as *prima facie* unjust – and the proposed extradition likewise so regarded as *prima facie* unjust – within the article (that is, unjust to the person sought);

43.3. In those circumstances, the Attorney-General should then ask if the *prima facie* unjust extradition from the perspective of the person sought can be saved (and viewed as overall not "unjust") by reason of the non-personal or less personal considerations of the nature of the offence and the interests of the Requesting State, as part of some overall "*balancing*" or "*weighing*" exercise (see FFC at [326]-[328], [402]-[407], [425]-[426], [428] and also [127], [133]-[135]).

The errors of the majority approach

44. **First**, the question posed by Article 9(2)(b) is whether "*extradition ... would be unjust, oppressive or incompatible with humanitarian considerations*" (emphasis added). The question is not whether the conviction, or any other aspect of the criminal justice system of the Requesting State, would be "*unjust*". As Jacobs J stated in *Perry v Lean* (1985) 39 SASR 515, in a similar but not identical statutory context, the question "*whether 'extradition' is unjust or oppressive, is not to be answered by deciding whether it is unjust or oppressive to charge the defendant. The question is whether it would, on the particular facts of the case, be unjust or oppressive to remove the accused into the jurisdiction of the court in which the charge has been preferred.*"[9]

45. This is not to say that an appreciation, and indeed an assessment, of the criminal justice system of both the Requesting State and the Requested State is not relevant to the determination under Article 9(2)(b), or that the Minister is not required to consider the first respondent's claim that his conviction *in absentia* did not follow upon a fair trial.[10] However, Article 9(2)(b) does not in its terms require the Minister to determine the quality of the conviction as "*unjust*" or otherwise. The "*value judgment*" required by Article 9(2)(b) is made by reference to the proposed extradition and follows upon a consideration of all the relevant factors outlined in Article 9(2)(b); namely, the nature of the offence; the interests of the Requesting State, and all the circumstances of the case. This error is significant as it promotes further errors.

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9 *Perry v Lean* (1985) 39 SASR 515 at 519.4; see also 521.7.

10 The first respondent submitted to the Minister a legal opinion that: "*[t]he fact of and circumstances surrounding Mr Adams' trial and appeal in absentia provide strong grounds to believe that he has not received a fair trial and that his extradition would be 'unjust'*" under Article 9(2)(b), according to Australian and international law (Annexure "A" to the submission to the Attorney-General of 18 December 2009, p 20; see also pp 4-11), given the "*discrepancy in standards*" as between Australian and Indonesian law (p 8). See also Attachment B at [181]ff.

46. **Secondly**, as outlined above, the majority adopted a tiered and hierarchical approach as the necessary and only means by which the decision-maker could lawfully make a decision under s 22(3) of the Act and Article 9(2)(b) of the Treaty. This is a staged process of assessment (FFC at [403]), whereby the circumstances of the case (here, the circumstances of the first respondent's conviction *in absentia) must be considered as* a "*primary factor*" and "*starting point*" (FFC at [326]), against which other prescribed considerations (namely, the nature of the offence and the interests of the Requesting State) only come into play as a possible counterpoint to any *prima facie* injustice, oppression or incompatibility with humanitarian standards (FFC at [402], [407]).

47. The ordinary meaning of the terms of Article 9(2)(b) ("*while also taking into account ...*") speaks against a bifurcated, sequential process of consideration. Article 9(2)(b) does not call for two separate processes of consideration: that is, a primary process concerned with the "*circumstances of the case*" and the question whether those circumstances are considered unjust, and a subsequent and secondary process concerned with the nature of the offence and the interests of the Requesting State, such that the result of the latter process may conflict with the result of the former process. It is open to the Minister to form a single value judgment under Article 9(2)(b), whereby, to take language from another context, the consideration is a "*single combined operation which takes into account all relevant facts as a whole*",[11] which factors are considered "*compositively*".[12]

48. This view receives some support from the decision of this Court in *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 (***Foster***),[13] noting the precise legislative framework there was not identical to the present. There the operation of the Act was modified directly by the relevant Regulation; no bilateral treaty was involved. Further, the Regulation made no reference to the interests of the Requesting State. Regulation 7 of the *Extradition (Commonwealth Countries) Regulations* (Cth) called for the Attorney-General to be satisfied that, "*by reason of: (a) the trivial nature of the offence; ... or (c) any other sufficient cause; it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to surrender the eligible person*". The appellant complained that the Minister failed sufficiently to take account of his claim that, if extradited to the United Kingdom, it was unlikely that the he would be sentenced to a term of imprisonment additional to the time that he would already have spent in custody.

