HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

PETER CLARENCE FOSTER APPELLANT

AND

MINISTER FOR CUSTOMS AND JUSTICE RESPONDENT

Foster v Minister for Customs and Justice [2000] HCA 38
Date of Order: 21 June 2000
Date of Publication of Reasons: 3 August 2000
B92/1999

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

W Sofronoff QC with D C Rangiah for the appellant (instructed by Patrick Murphy)

D M J Bennett QC, Solicitor-General of the Commonwealth with J A Logan SC for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Peter Clarence Foster v Minister for Customs and Justice

Extradition – Extradition to and from Commonwealth countries – Surrender determination by Attorney-General – Limitation condition qualification or exception – Satisfaction that circumstances engaging limitation condition qualification or exception do not exist – Unjust or oppressive or too severe a punishment to surrender eligible person – Double layer of satisfaction – Whether the Minister is satisfied that he or she is not satisfied that it would be unjust or oppressive or too severe a punishment to surrender eligible person.

Administrative law – Judicial review legislation – Alleged failure to take into account a particular consideration – Extent of Minister's obligation to make inquiries.

Words and Phrases – "unjust or oppressive or too severe a punishment".

Extradition Act 1988 (Cth), ss 22, 23.
Extradition (Commonwealth Countries) Regulations (Cth), reg 7.

1 GLEESON CJ AND McHUGH J. The issues in this appeal arise under the *Extradition Act* 1988 (Cth) ("the Act") and the Extradition (Commonwealth Countries) Regulations (Cth) ("the Regulations"). The respondent, by delegation from the Attorney-General, exercises powers under the Act. Pursuant to s 22 of the Act, she determined that the appellant was to be surrendered in relation to three extradition offences allegedly committed in the United Kingdom, a magistrate having previously determined that the appellant was eligible for surrender in respect of those and two other offences. Then, pursuant to s 23 of the Act, she issued a warrant for the surrender of the appellant to the United Kingdom. There had been an earlier determination, and warrant, in relation to five offences including the three mentioned above. Much of the material upon which the Minister acted in relation to the three offences had originally been provided in relation to the five.

2 The present appeal arises out of proceedings in the Federal Court of Australia in which the appellant challenged the Minister's exercise of her powers under the Act upon the ground that she failed to take account of a particular consideration, said to be one that she was bound to take into account, in that she did not inquire into a certain matter raised with her by the appellant's solicitor. The challenge was rejected by Drummond J at first instance[1]. By majority, (Moore and Kiefel JJ, Carr J dissenting) an appeal to the Full Court of the Federal Court was dismissed[2]. The appellant appeals, by special leave, to this Court.

The Act and the Regulations

3 Section 23 of the Act provides:

> "Where the Attorney-General determines under subsection 22(2) that a person is to be surrendered to an extradition country in relation to an extradition offence or extradition offences, the Attorney-General shall, unless the Attorney-General issues a temporary surrender warrant, issue a warrant for the surrender of the person to the extradition country under this section."

4 Section 22 provides:

> "(1) …

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1 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357.

2 *Foster v Minister for Customs and Justice* unreported, Federal Court of Australia, 22 October 1999.

(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.

…"

5 Section 11(1)(b) provides:

"(1) The regulations may:

(a) …

(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."

6 Regulation 7 of the Regulations, which, by regs 2 and 3, applies to the United Kingdom as an extradition country, provides:

"(1) … for the purposes of subsection 22(2) of the Act … such a person shall not be surrendered in relation to such an offence if the Attorney-General is satisfied that by reason of:

(a) the trivial nature of the offence;

(b) …

(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 …"

7 There is a double layer of satisfaction involved in s 22(3)(e) and reg 7. The section provides that the eligible person is only to be surrendered if the Attorney-General (or Minister) is satisfied that circumstances engaging a limitation, condition, qualification or exception to surrender contained in the Regulations do not exist. Regulation 7 provides for such a limitation. It prohibits surrender if the Attorney-General (or Minister) is satisfied that it would be unjust, oppressive or too severe a punishment. Therefore, in order to surrender a person the Attorney-General (or Minister) must be satisfied that he or she is not satisfied that it would be unjust, oppressive or too severe a punishment.

Since what is involved is the state of satisfaction, or lack of satisfaction, of the one decision-maker, what is critical is whether the decision-maker is satisfied of a matter referred to in reg 7. Applying the Act and Regulations to the present case, the Minister was obliged to ask whether she was satisfied that, by reason of the trivial nature of the appellant's alleged offences or by reason of 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. If the answer to that question were in the negative, then she would be satisfied that the circumstances referred to in s 22(3)(e)(iii) did not exist, and the qualification imposed by s 22(3)(e) upon the extent of her powers under ss 22 and 23 would not operate to inhibit their exercise.

8 The issue is whether, in concluding that she did not have the state of satisfaction referred to in reg 7, the Minister failed to act according to law in that she failed to take into account, or, adequately to examine, a consideration she was bound to take into account.

9 In order to explain the factual basis of that argument, it is necessary to refer to the background to the attempt to extradite the appellant, the arguments that were advanced to the Minister by his solicitor, and the Departmental reports and recommendations upon which the Minister acted.

The material before the Minister

10 The appellant has a significant criminal record and a rather complicated custodial history. For present purposes, it suffices to say that, during 1997, he was arrested in Australia in relation to a number of offences said to have been committed in the United Kingdom. That country's Serious Fraud Office alleged that the appellant and a man named Williams, in the course of marketing cosmetics, were involved in fraudulent practices involving the use of false documents. Attempts by the appellant to resist extradition gave rise to litigation in the Federal Court[3]. In late 1997 the appellant absconded, but he was re-arrested in February 1998. Submissions were made to the Attorney-General, and later the Minister, by the appellant's solicitor. Before the matter reached finality, the number of offences in respect of which extradition was sought was reduced to three. The reason for this was that the charges against the appellant had originally been framed upon the assumption that certain writing on allegedly false documents was that of Williams. That assumption had resulted in charges alleging a conspiracy between the appellant and Williams. However, handwriting experts concluded that the writing was that of the appellant, not Williams. In the result, conspiracy charges were not pursued. It was decided to

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3 See *Attorney-General (Cth) v Foster* (1999) 84 FCR 582.

prosecute the appellant on charges of substantive offences, abandoning conspiracy. The reduction in the number of alleged offences resulted, not from the taking of a less unfavourable view as to the appellant's alleged criminality, but from the exculpation of Williams as a co-offender in relation to some of the matters.

11 The present proceedings were commenced in the Federal Court on 7 April 1999. The issues raised at first instance, and on appeal to the Full Court, were wider than those argued in this Court. As was noted, there had been earlier proceedings in the Federal Court raising other questions concerning the attempt to extradite the appellant. The appellant's solicitor had, during 1998 and early 1999, made written representations in relation to a number of matters. The 1998 representations were included in a ministerial submission prepared by a Departmental officer in connection with an exercise of powers under ss 22(2) and 23 of the Act in relation to the five offences. That 1998 ministerial submission was again before the Minister when she came to consider the 1999 ministerial submission referred to below. For present purposes, it is necessary to consider only the representations which bear upon the subject that was argued in this Court. For practical purposes, they were contained in letters of 7 May 1998 and 2 March 1999. On 26 March 1999, Mr Shiel, a Departmental officer, prepared a memorandum discussing the submissions and recommending that the Minister exercise her powers under ss 22(2) and 23 of the Act. On 30 March 1999, the Minister accepted the recommendations and endorsed Mr Shiel's memorandum accordingly.

12 For present purposes, the important points in the solicitor's submissions are those relating to reg 7. In brief, two interrelated points were made. First, it was argued that the offences were trivial in nature. Secondly, it was argued that, the appellant already having spent a substantial period in custody in Australia awaiting extradition, it was unlikely that, if the appellant were extradited to the United Kingdom and convicted of the offences, he would be sentenced to a term of imprisonment additional to the time he would already have spent in custody. By reason of either or both of those matters, it was said, having regard to all the circumstances, it would be unjust or oppressive or too severe a punishment to surrender the appellant.

13 The reduction in the number of offences to three was the occasion of supplementary submissions in March 1999, and of the need for a fresh determination by the Minister, but the representations of present relevance were substantially made, and evaluated by the Minister's advisers, in 1998.

14 In the letter of 7 May 1998 the appellant's solicitor referred to s 22(3)(e) and reg 7, and to the need to consider questions as to "the trivial nature of the offence". In that connection an argument was advanced about the detail of the facts and circumstances of the alleged offences. The letter then submitted that

the reference in reg 7 to "the trivial nature of the offence" contemplates a consideration of the penalty likely to be imposed. Reference was then made to three matters: first, the time the appellant had already spent in custody awaiting extradition, including the circumstances of such custody; secondly, what were said to be his good prospects of rehabilitation; thirdly, the assistance he had given the authorities in relation to the investigation of other offences in which he was not involved. The argument concluded as follows:

> "In our respectful submission, it is very likely that *when all such matters are taken into account* it is likely that if any further term of imprisonment were to be imposed on Mr Foster the term would be very short indeed. If you agree with that proposition then we would respectfully submit that you would be satisfied that in the circumstances it would be unjust and/or oppressive and/or too severe a punishment to surrender Mr Foster for return to the United Kingdom." (emphasis added)

15 In July 1998, Departmental officers prepared for the Minister, in support of a recommendation to exercise the powers under ss 22 and 23, a commentary upon these submissions. That commentary was later made available to the Minister again when the subject was re-considered in March 1999. The commentary covered a number of other matters as well, but, in relation to the subject of present concern, it was as follows. Section 23(3)(e) and reg 7 were summarised. Under the heading "Trivial nature of the offence – intention", the solicitor's submissions as to the circumstances of the offences were set out. The view was expressed that, having regard to the material advanced on behalf of the appellant, there was no basis for concluding that he lacked fraudulent intention or that the offences were trivial, especially considering that the maximum penalty was 10 years imprisonment. Under the heading "Trivial nature of the offence – sentencing", there was an examination of the submission that there was likely to be either no additional custodial sentence, or a very short sentence, imposed in the United Kingdom. The three considerations advanced (time already spent in custody; prospects of rehabilitation; assistance to authorities) were noted. In relation to the last matter it was said that the Australian Federal Police had expressed a view as to the appellant’s motivation for giving assistance which, if accepted by a court, would not lead to a reduction in sentence. The headings referring to triviality, it should be noted, relate back to the way the arguments were put by the appellant's solicitor. Under the heading "Comments and conclusion" the following appeared:

> "21. The regulations applying the Act to the UK provide that the requesting country's offence qualifies as an offence for which extradition may be granted only where the maximum penalty that could be imposed is two years or more. The offences with which Mr Foster is charged are punishable by imprisonment by up to 10 years and, in our view, these

cannot be classified as trivial simply because it is possible that a sentencing judge may take into account time already spent in custody.