49. It was held by Gleeson CJ and McHugh J that, for the appellant's argument to succeed, there must be found in the legislation an implied obligation on the Minister to examine and investigate the contention at the level of particularity involved in the appellant's submission. On that basis, their Honours held that: *"[i]t does not follow that, in every case where such a contention is raised, the Minister is bound to investigate the facts, and sentencing practices of the*

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11 *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 254.3 (McHugh J).

12 *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 254.5 (McHugh J).

13 Justice Barker wrongly relied upon this decision at [339]-[351] as supporting his approach.

country seeking extradition, in order to be in a position to make for himself or herself a forecast of the likely sentence that will be imposed if extradition occurs" (at [26]). Their Honours concluded that the Minister was entitled to consider and evaluate the arguments advanced on the materials before her: "*She was not obliged to conduct her own sentencing investigation*" (at [30]). This approach would allow for the lawfulness of a single holistic assessment of injustice.

50. Justices Gaudron and Hayne concluded (at [45]) that "*s 22(3) requires the Minister to be satisfied that the limitation prescribed by the regulation does* not *apply.*[14] *In the context of reg 7 the relevant limitation depends upon the formation of a particular value judgment. In those circumstances, s 22(3) can provide no basis for the contention that the Minister was* bound *to take into account whether a non-custodial sentence was likely.*"

51. Their Honours also held (at [41]) that: "*At least for most purposes, the words 'unjust or oppressive or too severe a punishment' will be better understood as providing a single description of the relevant criterion which is to be applied rather than as three distinctly different criteria.*" While Barker J drew support from this statement (FFC at [351]), it is submitted that it is more consistent with the availability in law of a single holistic judgment as commended by the appellant.

52. Furthermore, if it must first be determined that the conviction *in absentia* represents "*manifest injustice*" (FFC at [135]), it is not evident how it can then be determined (subsequently) that surrender would not be unjust on the basis of the considerations (mandated under Article 9(2)(b)) of the nature of the offence and the interests of the Requesting State. The need to negate injustice necessarily arises in this two-tiered approach, which elevates the question of whether the conviction is "*unjust*" to an ultimate consideration, thereby giving the other factors in Article 9(2)(b) no real role to play in that assessment.

53. Nor is the conundrum resolved by saying one weighs the *in absentia* conviction which is unjust on a personal basis against the non-personal or less personal nature of the offence and interests of the Requesting State (FFC at [328]).

54. This invocation of a "*balancing exercise*", where a *prima facie* unjust extradition is then converted into a not unjust extradition by reference to other factors is reminiscent of a former approach to s 50 of the *Federal Court of Australia Act 1976* (Cth), rejected in *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31]-[33].

55. **Thirdly**, the majority equated consideration of what is "*unjust*" from the perspective of "*Australian standards*" with the question of compliance with

[14] In the present case, s 22(3)(e)(iv) (by virtue of s 22(3)(e)(ii)) requires the Minister to be satisfied that the limitation in Article 9(2)(b), which has the effect that the surrender of the person may be refused, either does not exist or does exist but that nevertheless surrender should not be refused. The Court below proceeded on the basis that the Minister approved surrender on the basis that the limitation did not exist (that is, that the surrender of the first person would not be "*unjust* ...") (FFC at [330]).

Australian law and practice. Notwithstanding the difficulty of pronouncing upon a uniform 'Australian standard',[15] according to the approach of the majority, any substantial discrepancy unfavourable to the accused between the law of Australia and the Requesting State (in this case, regarding the circumstances of obtaining a conviction, the right to appeal or the likely sentence) will be such as to render the law of the Requesting State "*unjust*" by Australian standards. It is only then (if at all, as discussed in the preceding paragraphs) that the Minister must consider the nature of the offence, the interests of the Requesting State, and any other "*circumstances of the case*" to determine whether those circumstances negate that injustice. This method and result is neither correct nor supported by the approach of this Court.

56. In *Foster*, Gaudron and Hayne JJ found, in the different statutory context there, that the question as to how one measures what is "unjust or oppressive" must be that "*the value judgment which the expression requires is to be made according to Australian standards, not the standards of any country*" (at [43]).[16] This followed the caution that the like language of the regulation in that case might be better viewed as a single, composite phrase, or at least one with overlapping elements (at [41]). Reading these passages together tends to confirm that a single, holistic assessment is available in law.

57. Australian standards must have some role to play where the question posed by Article 9(2)(b) is whether the "*Requested State... considers that*" extradition would be unjust. The question is: What role? The appellant submits that this does not necessitate a rigid and fixed comparative analysis of Australian and Indonesian criminal law, whereby any substantial discrepancy (to the extent that one system affords a greater level of protection of the rights of the defendant than the other) renders those less favourable features of the foreign system "*unjust, oppressive or incompatible with humanitarian standards*".[17]

58. This approach is supported by that of the Supreme Court of Canada, albeit in a different constitutional setting, which has held that the extradition process does not require conformity with local norms and standards. The foreign judicial system will not necessarily be considered "*fundamentally unjust*" because it

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15 That standard may, for example, vary as between the States and Territories.

16 Their Honours stated that the precise nature and content of that inquiry may require further consideration in an appropriate case, but refrained from doing so given that little or no argument was directed to that inquiry. Their Honours referred (at FN 27) to La Forest, *Extradition to and from Canada*, 3rd ed (1991), p 241, in which it is stated that the question whether a person should be surrendered from Canada should depend primarily on the seriousness with which the crime is regarded in Canada, and not in the foreign country. In that regard, La Forest relied upon the decision of *Ex P Bennett* (1974), 17 CCC (2d) 274 (Ont HCJ), which considered a provision of an Act that empowered the court to discharge the fugitive where it appeared "*to the court that by reason of the trivial nature of the case*" or other factors return of the fugitive would be "*unjust, oppressive or too severe a punishment*".

17 For example, Australian law may prescribe a standard that is higher than the international minimum standard for political, regulatory and other reasons.

operates in a manner different from, and without the legal safeguards demanded in, the local system of criminal justice.[18]

59. **Fourthly**, there is the related issue, which *Foster* did not have to consider, that the critical expression is incorporated into the Act from a treaty.

60. The meaning accorded by the Minister to the phrase "*unjust, oppressive or incompatible with humanitarian standards*" is one that Australia would expect, as a matter of a bilateral promise, Indonesia to accord to the same phrase.[19] In that regard, neither the article nor s 22 of the Act reduces the phrase effectively to a single dictate: namely, anything which is not done in accordance with the standards of the criminal law and procedure of the Requested State is *prima facie* unjust and oppressive. The Requested State is entitled to consider a range of material in forming the ultimate value judgment, including Australian practice; the practice of the Requesting State; and, where appropriate, practice in other nations, as well as international law.

61. In so doing, the Treaty does not *require* either State to make a determination that the features of the criminal justice system of its treaty partner are "*unjust*" whenever they are less favourable to an accused than at home. There will be a raft of areas where differences will emerge between States in their criminal law and procedure, including the rules of evidence; the provision of legal aid; scope of cross-examination; breadth of appeal rights; sentencing practice, including maxima, minima, and fixed term sentences; and prison conditions.

62. Such an approach would undermine the object of the Treaty (found in its preamble), which is to promote bilateral cooperation in the repression of crime and relations between the two countries in matters of extradition, by *requiring* such a judgment to be made and declared, and also by providing a ready opt-out of the agreement to cooperate.