22. However, if there is a possibility that an offence could be 'trivialised' by the likely sentence (as opposed to the maximum possible sentence), we consider that it would not be reasonable in this case to assume that the sentence would be reduced. Even if a UK sentencing judge could take into account the amount of time Mr Foster spent in custody prior to sentencing and any evidence of rehabilitation there is no evidence to suggest a judge would do so here.

23. Much of the time Mr Foster has spent in custody, including maximum security, since he returned to Australia has been as a result of him absconding from lawful custody in the UK, his challenge to the issue of the section 16 notice by the Attorney-General, his opposition to the extradition proceedings, his failure to answer bail in those proceedings (including a period of two months as a fugitive in Australia), his appeal from the decision of the magistrate that he was extraditable and his opposition to the making of a surrender decision. Mr Foster is, of course, free to oppose the extradition proceedings to the fullest extent available to him under the law. However, it is reasonable to conclude that a sentencing judge would not necessarily take into account additional time spent in custody (or maximum security) when the resolution of the proceedings has been prolonged at Mr Foster's own instigation.

24. Considering the AFP's and the UK Prison Service's assessment of Mr Foster's motivations, it is also reasonable to conclude that neither Mr Foster's informant activities or his work in the 'Outreach program' would necessarily be persuasive evidence of his rehabilitation for a sentencing judge in Australia or in the UK.

25. If Mr Foster believes that he should not receive a further custodial sentence, this is a submission that he will be free to make to the UK court if he is convicted of the extradition offences.

26. With respect to criterion (i), we advise that, for the reasons stated above, the extradition offences cannot be considered to be 'trivial'."

16 In a letter of 2 March 1999, after referring to the reduction in the number of charges, and to certain matters not presently relevant, the appellant's solicitor wrote:

"We have consistently argued that in all the circumstances, it would be unjust or oppressive or too severe a punishment to surrender Mr Foster in respect of the charges against him. In that context, we have raised what we

> would submit is the relatively minor nature of the charges against him and the corresponding question of whether any or any significant term of imprisonment would be imposed upon him if he were convicted."

17 A letter of 19 March 1999 related to a point not pursued in this Court.

The claim for judicial review

18 The basis upon which the relief claimed by the appellant is pursued in this Court is expressed in the appellant's written submissions as follows:

> "Although the Minister was pressed by the Appellant to consider that, given the time he had already spent in custody, it was unlikely that he would be further imprisoned if convicted of the extradition offences, she never did so. She did not obtain any information about the likely range of sentences that may be imposed [or] whether any part of the time which he had spent in custody awaiting extradition and otherwise might be taken into account in reducing that range."

19 The first sentence in that paragraph over-simplifies the argument that was put to the Minister in an important respect. It is true that she was asked to consider that it was unlikely that the appellant would be further imprisoned if convicted. However, that was said to be the consequence of a combination of three circumstances: the time he had already spent in custody; his prospects of rehabilitation; and the assistance by way of information he had given to the police. It was the cumulative effect of those three considerations that was relied upon. The second and third cannot now be ignored.

20 In argument, something was attempted to be made of the circumstance that the Departmental report dealt with this issue under the rubric of "triviality". That, however, is related to the way the argument was put on behalf of the appellant. The question is whether the consideration was one that the Minister was bound to take into account, and pursue by further inquiry. If it was not, that is an end of the matter. If it was, then either it was considered adequately or it was not. The outcome should not turn upon the heading of the paragraphs in the report under which it was addressed.

21 It is the second sentence in the paragraph quoted from the appellant's submissions that was the focal point of the argument in this Court. It is impossible to conclude that the contention that it was unlikely that the appellant would be further imprisoned if convicted was not considered. It was repeated for the benefit of the Minister, the arguments said to support it were summarised, and the Departmental response was stated. The appellant's argument is that the contention was not adequately considered, and the particular reason advanced for

that conclusion is that proper consideration of the contention required the pursuit of a line of inquiry that was not pursued.

22 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Brennan J said[4]:

> "The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power."

23 The level of particularity with which a matter is identified for the purpose of applying this principle may be significant. A related question arises where the failure complained of is not a complete failure to address a certain subject, but a failure to make some inquiry about facts said to be relevant to that subject[5]. The argument in this Court does not assert lack of procedural fairness, or unreasonableness to the degree that may constitute a ground for treating a decision as invalid. The appellant argues that the Minister was bound to consider what the likely sentence, following conviction after extradition, would be, and that the only satisfactory method of doing that was to seek advice or information on the subject from some person familiar with sentencing law and practice in the United Kingdom. That, it is said, is an issue that was squarely raised by the appellant's solicitor; it was relevant; the Minister was bound to consider it; and she could not, consistently with her statutory duties, leave the matter as it was left in the advice upon which she acted. The matter which, according to the appellant's written submissions, the Minister never considered is said to be the improbability of further imprisonment upon conviction. That, in turn, must be understood in the light of the particular considerations which, in combination, were said to give rise to that improbability. 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 submission. As was noted above, the factual basis for an assertion that the Minister gave no consideration at all to the subject is lacking.

24 All the members of the Full Court agreed that, insofar as the appellant's argument relied upon the supposedly trivial nature of the offences, the attack on

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4 (1986) 162 CLR 24 at 55. See also the judgment of Mason J in the same case at 39-42; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375 per Deane J.

5 cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289 per Mason CJ and Deane J.

the Minister's decision must fail[6]. That issue turned upon considerations as to the nature and circumstances of the offences, and was not raised in this Court.

25 On the assumption that the determination that the offences were not shown to be trivial in nature cannot be challenged, the appellant's contention that it was unlikely that he would be further imprisoned if convicted of the extradition offences (for the three reasons assigned) can be related to reg 7 only on the basis that it could be a sufficient cause for satisfaction that it would be unjust or oppressive or too severe a punishment to surrender the appellant. If that were accepted, it would then be necessary for the appellant to make good the proposition that, such a contention having been raised, the statute expressly or by implication required the Minister to pursue the facts urged in justification of the contention beyond what occurred in the present case.

26 Let it be accepted that it is possible to imagine a case where, even though an extradition offence is not trivial in nature, and the other statutory criteria as to penalty are fulfilled, it could be said with reasonable certainty that a court in the country to which an offender was to be extradited would not, following conviction, impose any penalty additional to that which had already been suffered. Let it also be accepted that, in such a case, the Minister might properly regard that as sufficient cause to be satisfied that it would be unjust or oppressive to surrender the eligible person. It 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 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.

27 The nature of the submission made by the appellant's solicitor in the present case illustrates the difficulty. The contention was based upon a combination of three factors. The first factor, the length of time already spent in custody, and the circumstances behind that, was capable of objective ascertainment, and was known to the Minister. The second factor was the appellant’s prospects of rehabilitation. This might become a significant matter for consideration in due course by a sentencing judge. How was the Minister to investigate and evaluate that factor? The third factor was the alleged assistance to authorities which, it was claimed, would entitle the appellant to favourable consideration by a sentencing judge. The Minister had before her some information on that. It is not said she should have investigated that matter further. In seeking information or advice as to the likely sentence that would be imposed in the United Kingdom,

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6 *Foster v Minister for Customs and Justice* unreported, Federal Court of Australia, 22 October 1999 at 13 per Carr J, 2 per Moore J, 7 per Kiefel J.

what assumption was she to ask the informant or adviser to make about that matter?

28 Another aspect of the submission made by the appellant's solicitor is of significance. The submission proceeded upon the assumption that the only relevant and potentially useful form of sentence that might be imposed upon the appellant was a custodial sentence. That assumption is of doubtful validity. It may be that, in the case of the appellant, a financial penalty, or a bond to be of good behaviour for a certain time, perhaps conditioned upon a requirement to make some form of restitution, could be a sentencing option.

29 Those considerations may or may not have practical significance in the case of the appellant. The point is that they illustrate the diffuse nature of the considerations into which, it is said, the Minister was bound to make further inquiry when confronted with the assertion that no additional penalty would be imposed upon the appellant if convicted and, for that reason, she should be satisfied of the matters set out in reg 7.

30 Whatever may be the theoretical possibility in other cases, when regard is had to the nature of the argument that was advanced by the appellant's solicitor in the present case, it was open to the Minister, on the material before her, to conclude that she was not satisfied that it would be unjust or oppressive or too severe a punishment to surrender the appellant. Furthermore, in the light of the nature of the representations made to her, there was no statutory obligation, express or implied, which bound the Minister to undertake further investigation or inquiry before concluding that she was not so satisfied. In view of the way the appellant's case was put to her, she was entitled to conclude that no further inquiry was necessary. She was not bound to make further investigation of the appellant's prospects of rehabilitation. She was not bound to investigate further the assistance he had supposedly given the authorities. She was not bound to put the results of such investigations, together with everything else she knew of the facts of the case, before a person experienced in United Kingdom sentencing practice and seek an opinion as to how a sentencing judge was likely to respond to them. The Act does not impose such obligations, either expressly or by implication. The Minister was entitled to consider and evaluate the arguments advanced by the appellant's solicitor on the materials before her. She was not obliged to conduct her own sentencing investigation. The Minister was entitled to conclude, on the information put before her, that she was not satisfied that, by reason of the matters raised by the appellant's solicitor, it would be unjust or oppressive or too severe a punishment to surrender the appellant.

31 The appeal should be dismissed with costs.

32 GAUDRON AND HAYNE JJ. We agree with Gleeson CJ and McHugh J that the appeal should be dismissed with costs.

33 At first instance, the appellant sought (among other relief) a declaration that the warrant issued by the Minister under s 23 of the *Extradition Act* 1988 (Cth) ("the Act") was a nullity. (The Minister acted on behalf of the Attorney-General. Whether she was empowered to do so was debated and resolved in other proceedings to which the appellant was a party[7]. The question was not raised or debated in this Court.)

34 The appellant alleged that "the Respondent failed to validly exercise the discretion as required by the provisions" of s 22 of the Act. In particular it was alleged that "a matter which the Respondent should have considered for the purposes" of s 22(3) of the Act and reg 7 of the Extradition (Commonwealth Countries) Regulations (Cth) ("the Regulations") was "what penalty was likely to be imposed" upon the appellant. It is only this aspect of his claim which falls for consideration, his central complaint in this Court being that, although the respondent was pressed to consider whether, given the time which the appellant had already spent in custody, it was unlikely that he would be further imprisoned if convicted of the extradition offences, she did not do so. Initially the appellant submitted that the failure either consisted in, or was evidenced by, the fact that the respondent did not obtain any information about the likely range of sentences that may be imposed upon the appellant or about whether any part of the time he had spent in custody might be taken into account in reducing that range. In the course of oral argument the error assigned by the appellant was expressed a little differently. It was said that the error was failing to obtain information about the *heaviest* sentence that it was likely would be imposed on the appellant if he pleaded guilty and there were no mitigating circumstances, rather than information about the likely *range* of sentences. Our reasons for dismissing the appeal do not depend upon any difference between the two formulations of the appellant's contentions and we therefore put the differences to one side.

35 As the reasons of Gleeson CJ and McHugh J show, the respondent considered all of the submissions which were made on the appellant's behalf, including the submissions that were made in relation to the likelihood of the appellant being further imprisoned if convicted of the extradition offences. Those submissions about the likelihood of further imprisonment were founded in a combination of circumstances, not simply the time which the appellant had already spent in custody. The respondent considered, and rejected, those contentions and that is reason enough to conclude that the appeal should fail. There are, however, some other aspects of the matter to which we wish to refer,

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7 *Attorney-General (Cth) v Foster* (1999) 84 FCR 582.

if only because we do not accept all of the reasoning of the majority of the Full Court of the Federal Court.

36 Section 22(3) of the Act provides (so far as is now relevant) that an eligible person is only to be surrendered in relation to a qualifying extradition offence if (among other things):

> "(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;
>
> …
>
> in certain circumstances – the Attorney-General is satisfied:
>
> (iii) where subparagraph (i) applies – that the circumstances do not exist …".

(Section 11 provides that regulations may make provision to the effect that the Act applies in relation to a specified extradition country subject to limitations, conditions, exceptions or qualifications.) Thus, in relation to certain countries (and in this case) surrender of a person must be refused unless the Minister is satisfied that certain specified circumstances do not exist.

37 The Regulations provide that the Act applies to the United Kingdom subject to the limitation, condition, exception or qualification that, for the purposes of s 22(2) of the Act, in addition to the conditions set out in s 22(3), an eligible person shall not be surrendered in relation to a qualifying extradition offence[8]:

> "if the Attorney-General is satisfied that by reason of:
>
> (a) the trivial nature of the offence;
>
> (b) the accusation against the eligible person not having been made in good faith or in the interests of justice; or
>
> (c) any other sufficient cause;

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8 Extradition (Commonwealth Countries) Regulations (Cth), reg 7(1).

> it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to surrender the eligible person or to surrender the eligible person before the expiry of a period specified by the Attorney-General."

This additional limitation on the power to surrender is a limitation cast in positive terms. There shall be no surrender if the Attorney-General is satisfied that "it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to surrender the eligible person". And yet s 22(3)(e)(iii) is cast in negative terms, requiring the Attorney-General to be satisfied that the circumstances described in the regulation do *not* exist.

38 We agree with Gleeson CJ and McHugh J that the consequence of the provision of this double layer of satisfaction of the one decision-maker is that a critical question for the decision-maker is whether he or she is satisfied of the matter or matters referred to in reg 7. But the provision of the double layer of satisfaction is important in that it reveals that the prohibition on surrender for which s 22(3)(e) provides (the Minister is satisfied that specified circumstances do *not* exist) is, in the present case, a prohibition which is founded upon a state of satisfaction. 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. Is the Minister satisfied that she has not reached a particular value judgment?

39 Regulation 7 refers to the trivial nature of the offence and to the accusation not having been made in good faith or in the interests of justice as two reasons upon which the Minister might base a conclusion of the kind mentioned in the regulation. But the regulation's operation is not limited to such cases, as the reference to "any other sufficient cause" demonstrates. There is no reason to read down the breadth of that expression.

40 Even giving "any other sufficient cause" its most ample meaning the probability that no custodial penalty will be imposed on the eligible person if he or she is convicted of the extradition offence will not, without more, demonstrate that it would be unjust or oppressive or too severe a punishment to surrender that person. We turn to explain why that is so.

41 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. The use of the disjunctive "or" might suggest the need to consider each element of the expression separately but for several reasons we think it preferable

not to approach the provision in that way. First, there is the fact that the terms used are, as we have already said, qualitative descriptions requiring assessment and judgment. Secondly, the use of the words "too severe" suggests a need for comparison with some standard of punishment that is regarded as correct or just or, at least, not too severe. Thirdly, the considerations which may contribute to the conclusion that something is "unjust" will overlap with those that are taken into account in considering the other two descriptions. It would, then, be artificial to treat the three ideas as rigidly distinct. Each takes its content, in part, from the use of the others. The questions which then arise are what is the standard which is embodied in these words and what is the subject of the application of that standard? We turn first to the latter question.

42 Although the regulation speaks of it being "too severe a punishment *to surrender* the eligible person" we doubt that the inquiry can be confined to whatever may be seen as the direct and immediate consequences of surrender of the eligible person. In at least some cases, it may be that attention may have to be directed to what will happen to the eligible person after surrender, including not only the probable nature and duration of detention pending trial but also the punishment that would be meted out to the eligible person if convicted of the extradition offence. That is, it may be necessary, in some cases, to consider whether the punishment which would be imposed on conviction, in combination with factors such as incarceration in both countries (before extradition and before trial), involuntary transportation, and the expense and difficulty of defending a trial in the foreign country, would lead to a disproportionately heavy burden of punishment being imposed on the eligible person. It is not necessary to decide what are the kinds of case in which such considerations might arise and, given the generality of the words employed in reg 7, it would be unwise to attempt to do so in any exhaustive way. For the moment it is enough to recognise that the answer to the question whether it would be unjust, oppressive or too severe a punishment to surrender may, in some cases, be affected by what will be the consequences that will or may follow for the eligible person after conviction.

43 The other question which arises is what is the standard which the words "unjust or oppressive or too severe a punishment" set? Unjust or oppressive by what measure? Too severe by what measure? The answer must be that the value judgment which the expression requires is to be made according to Australian standards[9], not the standards of any other country. It requires consideration of how the offence or offences for the prosecution of which the extradition is sought would be viewed in this country. Is surrender of the eligible person for that offence, or those offences, unjust or oppressive or too severe a punishment? The precise nature and content of that inquiry may require further consideration in an

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9 cf La Forest, *Extradition to and from Canada*, 3rd ed (1991) at 241.

appropriate case but little or no argument about that was called for or was directed to it in this matter and we say nothing more about it.

44 If the regulation permits or requires consideration of the consequences that may follow extradition, it by no means follows that the Minister was bound, in this case, to have made some independent inquiry of authorities in the United Kingdom to discover whether it was likely that the appellant would *not* receive a custodial sentence if he were convicted of the offences for which his extradition was sought. Confining attention to punishment by incarceration may mislead. Other forms of penalty can be imposed on an offender and some of those other forms of penalty might properly be regarded as significant punishment. But the fallacy in the argument is more deep seated. The likely *absence* of heavy penalty upon conviction cannot, standing alone, demonstrate that it would be unjust or oppressive or too severe a punishment to surrender a person.

45 It is necessary to recall the nature of the attack which the appellant sought to make on the Minister's decision and to consider that attack having regard to the relevant statutory framework. His attack was that the Minister was bound[10] to, but did not, take into account whether it was likely that the appellant would *not* be further imprisoned. It was alleged that the Minister was bound, by s 22(3) of the Act, to take this into account in making the decision required by s 23. But as has already been seen, s 22(3) requires the Minister to be satisfied that the limitation prescribed by the regulation does *not* apply. 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. Rather, attention must focus upon the decision required by reg 7.

46 Regulation 7 requires the Minister to have regard to "all the circumstances" in forming the requisite judgment. Even if the Minister must have regard to whether surrender and events subsequent to surrender will (in combination) lead to a disproportionately heavy burden of punishment falling on the eligible person, the possibility that a minor penalty will be imposed on the eligible person can in no way *increase* the overall burden imposed on that person. If there is a burden which is (or arguably may be) properly classed as unjust, oppressive or too severe a punishment, it will arise from other considerations. It follows that the possibility of a non-custodial sentence being imposed on the appellant is not a matter which the Minister was bound to take into account in this matter. There can, therefore, be no question of there being any obligation on the Minister to make inquiries about it.

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10 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J; *Sean Investments v MacKellar* (1981) 38 ALR 363 at 375 per Deane J.

47 KIRBY J. This appeal, from the Full Court of the Federal Court of Australia[11], concerns the law of extradition. Specifically, it relates to the obligations of the Minister having duties under the *Extradition Act* 1988 (Cth) ("the Act") to be "satisfied"[11] of certain matters when determining that an "eligible person" is to be surrendered by Australia to another country in respect of a "qualifying extradition offence"[12]. Because extradition involves the partial release of an attribute of its sovereignty by one State in favour of another, and a serious interference in the freedom of the person surrendered[13], the requirements of the legislation permitting extradition must be carefully and accurately observed. In this appeal, the complaint is that they were not.

The facts

48 In 1995, whilst being prosecuted in Queensland for Corporations Law offences, Mr Peter Foster, the appellant, was granted bail to permit him to travel to the United Kingdom. There, he was prosecuted for false trading offences. The extradition offences, in respect of which successive warrants were issued against him, concern additional offences which are alleged to have occurred in the United Kingdom at about that time[14].

49 The appellant was convicted of the false trading offences. He was sentenced to a term of imprisonment. In August 1996, he was allowed to leave prison for a seven day period. However, he did not return to prison. In October 1996, he departed the United Kingdom for Australia using a false passport and name. He has claimed that these actions were explained by his fear for his life if he remained in British prisons because it had become known that he was assisting police to uncover corruption amongst prison officers associated with an alleged "Asian mafia"[15]. Whilst it appears that the appellant did indeed assist police, his more extravagant allegations have been disbelieved. They are not presently relevant.

50 On his arrival in Australia, the appellant was arrested and removed to Queensland. There he eventually pleaded guilty to the Corporations Law offences previously mentioned. He was convicted. In November 1996, he was sentenced to imprisonment for eighteen months. He was to be released from

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11 The Act, s 22(3).

12 Defined in the Act, s 22(1).

13 *AB v The Queen* (1999) 73 ALJR 1385 at 1401 [80]; 165 ALR 298 at 319.

14 *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at 596.

15 (1999) 84 FCR 582 at 596.

prison on 15 April 1997. However, he was immediately arrested pursuant to a provisional warrant issued under s 12 of the Act and was retained in custody. That warrant related to six new offences alleged to have occurred in the United Kingdom. The offences involved one of conspiracy to use false instruments, two of conspiracy to defraud and three of using a false instrument. The Serious Fraud Office in the United Kingdom ("SFO") alleged that the appellant and one Christopher Williams had committed the offences whilst unlawfully and dishonestly endeavouring to induce various persons to deal with a company involved in the marketing of cosmetics. Mr Williams was a director of the company. Whilst the appellant was not an officer of the company, he allegedly played a major role in the company's affairs. The SFO alleged that the two accused had used false documents in their fraudulent attempts to secure goods, services and facilities to the company. Substantial sums were said to be owing to the suppliers, a claim disputed by the appellant.