63. Furthermore, it would be an awkward construction of what is a discretionary exception to extradition (by way of Article 9(2)), alongside mandatory exceptions in Article 9(1), and outright exclusions relating to the operation of the foreign system of criminal justice by way of Article 4 (political offences), Article 6 (double jeopardy) and Article 7 (death penalty). The approach of the majority inverts the role of the Article 9(2)(b) within the scheme of the Treaty, whereby any substantial difference between legal systems unfavourable to the accused will effectively be a circumstance precluding extradition (subject to some ill-defined ability to outweigh it on the "non-personal" grounds).

64. Moreover, such an approach does not sit well alongside the interpretative provision in s 10(1) of the Act (mirrored in Article 11(1) of the Treaty), which

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18 *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at 845 (McLachlin J, who formed part of the majority), applying *Canada v Schmidt* [1987] 1 SCR 500 at 522 (La Forest J, delivering the judgment of the plurality).

19 International treaties should be interpreted uniformly by contracting parties: *Povey v QANTAS Airways Pty Ltd* (2005) 223 CLR 189 at 202 [24]-[25] (Gleeson CJ, Gummow, Hayne and Heydon JJ); Cf *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188 at 268 [220] (French J).

proceeds on the basis that the circumstance of a person convicted in their absence of an offence against the law of an extradition country is an accepted case for extradition.[20]

65. **Fifthly**, reliance by the majority on the decisions of *Bannister v New Zealand* (1999) in 86 FCR 417 (***Bannister***) and *Binge v Bennett* (1988) 13 NSWLR 578 (***Bennett***), in support of the proposition that the question of injustice must be assessed "*from an Australian perspective against Australian standards, not by any other perspective or standards that do not form part of Australian law*"[21] is misplaced.[22] The majority have failed to distinguish between judicial review and the Court forming its own judgment on the ultimate question.

66. In *Bannister*, the Full Court heard an appeal under s 35(3) of the Act from the decision of the Supreme Court of Queensland, which decision quashed the determination of the magistrate under s 34(2) of the Act[23] to discharge the appellant on the basis that it would be "*unjust, oppressive or too severe a punishment*" to surrender him to New Zealand. Section 34 embodies a "backing of warrants" scheme rather different to the present context. In that regard, the Full Court was determining for itself whether the surrender would be "unjust", and accordingly looked to "*Australian [legal] standards*" evidenced in the jurisprudence of the High Court to determine that question.[24] This is not the same function as when a court undertakes judicial review of an executive decision, where the court conducting the review is called upon to ascertain jurisdictional error (if any), and not to determine the statutory question for itself.

67. Similarly, in *Bennett*, the appeal was concerned with a rehearing by the Supreme Court, pursuant to s 19(3) of the *Service and Execution of Process Act 1901* (Cth), of the magistrate's a determination under s 18(6)(c) of that Act, the terms of which were similar to those under consideration in *Bannister*.

68. This is not akin to judicial review of the Minister's decision under s 22 of the Act. Moreover, the present case is concerned with a statutory framework (by reference to the Treaty) that requires the decision-maker to consider factors in a way that is quite distinct from s 34 of the Act.

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20 This is consistent with the approach of Lander J in FFC at [42]-[46], [50]. See also *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 558, where Gummow J referred to s 10(1) of the Act as an example of legislative awareness of the need to accommodate the procedures of foreign jurisdictions in general, and of a species of conviction under foreign systems of law that does not correspond to that applying in common law countries in particular.

21 FFC at [333]-[338] (Barker J).

22 Similarly, in *Kakis v Government of the Republic of Cyprus* (1978) 1 WLR 779, the assessment of what was "*unjust or oppressive*" was one for the Court to make, by statute, and concerned the risk of prejudice to the accused in the prospective conduct of a trial, rather than a past event or circumstance.

23 Subsection 34(2) of the Act provides that, if the magistrate is satisfied by the person that, because of circumstances including the trivial nature of the offence, "*or for any other reason, it would be unjust, oppressive or too severe a punishment*" to surrender the person to New Zealand, the magistrate shall order that the person be released. The magistrate was acting in an administrative capacity: *Newman v New Zealand (No 2)* (2012) 206 FCR 17 at [17].

24 As the Full Court stated in *Bannister v New Zealand* (1999) 86 FCR 417 at [26]: "*In considering the present application, we can only apply the decision of our own ultimate appellate court.*"

69. Both *Bannister* and *Bennett* are addressed to the broader, and discrete, question of the application of Australian standards to the assessment of what is "unjust", etc. In that regard, they go no further than to say that it is relevant to consider (with some caution as to transferring what was said about these words in one context to their use in another)[25] the incidents of the criminal justice system in considering the analogous, but distinct, phrase in s 34(2) of the Act and s 18(6)(c) of the *Service and Execution of Process Act*.[26]

70. Accordingly, the value judgment called for by Article 9(2)(b) is not one for the Court itself directly to make within the judicial review framework. By virtue of s 22(3)(e) of the Act, it is reposed in the Minister. Accordingly, a focus upon the justice of a conviction by reference to (putative) Australian criminal law removes the value judgment from the Minister and makes it an assessment under Australian law. Consequently, by determining the "*manifest injustice*" of the first respondent's conviction *in absentia*, the majority is not only asking the wrong question, but also providing an answer that is the preserve of the Minister (within the bounds of legal reasonableness). As Gaudron and Hayne JJ held in *Foster* at [38]: "*Section 22(3)(e) does not depend directly upon any conclusion about some question of fact or law. The relevant state of satisfaction is of matters described in qualitative terms which call for the making of value judgments about which reasonable minds may differ. The engagement of s 22(3)(e) in this case depends, therefore, upon the judgment reached by the Minister.*"

71. This error pervades the first respondent's submissions as made throughout this matter, on special leave and it may be expected to be repeated on the appeal.

72. **Finally**, a related error concerns the inference drawn by the majority, on the basis of the content of the Departmental submission, that the Minister did not consider the question whether the circumstances of the first respondent's conviction *in absentia* complied with Australian law (FFC at [133], [135]-[136]; [249], [428]). Even if it were concluded that the Departmental advice was deficient,[27] that deficiency alone would not constitute reviewable error or render the decision invalid (there is no evidence that the submissions were intentionally false or misleading),[28] nor does it demonstrate that the Minister so

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25 *Binge v Bennett* (1988) 13 NSWLR 578 at 596A-B (Mahoney JA).

26 *Bannister v New Zealand* (1999) 86 FCR 417 at [22], [26]; *Binge v Bennett* (1988) 13 NSWLR 578 at 596C (Mahoney JA).

27 The majority relied upon (what their Honours considered) the deficiency of the passage in the Departmental Submission to the Minister (Attachment B) at [197], which provides: "As a *preliminary point, the Department notes that convictions in a person's absence are rare in Australia and generally only occur for summary offences or where the defendant has deliberately absented himself from proceedings after having appeared initially.*"

28 *Oates v Attorney-General (Cth)* (2001) 181 ALR 559 at [133] (Lindgren J); *McHugh Holdings Pty Ltd v Director General Communities (NSW)* [2009] NSWSC 1359 at [41] (Hoeben J). See also *Brock v Minister for Home Affairs* [2010] FCA 1301 at [71] (Foster J); *Vasiljkovic v O'Connor* [2010] FCA 1246 at [110] (Edmonds J).

misunderstood the question he had to decide under the Act that he fell into jurisdictional error.[29]

73. In that regard, there is a step missing in reaching the conclusion that the Minister was misled into taking into account a "*wrong*" consideration ("*mere rarity*") (FFC at [136]), or failing to take into account the "*correct*" relevant consideration. Furthermore, it would have to be demonstrated, not only that the Minister considered the "*mere rarity*" of *in absentia* convictions in Australia, but that the Minister was bound not to have regard to this consideration. This is clearly not so.