51 The provisional warrant pursuant to which the appellant had been detained was first returned before a magistrate on 13 May 1997. Over the opposition of the Director of Public Prosecutions, the magistrate granted bail to the appellant. A notice was then signed by the Attorney-General[16] to enable the United Kingdom's extradition request to be heard. The appellant challenged the validity of that notice in the Federal Court. In November 1997, his challenge was dismissed[17]. Shortly thereafter, the extradition hearing was listed before a magistrate. However, the appellant failed to appear at the hearing. He was re-arrested in February 1998. On 4 March 1998, a magistrate found that he was eligible for surrender under the Act in relation to two counts of conspiracy to defraud and three of using a false instrument (five offences in all). The magistrate ordered that the appellant be committed to prison under the Act[18]. Pursuant to such order, the appellant has been held in custody since that day. In April 1998, an application for review of the magistrate's order was dismissed by the Supreme Court of Queensland.

52 In May 1998, the appellant's solicitors wrote a submission to the Attorney-General concerning the exercise of his power under the Act to determine whether the appellant should be surrendered to the United Kingdom[19].

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16 Pursuant to the Act, s 16(1).

17 *Foster v Attorney-General of the Commonwealth of Australia* unreported, Federal Court of Australia, 14 November 1997 per Cooper J. An appeal from this decision was taken to the Full Court of the Federal Court but later abandoned: see *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at 597.

18 The Act, s 19(9)(a).

19 The Act, s 22(2).

Amongst many other matters raised was the actual sentence that the appellant would be likely to receive if he were convicted of the extradition offences alleged against him and the relevance to such sentence of the time which the appellant had already spent in custody awaiting extradition. The letter read, in part:

> "[T]he reference in Regulation 7 to 'the trivial nature of the offence' contemplates a consideration of the penalty likely to be imposed upon conviction in all of the surrounding circumstances. Seen in that light, it is relevant to recognise ... that whilst there was allegedly an intention to deceive, there was no intention to cause actual loss, and little if any actual loss was ultimately sustained.
>
> ... [having regard to his background, the extradition proceedings] have resulted in his having been already held for four months in maximum security conditions awaiting extradition. A sentencing Judge in the United Kingdom would surely consider that he has thus been already significantly punished for his alleged role in these offences.
>
> ...
>
> In our respectful submission ... when all such matters are taken into account it is likely that if any further term of imprisonment were to be imposed on Mr Foster the term would be very short indeed. If you agree with that proposition then we would respectfully submit that you would be satisfied that in the circumstances it would be unjust and/or oppressive and/or too severe a punishment to surrender Mr Foster for return to the United Kingdom."

53 By July 1998, the appellant's solicitors became aware that the Attorney-General had delegated his powers under various statutes, including the Act, to the Minister for Customs and Justice ("the Minister")[20]. In that month, his solicitors wrote a letter to the Minister which relevantly said:

> "The offences alleged against Mr Foster are relatively minor, and relate to events which are said to have occurred approximately three years ago. Since then he has already served more time in prison than he would have served in respect of any sentence likely to be imposed upon conviction."

54 Also in July 1998, officers of the Attorney-General's Department prepared a memorandum for the Minister. It contained a summary of the appellant's arguments as to why he should not be extradited to the United Kingdom. Whilst accurately recording the many submissions which had been put successively

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20 Pursuant to the *Acts Interpretation Act* 1901 (Cth), s 19.

before the Attorney-General and the Minister, the memorandum did not specifically refer to (or contain any information or estimate about) the actual sentence likely to be imposed on the appellant were he to be convicted of the extradition offences. The closest that the memorandum came to referring to the appellant's submission regarding such sentence was a passage that appears to relate to the appellant's separate contention that the offences were of a "trivial nature". The memorandum said in this regard[21]:

> "Mr Foster, his solicitors and his mother ... also assert that the SFO charges are not serious enough to warrant extradition to the UK. The response of the UK authorities to Mr Foster's assertions has been obtained and Mr Foster given the opportunity to comment on them ... [T]he SFO charges are serious matters punishable by imprisonment in the UK for up to 10 years. It is therefore recommended that you exercise your discretion to surrender Mr Foster to the UK to face the SFO charges despite his assertions."

55 On the specific point concerning the likely sentence that would be imposed on the appellant, the memorandum to the Minister was not forthcoming. As the relevant paragraphs of the memorandum are set out in the reasons of Gleeson CJ and McHugh J[22], I will not repeat them but I incorporate them by reference in these reasons. No attention was given elsewhere in the officers' memorandum to the other basis upon which the appellant's solicitors had submitted that the Minister should decline to determine that the appellant be surrendered, namely that for another "sufficient cause" it would be "unjust or oppressive or too severe a punishment" to surrender him in the circumstances.

56 On 24 July 1998, the Minister determined that the appellant be surrendered to the United Kingdom in respect of the five extradition offences described. She issued a surrender warrant under the Act for this purpose[23]. She gave no separate or specific reasons for her determination. No such reasons were required by the Act nor, arguably, by the common law[24]. The Minister's endorsement of the foregoing memorandum suggests that it afforded the entire basis upon which she reached the determination envisaged by the Act[25]. No contrary submission was

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21 See *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at 600.

22 Reasons of Gleeson CJ and McHugh J at [15].

23 The Act, s 23.

24 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; but cf *Stefan v General Medical Council* [1999] 1 WLR 1293; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at 845.

25 The Act, s 22(2).

made. Hence the attention that has been paid in this and earlier proceedings[26] to the terms in which the officers' memoranda were expressed.

57 Following the issue of the surrender warrant, the appellant again sought relief in the Federal Court. He did so on this occasion on the basis that the power conferred by the Act could only be exercised lawfully by the Attorney-General and not by the Minister. He succeeded in this argument at first instance[27]. However, that decision was reversed on appeal[28]. The issue so determined has not troubled this Court. Nevertheless, litigation of the question further delayed execution of the warrant. It resulted in the appellant's continuing detention in Australia.

58 Meanwhile, a development occurred in the United Kingdom which affected the number of offences in relation to which that country had sought the appellant's extradition. A court in that country dismissed all charges against the appellant's co-accused, Mr Williams. This led the appellant's solicitors to request of the Minister an opportunity to make further representations when it became clear that, in consequence of the foregoing, the "extradition offences" would be reduced to three offences. In February 1999, the Minister acceded to this request. On 2 March 1999, the solicitors wrote to the Minister once again to draw attention to the appellant's ongoing loss of liberty in the context of the reduced number of offences for which extradition was sought:

> "Mr Foster's extradition was originally sought in respect of six charges, but he was found eligible for surrender in respect of five only of those charges. ... [T]he two counts of conspiracy to defraud will not be proceeded with, and Mr Foster's extradition is therefore sought only in respect of the three counts of using a false instrument.
>
> ... We have consistently argued that in all the circumstances, it would be unjust or oppressive or too severe a punishment to surrender Mr Foster in respect of the charges against him. In that context, we have raised what we would submit is the relatively minor nature of the charges against him and the corresponding question of whether any or any significant term of imprisonment would be imposed upon him if he were convicted."

59 The Minister then received from officers of the Attorney-General's Department a further memorandum of 28 March 1999 concerning the appellant's

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26 *Attorney-General (Cth) v Foster* (1999) 84 FCR 582.

27 *Foster v Attorney-General (Cth)* (1998) 158 ALR 394.

28 *Attorney-General (Cth) v Foster* (1999) 84 FCR 582.

submissions. This memorandum also omitted any indication about the range of sentences to which the appellant was actually exposed. The Minister decided to make a new determination under the Act and did so on 30 March 1999. By it, she revoked the earlier warrant of July 1998. She determined that the appellant should be surrendered to the United Kingdom on the three counts of using a false instrument. She thereupon issued a new warrant under the Act. It is the execution of that warrant which is the subject of the present proceedings.

The history of extradition legislation

60 In order to understand the decisions on the point arising under the Act, it is necessary to refer to the applicable provisions of the Act and of the Extradition (Commonwealth Countries) Regulations (Cth) ("the Regulations"). But first, it is useful to notice the legislative antecedents.

61 In colonial days, the Imperial authorities in the United Kingdom determined that arrangements should be made for the apprehension and return of fugitive offenders from one part of the Crown's dominions to another. In such a case, given the then prevailing view of the unity of the Crown, no surrender of sovereignty to a foreign power was involved. This was the execution of an attribute of the single sovereign whose writ ran throughout the Empire. Nevertheless, the inconvenience and potential oppression to the individual involved in a return from one dominion to another (even from Ireland to Great Britain) was recognised when the *Fugitive Offenders Act* 1881 (Imp) ("the 1881 Imperial Act") was enacted[29]. Protective provisions were included which have since become standard in extradition legislation, at least in countries of the Commonwealth of Nations. The provisions included a specification of the offences to which the Act (and thus the possibility of extradition) would apply[30]. They also included the possibility of discharge of the fugitive when the case was properly classifiable as frivolous, or where the return would clearly be unjust[31]. Special provisions were made for the return of prisoners in respect of groups of British dominions and colonies which, by reason of their contiguity or otherwise, made it appropriate to so provide[32]. Exceptions were enacted, both for the general case and for such inter-colonial cases, substantially in identical terms, using statutory language which persists in the current Australian legislation and comes under scrutiny in this case.

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29 44 & 45 Vict c 69.

30 Notably s 9, which confines the Act to offences punishable on indictment or information by imprisonment with hard labour or a term of twelve months or more.

31 s 10. See also s 19.

32 Pt II of the Act.

62 Relevantly, s 10 of the 1881 Imperial Act provided:

> "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to ... all the circumstances of the case, be unjust or oppressive *or too severe a punishment* to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just" (emphasis added).

63 The perceived insufficiencies of the inter-colonial provisions of the 1881 Imperial Act led to a demand in November 1883 directed towards all of the Australasian colonies, including Fiji, for local laws which would provide for the ready exchange of offenders within Australasia. Out of this demand (and others) emerged the proposal for a Federal Council. The Imperial Parliament quickly enacted the *Federal Council of Australasia Act* 1885 (Imp). By s 15 of that Act, the Federal Council was empowered to make laws with respect to extradition[33]. The Council became a staging post on the way to Australian Federation. The provisions of s 15, in turn, became the source for a head of federal legislative power ultimately adopted in the Australian Constitution[34].

64 Promptly after the establishment of the Commonwealth, that head of power was utilised in the passage of the *Service and Execution of Process Act* 1901 (Cth) ("the 1901 Act"). In its drafting, that Act was obviously influenced by the template provided by the 1881 Imperial Act. Notwithstanding the fact that the return of an alleged offender to which the 1901 Act applied would not only be to another part of the dominions of the Crown but also to another part of the single federal nation, the 1901 Act envisaged that a magistrate asked to make the order for return might refuse to do so if it appeared "for any reason [that] it would be unjust or oppressive to return the person"[35]. Even within the federated Australian nation, the possibility of exceptions to the local form of "extradition" was recognised and provided for. Courts were to decide when such exceptions were applicable.

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33 *Binge v Bennett* (1988) 13 NSWLR 578 at 584.

34 Constitution, s 51(xxiv). See also s 51(xxxviii); cf Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed, (1976) at 172-173.

35 s 18(4).

65 Following discussion in 1965, the Law Ministers of the Commonwealth of Nations met in London in 1966. They produced draft principles of new legislation to deal with the exchange of fugitive offenders between the several parts of the Commonwealth of Nations[36]. The object was to replace the Imperial system with, relevantly, an interactive procedure more suitable to the independent status of the several countries of the Commonwealth.

66 In 1967, the United Kingdom Parliament enacted the *Fugitive Offenders Act* 1967 (UK) to replace the 1881 Imperial Act[37]. The year before, the Federal Parliament in Australia had enacted the *Extradition (Commonwealth Countries) Act* 1966 (Cth)[38]. But there were, from the start, important differences between the United Kingdom and the Australian statutes. Apart from the special treatment of extradition to and from New Zealand provided for in the Australian Act, the latter also preserved a provision which was deleted in the United Kingdom Act of 1967. This was the provision in s 16(3) of the Australian Act permitting (as the 1881 Imperial Act had done) refusal of extradition where, "having regard to the circumstances under which the offence is alleged to have been committed or was committed, it would be unjust, oppressive *or too severe a punishment*"[39] to surrender the person concerned. Section 8(3) of the United Kingdom Act of 1967 confined refusal, relevantly, to the case where "it would, having regard to all the circumstances, be unjust *or oppressive to return him*"[40]. Reference to the excessive severity of the punishment was dropped.

67 In 1985, a review of Australia's extradition law was initiated[41]. In part, this was to ensure compliance with new obligations assumed by Australia under international treaties[42]. In part, it was also a result of a desire to modernise and

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36 *Ingram v Attorney-General (Cth)* [1980] 1 NSWLR 190 at 207; *Bryan v Preston* (1982) 44 ALR 217.

37 *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 782; [1978] 2 All ER 634 at 638.

38 At the same time, the *Extradition (Foreign States) Act* 1966 (Cth) was enacted.

39 s 8(3) (emphasis added).

40 Cited in *Ingram v Attorney-General for the Commonwealth* [1980] 1 NSWLR 190 at 207-208 per Yeldham J (emphasis added).

41 See the Second Reading Speech of the Extradition Bill 1987, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 October 1987 at 1615 per Mr Bowen.

42 eg Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, [1989]

(Footnote continues on next page)

generalise extradition law still further, whilst preserving the special treatment of extradition to and from New Zealand and the particular treatment of extradition between Commonwealth countries[43]. The outcome was the Act that is presently applicable.

The legislation applicable to the case

68 As originally enacted, the Act, in providing for the surrender determination to be made, made no reference to the broad basis for determining that a person should not be surrendered where, relevantly, the Minister is satisfied that, for "any other sufficient cause", to do so would be "unjust or oppressive or too severe a punishment". In terms, the provisions of s 22 of the Act, which empower the Attorney-General to determine whether a person is to be surrendered[44], provide criteria of which the Attorney-General must be satisfied. Only if the Attorney-General is so satisfied, and the conditions expressed are fulfilled, may the Attorney-General "in his or her discretion, [consider] that the person should be surrendered in relation to the offence"[45].

69 The criteria mentioned in s 22 of the Act include that there "is no extradition objection in relation to the offence"[46]; that the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture[47]; that where in the extradition country the offence is punishable by the penalty of death, that penalty will not (to put it shortly) be carried out[48]; and that the extradition country has given a "speciality assurance" in relation to the person[49]. However, somewhat elliptically, s 22 of the Act provides for a case

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ATS 21, 23 ILM 1027 and 24 ILM 535 (entered into force 26 June 1987). See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 October 1987 at 1615; cf *Perry v Lean* (1985) 39 SASR 515 at 519.

43 The two Acts (*Extradition (Commonwealth Countries) Act* 1966 (Cth) and *Extradition (Foreign States) Act* 1966 (Cth)) were repealed and replaced by the Act. See *Extradition (Repeal and Consequential Provisions) Act* 1988 (Cth).

44 And in circumstances of lawful delegation to a Minister, that Minister: *Attorney-General (Cth) v Foster* (1999) 84 FCR 582.

45 The Act, s 22(3)(f).

46 The Act, s 22(3)(a).

47 The Act, s 22(3)(b).

48 The Act, s 22(3)(c).

where, because of s 11 of the Act, the Act applies in relation to the extradition country subject to a "limitation, condition, qualification or exception" that has the effect that surrender of the person shall or may be refused.

70 The reference to s 11 in s 22(3)(e) of the Act provides the means by which the Regulations are incorporated into the relevant Ministerial determination the consideration of which is in issue in this appeal. By s 11(1), it is provided that the Regulations may "make provision ... to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications"[50]. It was not contested that reg 7 of the Regulations introduces such a limitation, condition, exception or qualification. Nor was it disputed that the Regulations were applicable in this case to control the Minister's determination under s 22 of the Act. The applicable provisions of reg 7 appear in the reasons of Gaudron and Hayne JJ[51]. I will not reproduce the Regulation but again I incorporate its terms by reference.

71 By reg 7(2), it is stated that "eligible person" and "qualifying extradition offence" have the same meanings, respectively, as in s 22 of the Act. By s 22(1)(a) of the Act, "eligible person" means a person committed to prison by order of a magistrate under s 18 of the Act. The appellant does not now contest that he is within the definition of an "eligible person" under s 22 of the Act. By s 22(1), the phrase "qualifying extradition offence" means any extradition offence for which, in final proceedings, a court has determined that the person is eligible for surrender within the meaning of s 19 of the Act. The appellant does not contest that this definition also applies to him. Nor does the appellant now dispute that the other criteria in s 22(3) of the Act have been fulfilled. In this way, the issue in this appeal was narrowed to the operation in the appellant's case of reg 7(1).

72 Indeed, the issue was still further confined by the appellant's making it clear that he no longer persisted, as such, with the earlier objection relying on par (a) ("the trivial nature of the offence"). For present purposes, the appellant was prepared to concede that point and to concentrate on his argument that the Minister was obliged specifically to address her attention to his claim. This was that, by reason of any "other sufficient cause" (namely the actual penalty to which he was likely to be subjected in the United Kingdom taking into account the period he had already spent in custody in Australia awaiting extradition), it

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49 The Act, s 22(3)(d); cf *AB v The Queen* (1999) 73 ALJR 1385 at 1396 [58], 1401-1404 [80]-[91]; 165 ALR 298 at 313, 319-323.

50 The Act, s 11(1)(b).

51 Reasons of Gaudron and Hayne JJ at [37].

would be "unjust or oppressive or too severe a punishment to surrender" him to the United Kingdom. The appellant submitted that he had adequately placed this issue before the Attorney-General and the Minister for determination; that, relevantly, the Minister was bound to consider it; and that, in the memorandum provided to the Minister, which she endorsed, the inference was irresistible that she did not consider this issue. She was therefore still obliged in law to do so. This Court, so it was argued, should uphold that obligation.

The decision at first instance

73 The appellant sought a declaration in the Federal Court[52] that the warrant issued by the Minister under s 23 of the Act, that is, the second warrant, was a nullity. Consequential injunctive relief was also sought. The Minister accepted, correctly in my view, that the requirements of the Act, notably ss 22 and 23, have to be complied with for the issue of the warrant to be a lawful exercise of the power conferred by s 22 and the duty imposed by s 23. The primary judge, Drummond J, properly acknowledged the limited function of the courts when asked to determine whether an administrative decision was within power and whether the process mandated by the Act had been observed[53]. His Honour accepted that a court exercising the judicial power of the Commonwealth was not entitled to review on the merits an administrative decision made by a member of the Executive Government. The judicial power had to be confined, relevantly, to defining the scope of the administrative power and deciding the legality of its exercise[54].

74 The primary judge recognised that reg 7 established a limitation on the Minister's discretionary power under s 22(2) of the Act to order surrender of a person such as the appellant[55]. By force of s 22(3)(e) of the Act, an eligible person is only to be surrendered when the Minister considers, and reaches the state of mind of being satisfied, that none of the circumstances mentioned in reg 7(1) exists. The primary judge disposed of three separate arguments which

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52 Brought pursuant to the *Judiciary Act* 1903 (Cth), s 39B.

53 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 359-360 citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

54 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J.

55 The intention of reg 7 was to limit the discretion of the Minister: see the Second Reading Speech of the Extradition (Repeal and Consequential Provisions) Bill 1987, Australia, House of Representatives, *Parliamentary Debates*, (Hansard) 28 October 1987 at 1619 per Mr Bowen.

the appellant advanced in his attack on the validity of the warrant. These related to the adequacy of the speciality assurance given by the United Kingdom in light of certain proceedings in that country's Parliament; the alleged "trivial nature" of the three remaining extradition offences[56]; and the complaint that the Minister's ultimate decision was unreasonable in the administrative law sense[57]. None of these grounds was reargued in this Court.

75 Despite rejecting the grounds of objection expressed in terms of the trivial nature of the offence[58], the primary judge accepted that the Minister still had to make a "discretionary judgment on all the circumstances of the case and [to] form the opinion [on the submission] that surrender for the offence would impose too severe a punishment on the person before being required to refuse surrender"[59]. On this point the primary judge concluded that:

> "There is reason to think that the Minister failed to advert to the punishment issue that she was required by reg 7 to take into account in so far as she was prevented from doing that by the lack of any information before her to indicate the likely punishment this applicant would receive if extradited to the United Kingdom and convicted there only of the three extradition offences"[60].

76 The primary judge went on to acknowledge that there was much material before the Minister which emphasised the importance of considering the question of the severity of the punishment to which the appellant would be exposed by surrender. He concluded that the material "was such as to require her to give consideration to the question raised by reg 7 of the severity of punishment that surrender of the applicant might involve before she could validly make her decision for the applicant's surrender"[61]. He also concluded that there was no reason to doubt the ready availability of such information to the officers preparing the memoranda for the Minister, including from the SFO in the United Kingdom with whom the Australian authorities had been in frequent communication[62]. Because, immediately before the Minister's determination and

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56 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 372.