74. Indeed, one only needs to review those parts of Attachment B of the submission to the Minister set out by Lander J at FFC [101], [104]-[106], [109], [112], [113] and [116] – largely not referred to by the majority – to see that the Minister was informed in sufficient detail of the circumstances under Indonesian law governing:

74.1. why in relation to this type of offence, and this form of non-personal service, the *in absentia* conviction was regarded as lawful;

74.2. the availability of limited appeal rights; and

74.3. the likely sentencing outcomes.

75. The Attorney-General or Minister for Justice, was adequately placed, as a person with a high degree of responsibility for our criminal justice system, to bring to bear Australian standards on those circumstances, as part of the single, overall assessment. The finding that it was not enough for the Minister to be told that *in absentia* convictions are "*rare*" in Australia (FFC at [415]) and that he accordingly was "*constructively misled*" (FFC at [426]) is to impute legal ignorance to the Minister without foundation.

76. It is evident that the majority considered that it was a mandatory relevant consideration that an *in absentia* conviction leading to life imprisonment with no individual right of appeal would not have occurred (and so be "*manifestly unjust*") in Australia (FFC at [133]-[135]; [404]). The majority appears to have inferred that the Minister did not consider this from the fact that the Departmental Submission did not describe matters this way.

77. This misconceives what is meant by a mandatory relevant consideration within the statutory scheme. The majority has labelled as a mandatory relevant consideration what is one, debatable, way of analysing the material that was before the Minister in making the ultimate value judgment.

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[29] See *Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at [35] (McHugh J). See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [83] (McHugh, Gummow and Hayne JJ).

78. Here again the majority has misinterpreted the role of the court on judicial review.

PART VII LEGISLATIVE MATERIALS

79. The relevant statutory provisions and regulations (as at the date of the appellant's determination on 17 December 2010) are reproduced in Annexure I.

80. Those provisions are still in force, in that form, at the date of making these submissions, save for sub-ss 10(3), 11(6), 22(1) and (5), which have been subsequently amended or repealed, and sub-ss 22(6) and (7), which have been subsequently added, although they are not pertinent to this appeal.

PART VIII ORDERS

81. For the reasons set out above, the appeal should be allowed.

82. The order of the Full Court given on 15 February 2013 (dismissing the appeal before it) should be set aside, and in substitution therefor:

    82.1. The appeal be allowed.

    82.2. The orders made by the primary judge on 15 March 2012 be set aside.[30] In substitution for those orders, the application be dismissed.

PART IX ESTIMATE OF ORAL ARGUMENT

83. It is estimated that between 1.5 and 2 hours will be required for the presentation of oral argument, depending on the submissions made by the first respondent in support of the notice of contention.

Dated: 17 October 2013

Justin Gleeson SC
Solicitor-General of the Commonwealth
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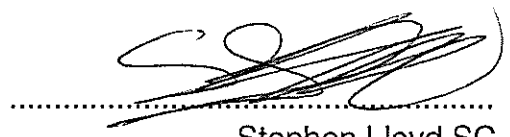
Email: Justin.Gleeson@ag.gov.au

[30] The appellant does not seek to disturb the costs orders below (which were given by the primary judge on 12 April 2012). Orders 1 and 2 of the orders made on 15 March 2012 are directed to the quashing of the s 22 determination and the s 23 surrender warrant.



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Counsel for the Appellant

ANNEXURE I

LEGISLATIVE MATERIALS

EXTRACTS FROM *EXTRADITION ACT 1988* (CTH)

10 Interpretative provisions relating to offences

(1) Where a person has been convicted in the person's absence of an offence against the law of an extradition country, whether or not the conviction is a final conviction, then, for the purposes of this Act, the person is deemed not to have been convicted of that offence but is deemed to be accused of that offence.

(2) 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.

(3) In determining for the purposes of paragraph 7(d), subparagraph 16(2)(a)(ii) or paragraph 19(2)(c) whether, if conduct constituting an extradition offence in relation to an extradition country, or equivalent conduct, had taken place in Australia or in a part of Australia at a particular time, that conduct or equivalent conduct would have constituted an offence of a particular kind in relation to Australia or the part of Australia, the following provisions have effect:

(a) where the conduct or equivalent conduct consists of 2 or more acts or omissions—regard may be had to all or to only one or some of those acts or omissions;

(b) any difference between the denomination or categorisation of offences under the law of the country and the law of Australia, or the law in force in the part of Australia, as the case requires, shall be disregarded.

(4) A reference in this Act to an extradition offence for which surrender of a person is sought by an extradition country is, in relation to a time after the Attorney-General has given a notice under subsection 16(1) in relation to the person, a reference to any extradition offence to which the notice (including the notice as amended) relates.

11 Modification of Act in relation to certain countries

(1) The regulations may:

(a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral

extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or

(b) make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications, other than such limitations, conditions, exceptions or qualifications as are necessary to give effect to a multilateral extradition treaty in relation to the country.

(1A) The regulations may provide that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a multilateral extradition treaty in relation to the country.

(1B) Regulations may be made under both subsections (1) and (1A) in relation to a specified extradition country.

(1C) For the purposes of subsections (1) and (1A), the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies to the country concerned subject to that treaty.

(2) For the purposes of subsections (1) and (1A), but without otherwise affecting the generality of that subsection, the reference in paragraphs (1)(a) and (b) and subsection (1A) to this Act applying subject to limitations, conditions, exceptions or qualifications is deemed to include a reference to this Act applying subject to a modification to the effect that a number of days greater or less than the 45 days referred to in paragraph 17(2)(a) applies for the purposes of that paragraph.

(3) Until the regulations make provision as mentioned in subsection (1) in relation to an extradition country, being a foreign state to which paragraph (c) of the definition of ***extradition country*** in section 5 applies, this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications to which the former Foreign Extradition Act, in its application in relation to the extradition country as a foreign state, was subject by virtue of section 9 of that Act, but only to the extent that they are not inconsistent with limitations, conditions, exceptions or qualifications provided for by regulations under subsection (1A).

(4) Where, by virtue of subsection (1) or (3), this Act applies in relation to an extradition country subject to a limitation, condition, qualification or exception that, but for this subsection, would have the effect that a person is not eligible for surrender to the extradition country in relation to an extradition offence for the purposes of subsection 19(2) unless the sufficient evidence test is

satisfied, then, that limitation, condition, qualification or exception shall be taken instead to have the effect that the person is not eligible for surrender to that country in relation to that offence for the purposes of subsection 19(2) unless the *prima facie* evidence test is satisfied.

(5) For the purposes of subsection (4):

(a) a reference to the sufficient evidence test being satisfied is a reference to the provision of evidence that, if the conduct of the person constituting the extradition offence referred to in that subsection had taken place in a part of Australia, would be sufficient to:

(i) justify trial of the person in relation to an offence against a law in force in the part of Australia;

(ii) justify committal of the person for trial in relation to such an offence; or

(iii) establish a *prima facie* case that the person committed such an offence; and

(b) a reference to the *prima facie* evidence test being satisfied is a reference to the provision of evidence that, if the conduct of the person constituting the extradition offence referred to in that subsection had taken place in the part of Australia referred to in paragraph (a) of this subsection, would, if uncontroverted, provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence.

(6) For the purpose of determining under subsection 19(1) whether a person is eligible for surrender in relation to an extradition offence for which surrender of the person is sought by an extradition country, no limitation, condition, qualification or exception otherwise applicable under this section (not including a limitation, condition, qualification or exception having the effect referred to in subsection (4)) has the effect of requiring or permitting a magistrate to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d).

22 Surrender determination by Attorney-General

(1) In this section:

eligible person means a person who has been committed to prison:

(a) by order of a magistrate made under section 18; or

(b) by order of a magistrate made under subsection 19(9) or required to be made under subparagraph 21(2)(b)(ii) (including by virtue of an appeal referred to in section 21),

being an order in relation to which no proceedings under section 21 are being conducted or available.

qualifying extradition offence, in relation to an eligible person, means any extradition offence:

(a) if paragraph (a) of the definition of ***eligible person*** applies—in relation to which the person consented in accordance with section 18; or

(b) if paragraph (b) of the definition of ***eligible person*** applies—in relation to which the magistrate referred to in that paragraph or the court that conducted final proceedings under section 21, as the case requires, determined that the person was eligible for surrender within the meaning of subsection 19(2).