57 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 376.

58 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 372.

59 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 372.

60 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 373.

61 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 373.

62 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 373.

issue of the second warrant, the memorandum and attachments provided to the Minister in March 1999 refrained from affording any indication to the Minister about the range of punishments to which the appellant was exposed, the primary judge concluded that "the minister cannot be in a position to discharge her obligation under the law to consider the punishment question"[63]. He did not regard the material provided to the Minister in the March 1999 memorandum, or the July 1998 memorandum, as addressing that question[64]. The earlier one had, in any case, been sent at a time when five charges were involved. Moreover, it had expressed the view that it was unnecessary to form a view on the sentences which the United Kingdom would be likely to impose.

77 Upon the foregoing analysis, the primary judge found that the Minister[65]:

> "had no information before her on the likely punishment the applicant would receive, if convicted of the three extradition offences, and so could not do what she was required by reg 7 to do when she made her decision of 30 March 1999, viz, have regard to whether surrender would be too severe a punishment for him".

78 It might have been expected that this conclusion would result in the provision of relief to the appellant. However, the primary judge went on to find that the long period of detention which the appellant had endured while awaiting the determination of the various challenges to the extradition process had been brought about by his own "deliberate conduct"[66]. Accordingly, save for the initial period of a month after he was re-arrested in Queensland in April 1997, the primary judge did not consider that there was any relevant loss of liberty which was not, as he described it, "self-inflicted"[67]. There was therefore no relevant detention which would be available to be taken into account in offsetting the likely punishment of the appellant in the United Kingdom so as to give rise to a conclusion that it would be unjust, oppressive or too severe a punishment now to surrender him. It was on that footing alone that relief was denied to the appellant.

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63 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 374.

64 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 374.

65 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 374-375.

66 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 375.

67 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 375.

The decision of the Full Court

79 The appellant appealed to the Full Court of the Federal Court. By majority[68], his appeal was dismissed. The essential difference amongst the judges in the Full Court is relevant to the present appeal. The dissentient, Carr J, substantially upheld the primary judge's conclusion on the interpretation of reg 7. However, his Honour decided that the consideration that had persuaded the primary judge to deny relief had been based on a legal misconception. Once the warrant was issued by the magistrate, he was bound by the Act to commit the appellant to prison to await extradition[69]. Although, exceptionally, bail might be provided[70], in the circumstances of this case, its provision was most unlikely. Accordingly, the considerable time that the appellant had spent in custody awaiting extradition was the result of the operation of extradition law. It was not to be ascribed to the appellant's deliberate or illegal conduct. In this respect, Carr J expressed concurrence with a view also stated by the primary judge that, ordinarily, the time taken exercising legal rights to challenge the extradition process should not be regarded as self-inflicted, unless there was an indication of an abuse of process, which did not arise in this case[71]. On this basis, Carr J concluded that the Minister had failed to do what was required by reg 7, that the administrative decision-making in question had miscarried, and that an order of judicial review was warranted.

80 The majority in the Full Court decided otherwise. In his reasons, Moore J expressed the opinion that the words "unjust or oppressive or too severe a punishment" in reg 7 were directed to the "effect of extradition"[72]. In his Honour's opinion, if the charges were not trivial (a consideration earlier adverted to in the Regulations), then "the fact that the person ... may not be at risk of lengthy imprisonment is not a matter that must, of itself, be considered when reviewing the effect of extradition"[73]. In her reasons, the other member of the majority, Kiefel J, by reference substantially to English decisions, perceived a juxtaposition between the cases examining the category "unjust" or "oppressive"

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68 Moore and Kiefel JJ; Carr J dissenting.

69 The Act, s 19(9)(a).

70 The Act, s 26.

71 Full Court judgment at 16; cf *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 375-376.

72 Full Court judgment at 2.

73 Full Court judgment at 3.

and the cases examining the category "too severe a punishment" to surrender the eligible person[74].

81 Because of the history to which I have referred, care must be exercised in invoking recent English decisions on extradition. This is because of the deletion from the *Fugitive Offenders Act* 1967 (UK) of the general provision requiring the relevant Minister to consider whether, by reason of "any other sufficient cause", surrender would, "having regard to all the circumstances, be unjust or oppressive or too severe a punishment". In the case of extradition of a person from Australia, including to a Commonwealth country such as the United Kingdom, our lawmakers have preserved this broad criterion although it has been deleted or omitted from other Australian legislation[75]. It remains applicable in Australia to safeguard the surrender of a person by this country to another.

82 In concluding her reasons, Kiefel J remarked, in words supported before this Court by the Minister[76]:

> "There remains the question whether it would be oppressive, having regard to the time he had already spent in custody, to surrender the appellant. In this context what is under consideration is fairness and perhaps also hardship. This was not a matter put forward by the appellant in his submissions to the Minister. The question, generally, whether it would be unjust or oppressive to surrender him was however addressed in the departmental submission and rejected. The Minister was aware of the time spent in custody, and the view was expressed that, in part, it had been brought about by the appellant having absconded at an early point. There was nothing in my view to require the Minister to further consider the question."

83 From the order of the Full Court of the Federal Court dismissing his appeal, the appellant, by special leave, appeals to this Court.

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74 Full Court judgment at 8. The considerations often overlap: *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 782-783 per Lord Diplock; [1978] 2 All ER 634 at 638; *Carmady v Hinton* (1980) 23 SASR 409; *Perry v Lean* (1985) 39 SASR 515 at 520.

75 eg *Service and Execution of Process Act* 1901 (Cth), s 18(6). This Act was repealed by the *Service and Execution of Process (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth), s 3, and replaced by the *Service and Execution of Process Act* 1992 (Cth), which has no provision in similar terms.

76 Full Court judgment at 11.

The issues

84 The single ground on which the appellant sought the intervention of this Court was that the Federal Court had erred in finding that the Minister was not bound under reg 7(1) to take into account the nature and extent of the punishment to which it was likely that a person to be surrendered would be exposed if that person was convicted in the requesting country of the extradition offences. In dealing with this ground of appeal, three issues are raised:

1. Whether, on a true construction of reg 7(1), the reference to "too severe a punishment" involves, where that ground is invoked, consideration of the likely sentence to be imposed by a court in the extradition country, not only for the purpose of deciding whether such sentence would be unreasonably severe but whether it might be too insubstantial, thereby rendering the punishment involved in surrender too severe;

2. Whether, if reg 7(1) does involve consideration of the likely sentence to be imposed, this is a matter which the Minister is *bound* to take into account (thereby attracting judicial review to the omission) or merely a matter which the Minister *may* take into account (in respect of which an omission would not attract judicial relief); and

3. Whether, in any event, the issue raised by the appellant was adequately dealt with in the Ministerial determination in this case.

The construction of reg 7(1)

85 A number of general propositions can be stated concerning the meaning and operation of reg 7(1). First, the terms of reg 7 must be given meaning in a way that upholds the important purposes which the Regulations, and s 22 of the Act (which reg 7(1) qualifies[77]), are designed to secure. Extradition is a very serious imposition on the person involved. Even where it results in surrender to a country whose courts are acknowledged to be independent, it has nonetheless been considered appropriate (as in the return of accused persons to different jurisdictions within Australia) to provide safeguards. As the history of the legislation demonstrates, these safeguards are of long standing. They are intended to be upheld by the decision-maker with the power of determination, who, in Australia, is the applicable Minister. Their existence acknowledges that the principle of interjurisdictional comity which the process of extradition maintains must be secured by procedures, and by the application of rules, which protect a person subject to an extradition application.

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77 Pursuant to the Act, ss 22(3)(e) and 11(1).

86 Those who are extradited from Australia are ordinarily subjected to initial detention in Australia, removal under restraint, frequently over a long distance, detention in the extradition country, subjection to that country's judicial process with costs that may not be recoverable, laws and customs that may be different in significant respects from those of Australia, custodial institutions that will sometimes be sub-standard, and all this ordinarily at a considerable distance from family and friends. In a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime. But it is a response which is subject to recognised checks which, in Australia, are set forth in the Act and the Regulations. Where those checks have not been accurately observed, at least in a case in which the Minister having the power of determination is obliged to observe them, it is the duty of the courts to set aside a decision which has miscarried and to require a lawful decision to be made which observes the protections put in place by, or under, the law enacted by the Parliament.

87 Secondly, the history of the Act, and the Regulations made pursuant to the Act, suggests the persistence, within Australia, of a determination to preserve a broadly expressed exception to the extradition of Australian citizens (and others protected by Australian law) to other countries (including Commonwealth countries). This exception goes beyond the standard provisions covered in the Act itself: want of an extradition objection; absence of the risk of torture, execution or the death penalty; and provision of a speciality assurance[78]. Indeed, it goes beyond the extradition legislation of other Commonwealth countries, including the United Kingdom, by preserving the need to consider "any other sufficient cause" which would render it "too severe a punishment" to surrender the eligible person. The persistence of this formula suggests a deliberate imposition on the Minister in Australia of an obligation to be satisfied about the "punishment" in question. It must be assumed that the rule-maker meant to include a consideration additional to injustice and oppression and to require that "all the circumstances" be considered.

88 Thirdly, the reference in par (a) of reg 7(1) to "the trivial nature of the offence" and the requirement under par (c) to address separately "any other sufficient cause" each occur in the context of a regulation which hypothesises "a qualifying extradition offence". There is no *genus* linking the several provisions in reg 7(1)(a), (b) and (c). Therefore, each paragraph must be given its full independent operation. In the case of a Commonwealth country, such as the United Kingdom, a qualifying extradition offence means an offence "for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than two years"[79]. Thus, the context is one which

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78 The Act, s 22(3)(a), (b), (c) and (d).

79 The definition of "extradition offence" in the Act, s 5, as modified by reg 5.

involves an offence defined in terms of the "maximum penalty" provided by the law of the requesting country. Nevertheless, the Minister is also required to address his or her mind to "a punishment" which will be involved in a determination to surrender the eligible person "having regard to all the circumstances". The juxtaposition between the qualifying "extradition offence" and the "punishment" suggests that the latter is addressed to something different from, and additional to, the former. The former is objectively discoverable. The latter, like injustice and oppression, requires the ascertainment of facts and the application of evaluation and judgment on the part of the Minister. It is a process which the rule-maker has gone to some pains to impose by adding to the language of the Act and in terms now peculiar to Australian law. On the face of things, it is therefore an obligation that the Minister is required to discharge. Mere reference to a qualifying maximum punishment is not sufficient for a decision on this separate criterion where it is relevant.