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;

(b) the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;

(c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out;

(d) the extradition country concerned has given a speciality assurance in relation to the person;

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances—the Attorney-General is satisfied:

(iii) where subparagraph (i) applies—that the circumstances do not exist; or

(iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

(4) For the purposes of paragraph (3)(d), the extradition country shall be taken to have given a speciality assurance in relation to the eligible person if, by virtue of:

(a) a provision of the law of the country;

(b) a provision of an extradition treaty in relation to the country; or

(c) an undertaking given by the country to Australia;

the eligible person, after being surrendered to the country, will not, unless the eligible person has left or had the opportunity of leaving the country:

(d) be detained or tried in the country for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender other than:

(i) any surrender offence;

(ii) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the eligible person could be convicted on proof of the conduct constituting any surrender offence;

(iii) any extradition offence in relation to the country (not being an offence for which the country sought the surrender of the eligible person in proceedings under section 19) in respect of which the Attorney-General consents to the eligible person being so detained or tried; or

(e) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender to the first-mentioned country, other than any offence in respect of which the Attorney-General consents to the eligible person being so detained and surrendered.

(5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any qualifying extradition offence, the Attorney-General shall order, in writing, the release of the person.

EXTRACTS FROM *EXTRADITION (REPUBLIC OF INDONESIA) REGULATIONS 1994* (CTH)

Declaration of Republic of Indonesia as extradition country

4. The Republic of Indonesia is declared to be an extradition country.

Application of Act

5. The Act applies in relation to the Republic of Indonesia subject to the Extradition Treaty between Australia and the Republic of Indonesia done at Jakarta on 22 April 1992 (being the treaty a copy of the English text of which is set out in the Schedule).

SCHEDULE

EXTRADITION TREATY BETWEEN AUSTRALIA AND THE REPUBLIC OF INDONESIA

AUSTRALIA AND THE REPUBLIC OF INDONESIA,

DESIRING to make more effective the cooperation of the two countries in the repression of crime and specifically, to regulate and thereby promote the relations between them in matters of extradition,

HAVE AGREED AS FOLLOWS:

...

Article 9
Exceptions to Extradition

1. Extradition shall not be granted in any of the following circumstances:
   (a) where the person sought has acquired exemption from prosecution or punishment by reason of lapse of time or other lawful cause according to the law of either Contracting State in respect of the act or omission constituting the offence for which extradition is requested;
   (b) where the act or omission constituting the offence for which extradition is requested is of a kind that, under the law of the Requested State, constitutes an offence only against military law;
   (c) where the person whose extradition is requested is liable to be tried by a court or tribunal that is especially established for the purpose of trying his case or is only occasionally, or under

exceptional circumstances, authorised to try such cases or his extradition is requested for the purpose of his serving a sentence imposed by such a court or tribunal;

(d) where the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions; or

(e) where the Requested State has substantial reasons for believing that the person whose extradition is requested will be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

2. Extradition may be refused in any of the following circumstances:

(a) where an investigation is in progress or a prosecution is pending in the Requested State in respect of the offence for which the extradition of the person is requested;

(b) where the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive or incompatible with humanitarian considerations;

(c) in the case of a person convicted and sentenced in respect of an offence, less than six months of the sentence of imprisonment or any other form of deprivation of liberty imposed in the Requesting State for the offence for which extradition is requested remains to be served, taking into account the serious nature of the offence;

(d) if the competent authorities of the Requested State have decided in the public interest to refrain from prosecuting the person for the offence in respect of which extradition is requested; or

(e) where the offence for which extradition is requested is regarded under the law of the Requested State as having been committed in whole or in part within that State.