89 Fourthly, the last mentioned contextual consideration is reinforced by another[80]. Several provisions in s 22 of the Act indicate the relevance of ascertaining what is likely to happen to the eligible person in the extradition country on that person's return, both before and after any conviction there. Thus the Act itself requires specific consideration to be given to whether or not the person will be subjected to torture[81]; might, in the absence of undertakings to the contrary, be liable to be sentenced to death and execution[82]; or afforded a "speciality assurance" not to be detained or tried for offences other than those arising from the conduct constituting the surrender offence(s) without either an opportunity to leave the country or the consent of the Attorney-General of Australia[83]. In the context of such provisions, which are concerned with matters that go beyond formalities of the legal process and extend to the actualities of the burdens to which the "eligible person" will be subjected if extradited, it is but a small step to conclude that the incorporation of a reference to "punishment", by force of another provision of the same sub-section of the Act[84], is designed to have a similar operation. In other words, that word obliges the Minister to secure information about, and to evaluate, the likely "punishment" to which the eligible person will be subjected. Far from being inconsistent with the structure and language of the Act, the surrendering provisions of the Act reinforce the construction urged by the appellant.

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80 Called to attention by Carr J. See Full Court judgment at 15.

81 The Act, s 22(3)(b).

82 The Act, s 22(3)(c).

83 The Act, s 22(3)(d).

84 The Act, s 22(3)(e) together with s 11.

90 Fifthly, the Australian persistence with reference to "any other sufficient cause"[85] in the context of a regulation which already provides for consideration of "the trivial nature of the offence"[86] contradicts the Minister's contention that the entire universe of triviality (and thus of limited punishment) is to be dealt with in terms of par (a) of reg 7(1). On the language of par (c) alone, but particularly having regard to the legislative history, such a contention cannot be accepted. Moreover, it was clearly contemplated that, although, by definition, the offence would carry at least imprisonment or deprivation of liberty for not less than two years in the requesting country, it might still appear to the Minister that the offence was of a "trivial nature" when judged according to the standards of Australia[87]. Paragraph (c) introduces the possibility that even where the previously stated considerations were insufficient to satisfy the Minister that the person shall not be surrendered, some other "sufficient cause" might do so. One such case would be the fact that surrender of the eligible person would be "too severe a punishment" having regard to "all the circumstances" of the particular case[88].

91 Sixthly, the obligatory language in which reg 7(1) is expressed must be given effect. An eligible person in relation to a qualifying extradition offence "*shall not* be surrendered" if the Minister is satisfied of the specified disqualifying considerations. Obviously, the Minister could only reach, or fail to reach, such satisfaction if he or she addressed attention to the matter of the "punishment" involved in surrendering the eligible person. Thus, if the Minister addressed questions of "punishment" only in relation to the "trivial nature of the offence", and not to whether for some "other sufficient cause" it would be unjust, oppressive or too severe a punishment to surrender the eligible person, an important prerequisite to the satisfaction postulated by reg 7(1) would not be addressed. It would be ignored. This is precisely what the appellant complains happened in his case.

92 Finally, and most importantly, meaning must be given to the entire phrase "too severe a punishment to surrender". Whereas the considerations of injustice

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85 Reg 7(1)(c).

86 Reg 7(1)(a).

87 cf La Forest, *Extradition To and From Canada*, 3rd ed (1991) at 252.

88 The statutory reference to all the circumstances enjoins the decision-maker to have regard to all circumstances which can reasonably have a bearing on the question of whether by reason of "any other sufficient cause" it would be unjust: *R v Governor of Pentonville; Ex parte Narang* [1978] AC 247; *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 785 per Lord Russell of Killowen; [1978] 2 All ER 634 at 641.

or oppression stand alone, the consideration of a punishment which is "too severe" obviously postulates a comparison with a punishment which is *not* "too severe". It therefore envisages the ascertainment of some real appreciation of the actual punishment that is likely to be imposed. Knowledge of the statutory maximum, prerequisite to enlivening s 22 of the Act and reg 7(1), is insufficient for this purpose. The terms of the regulation oblige a descent to something more factual and practical. Only then can the Minister reach the necessary level of satisfaction about whether a "punishment" is "too severe" for the surrender of the eligible person that is contemplated.

93 At one extreme, it might be "too severe a punishment" by Australian standards, because, although falling short of torture or the death penalty, the "punishment" involved would be out of proportion to the facts and circumstances constituting the offence for trial of which extradition is sought. At the other extreme, as this case was alleged to be, the surrender might, according to Australian standards, be "unjust or oppressive or too severe a punishment" because the punishment actually likely to be imposed is extremely modest and, as such, does not warrant the inconvenience, impositions and other burdens that extradition necessarily entails[89]. The issue raised by the appellant's case may be a comparatively rare one. But it was presented in this instance by a combination of practical circumstances: (1) the deletion of one offence by the magistrate; (2) the deletion of two further offences in the Minister's second determination and in the second warrant; (3) the very lengthy interval of time that the appellant had been in detention awaiting the conclusion of the legal challenges to his extradition; and (4) the likelihood that much, perhaps most, of that time in detention would properly be expected to be brought into account in any custodial sentence which a United Kingdom court imposed upon the appellant confined strictly to the three offences in respect of which the speciality undertaking is applicable.

Responding to the Minister's arguments

94 To resist this analysis concerning the requirements of reg 7(1), the Minister deployed a number of arguments. In addition to that concerning the suggested role of par (a) to cover the universe of triviality (which I have rejected), it was submitted that the grammatical structure and apparent purpose of reg 7(1) indicated that the "punishment" being referred to was solely the fact of extradition. However, once it was conceded that consideration could also be given to the immediate consequences of extradition (such as incarceration of the

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89 Where the burden of return is patently disproportionate to the seriousness of the alleged crime, this is a consideration that weighs against surrender: see *R v Governor of Pentonville Prison; Ex parte Narang* [1978] AC 247 at 275 per Viscount Dilhorne.

eligible person in both countries, the involuntary transportation to the extradition country and the expense and difficulty of defending a trial in that country) it became impossible, logically, to draw a line and exclude the other consequences of surrender, most notably the punishment to which, contingently on conviction, the extradited person is subjected and the risk of mistreatment before and after any conviction. All of these are included in the entirety of the circumstances which must be considered in order to reach a conclusion on the issues of injustice, oppression and excessive "punishment" which reg 7(1) postulates as preconditions to the ministerial satisfaction. No other construction of the sub-regulation is consistent with the effective incorporation of the sub-regulation's provisions in s 22(3)(e) of the Act.

95 It was then argued that nothing in the legislative history or the pre-legislative materials in support of the Act gave credence to consideration of the likelihood of punishment in the requesting country. It is difficult to take this argument seriously given that several provisions of s 22(3) of the Act oblige the Minister to evaluate actual ways in which the eligible person will be treated in the requesting country, if surrendered. In any case, it is not inconsistent with the appellant's construction that the question whether a person should be surrendered from Australia depends primarily on the seriousness with which the offence is regarded "here, not in the foreign country"[90]. This remains a question upon which, having regard to all the circumstances, the Minister must be satisfied. The plain words of reg 7(1) address the Minister's attention, in reaching the satisfaction or otherwise contemplated by the sub-regulation, to a "punishment" which is "too severe" and which the surrender would involve. This is judged with Australian eyes. But it cannot be judged at all unless the Minister is provided with materials on the "punishment" which surrender would be likely to involve. This includes the range of sentences to which, in the circumstances, the person is actually liable. Knowledge of the statutory maximum, which may have little relevance for defining the actual "punishment", is not enough.

96 As a fallback position, it was submitted for the Minister that even if (by analogy to torture and the death penalty) it were relevant to consider the likelihood of an unduly *severe* sentence in the extradition country, it would not follow that it was permissible to take into account the likelihood of a particularly *light* sentence. However, once the possibility of scrutinising the sentence is contemplated to decide whether it is "too severe a punishment", it necessarily follows that the Minister must embark on the ascertainment of the likely actual sentence, whether severe or light. This is hardly surprising given the criteria to

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90 cf *Ex parte Bennett* (1974) 17 CCC (2d) 274 at 279 citing La Forest, *Extradition To and From Canada* (1961) at 104.

which the Act expressly addresses the Minister's attention in reaching the satisfaction required as a prerequisite to the surrender determination[91].

97 The Regulations must be given meaning in the context of their application to a wide range of Commonwealth countries which now have significantly different approaches to criminal offences and punishment. The meaning of reg 7(1) cannot be ascertained by reference solely to its application where the requesting country is the United Kingdom. In some Commonwealth countries, punishments which are short of torture may be imposed (such as punitive birching) which may reasonably satisfy the Minister, in all the circumstances, that it constitutes too severe a punishment to surrender the eligible person.

98 I have therefore reached a view about the meaning and operation of reg 7(1) similar to that of the primary judge and of Carr J in the Full Court. Specifically, I agree with Carr J that it is not necessary that the officers advising the Minister, or the Minister herself, should reach a precise conclusion on the likely punishment of the person whose extradition is sought[92]. It would have been sufficient for an indication of a range to be given to the Minister. Nor is it an answer that sentencing varies in accordance with individual judicial officers. Notwithstanding this trite observation, informed estimates are made every day upon which prosecutors and persons charged with criminal offences make very important decisions.

99 In the instant case, it would not have been difficult for advice on the range of actual likely punishments to be procured, either from the SFO with whom the Minister's department was in regular contact, or otherwise. If the SFO were thought partisan, other sources of advice would be available to an Australian High Commission. It is no answer that an estimate could not be made without having knowledge of the appellant's likely plea, offer of amends and expression of contrition. In the absence of indications to that effect, the advice would have to be tendered on the assumption that the charges were contested and the person was nonetheless convicted. Nor is the possibility of various non-custodial sentences, mentioned in argument, conclusive. Sentencing guidelines are now common in many countries. They may help reduce the elements of disparity. However that may be, if the search is for an evaluation of the "punishment" involved in surrender, whether it is "too severe" and whether in a particular case it is "unjust or oppressive", it can only ultimately be evaluated by reference to what is likely to be the burden on the person concerned. Rejecting that inquiry and confining attention solely to the statutory maximum fixed by legislation diverted the Minister from addressing her mind to the matters essential to the

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91 The Act, s 22(3)(a), (b), (c) and (d).

92 Full Court judgment at 15.

satisfaction of which reg 7(1) speaks. In any event, such a confined inquiry could not suffice in the case of a common law offence of which no statutory maximum punishment was specified.

100 I agree with Gaudron and Hayne JJ that the effect of the Act is to require that the Minister be satisfied that the circumstances described in reg 7 do not exist[93]. If the Minister concludes that they do not, there is a legal prohibition on removal. It is a prohibition based upon a state of satisfaction. But this is not a subjective satisfaction. In the absence of additional reasons or other evidence, it is one inferred objectively from the materials placed before the Minister relevant to the decision eventually made. What was expected of the Minister was not a "sentencing investigation"[94], as would be proper to a judge later sentencing the appellant. But it was an evaluation which complied with, and addressed itself to, the requirements laid down by the Parliament applicable to this case. How, one might ask, could the requisite state of satisfaction ever be formed, objectively, when, in the relevant memoranda, the officers advising the Minister did not provide her with any factual guidance on the type and actual "punishment" to which the appellant was exposed? How could the comparative evaluation called for ("too severe a punishment") be approached? How could the relevant considerations be weighed when the memoranda explicitly or implicitly denied that the inquiry was legally relevant to the Minister's decision[95]?

101 For all these reasons, I would reject the construction of the Act and of reg 7(1) urged for by the Minister. I would uphold the appellant's arguments.

The Minister's duty to take punishment into account

102 It was not disputed that the only basis upon which the appellant would be entitled to an order for judicial review was if he could show that the Minister had a *duty* to consider the appellant's likely actual punishment. It would not be sufficient that this was a consideration which the Minister *might* take into account. Only a failure to conform to a legal duty could, in circumstances such as the present, attract judicial intervention. The mere fact that an interested person, in the course of a submission, requests a Minister to take into account the suggested consideration would not, of itself, elevate that matter to one of

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93 Reasons of Gaudron and Hayne JJ at [37].

94 Reasons of Gleeson CJ and McHugh J at [30].

95 See the memorandum of July 1998 set out in the reasons of Gleeson CJ and McHugh J at [15]. In the memorandum of March 1999, the sole reference to punishment was to the maximum penalty of ten years for each of the three remaining offences.

obligation[96]. However, a number of considerations combine to produce the conclusion that consideration of the actual punishment to which the appellant was likely to be subjected if convicted of the extradition offences was a matter of legal duty.

103 The first is the language in which reg 7(1) is expressed. The person "shall not be surrendered" if the Minister is satisfied of certain matters. This imperative language suggests a duty on the part of the Minister to take the steps needed to address the matters relevant to the satisfaction with which the law is concerned. The requisite satisfaction could never be reached if the materials necessary to identify the "punishment" which surrender would entail were not placed before the Minister in sufficient detail to permit an evaluation to be made as to whether such "punishment" was "too severe" in all the circumstances. The references to "all the circumstances" and to the evaluative considerations of injustice and oppression reinforce this approach to the meaning of reg 7(1).

104 In addition to the language of reg 7(1), there is also its purpose. I would adopt the words of Carr J[97]:

> "The elevation of such a consideration from one which is not irrelevant ... to one which a decision-maker is bound to consider, is made easier, in my opinion, where (as here) the context is one of deprivation of liberty and the disruption of life of an Australian citizen whom the respondent has been asked to surrender to a foreign State. In my view, it is not asking too much of an extradition decision-maker to require him or her to consider the range of likely punishment in the requesting State and whether the pointlessness of the exercise in punishment (if it be pointless), would make surrender oppressive or too harsh a punishment."

105 Even if it were concluded that reg 7(1) did not state in sufficiently explicit terms the duty of the Minister to consider the actual punishment to which an eligible person was likely to be subjected (a view of the sub-regulation which I would reject), it is permissible in ascertaining the duty of the Minister to have regard to the entire subject matter, scope and purpose of the law. Relevantly, reg 7(1) is designed to impose on the Minister, by reference to the Minister's satisfaction, a duty to safeguard those subject to extradition requests from surrender which would be unjust or oppressive or "too severe a punishment". Once it appears that the return of the appellant would be unjust or oppressive,

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96 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-44.

97 Full Court judgment at 17.

such discretion as exists may only be exercised in one way[98]. In the present case, it is not necessary to speculate on the problems that might arise where the person, subject to the extradition request, was not legally represented or adequately advised. Here, the appellant was well advised. He specifically raised for the Minister's satisfaction the consideration in question. In such a case, "all the circumstances" include the circumstance that the consideration was urged as relevant to the Minister's satisfaction, rejected as such by the officers of the Attorney-General's Department advising her and, when mentioned at all by them, confined to matters pertinent to the alleged "trivial nature of the offence". Particularly, because the likely sentence of the appellant was explicitly raised, it became, in all the circumstances, something upon which the Minister was entitled to receive accurate advice and bound to consider in making the surrender determination.

The duty was not properly or adequately performed

106 It remains finally to decide whether, as the Minister submitted, the issue of the appellant's likely actual punishment following his surrender was adequately raised by his submissions to the Minister and therefore, by inference, adequately taken into account in the determination which she made to issue the second warrant for his extradition to the United Kingdom.

107 With respect to Kiefel J who so concluded, and to Moore J who concurred in her Honour's reasons in this regard, I cannot agree that, in his submissions to the Minister, the appellant did not put forward the suggestion that, having regard to the time he had already spent in custody, to surrender him would be oppressive[99]. As the passages from the solicitors' letters which I have extracted in these reasons make clear, the submission was put repeatedly. It was addressed not only in terms of oppression but also, specifically, in terms that it would involve "too severe a punishment". It was advanced to the Minister prior to the first and second determinations and the warrants which followed each.

108 Once it is accepted that there was a duty on the part of the Minister to consider the likely sentence that would be imposed on the appellant, in order to judge whether his surrender would, in all the circumstances, be "too severe a punishment", it was necessary for the Minister to be supplied with information that would permit that consideration to be evaluated by her. Instead of this, the officers of the Attorney-General's Department advising the Minister rejected the relevance of the appellant's submission. By inference, they suggested that she should do likewise. They did not provide the Minister with the necessary

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98 *R v Governor of Pentonville Prison; Ex parte Narang* [1978] AC 247 at 274.

99 Full Court judgment at 11.

information. In so far as they considered the likely punishment which the appellant faced, they did so solely by reference to the arguments addressed to the "trivial nature of the offence". They did not address their memorandum of March 1999, which immediately preceded the applicable surrender decision, to the alternative proposition being advanced for the appellant, namely that for another "sufficient cause" a point had been reached where his surrender would be "too severe a punishment" or "otherwise oppressive". In saying this, I do not mean to be unduly critical of the officers. They took a view of the meaning of reg 7(1). Although, as I have demonstrated, the phrase in question ("too severe a punishment") has existed in extradition legislation since the 1881 Imperial Act, it has not previously been the subject of the analysis it has received in this case. Yet the fact remains, in my view, that the Minister was misadvised. Because it must be inferred that she exercised her statutory power and discretion by reference to the memorandum placed before her by the officers, it follows that her decision-making miscarried.

109 It remains only to say that I agree with Carr J that, whilst the primary judge was correct in the construction which he gave to the meaning of reg 7(1), read in the context of the Act, he was incorrect in concluding that the long period which the appellant had spent in custody awaiting the conclusion of the extradition proceedings was the result of his own "deliberate conduct" and thus "self-inflicted"[100]. Having regard to the terms of the Act, in the context of a person most unlikely to secure the exceptional provision of bail whilst awaiting the conclusion of extradition proceedings in the courts, the appellant's loss of liberty must be classified as a consequence of extradition law. It is thus such as could hardly fail to be considered and, to a large extent, taken into account, by any judge in the United Kingdom determining the penalty proper for the three offences which remain as the basis of the appellant's extradition request[101].

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100 *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 375.

101 The length of time that has elapsed pending extradition is a consideration that has been recognised to be relevant for a court asked to surrender a citizen. Thus, if the courts of a requesting country were shown to be shockingly dilatory in concluding a criminal prosecution of the kind in issue, this would be a consideration that could be weighed: *Re Henderson* [1950] 1 All ER 283 at 287 per Tucker LJ; cf *R v Governor of Pentonville Prison; Ex parte Narang* [1978] AC 247 at 276; *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779; [1978] 2 All ER 634; *Oskar v Government of the Commonwealth of Australia* [1988] AC 366 at 378; *Hicks v Martin* (1990) 27 FCR 416.

Conclusion

110 To the time of hearing argument, the total deprivation of liberty suffered by the appellant from his first arrest in relation to the extradition charges was two years and forty-seven days[102]. Confined to the three offences remaining in issue, and assuming that they were contested unsuccessfully, the question to be considered was therefore what range of sentence a person with the appellant's record would be likely to face. If viewed from the perspective of Australia, such a sentence would be unlikely greatly to exceed, in total punishment, the bulk of the loss of liberty suffered by the appellant whilst contesting and awaiting extradition. The appellant acknowledged that the Minister might yet conclude that his surrender was warranted. She might remain of the view that her discretion[103] should be exercised in favour of surrender. But then, at least, the decision would have been made by reference to the applicable considerations. It would have been made, in short, in accordance with law. It was the appellant's entitlement to have the Minister perform her duties in that way, just as it was the Minister's obligation to ensure that the officers of the Attorney-General's Department provided her with the relevant information by which to discharge her power and discretion as the law contemplated.

111 It would be easy, in the case of a person such as the appellant, to be irritated by his numerous challenges to his surrender to the United Kingdom. It would be easier still to be unconvinced by a number of the arguments which he advanced in earlier proceedings. Easiest of all would it be to conclude that, after so many earlier attempts had failed, the appellant should cease his arguments, proceed to the United Kingdom, and advance any points concerning his punishment, and the allowance to be made for the time he has spent in detention awaiting extradition, before the independent courts of that country.

112 However, that is not the way extradition law works. From the earliest days of the 1881 Imperial Act to the present time, strict procedures have been laid down. Explicit criteria are established by law. They govern the relevant decision-maker, in this case the Minister. They protect Australian citizens and others in Australia defended by its law. The appellant was entitled to the benefits of the procedures established and to the protection of the criteria laid down by and under the Act of Parliament. In a particular respect, he did not secure the benefit that a critical decision affecting his extradition was made by reference to the considerations mandated by law. He sufficiently raised, and persisted with, his objection. It was a valid one. It was rejected by those advising the Minister and, by inference, by her. The result was that the Minister's determination

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102 By the time of this Court's orders, it was two years, four months and fourteen days.

103 Provided for in the Act, s 22(3)(f).

miscarried. The warrant which followed such determination should therefore have been revoked and reconsidered.

Order

113 On 21 June 2000, this Court published its orders and reserved the publication of its reasons to a later date. On that occasion I announced the orders which I favoured. They were that: the appeal should be allowed; the order of the Full Court of the Federal Court of Australia should be set aside; in lieu thereof, it should be ordered that the appeal to that Court from the order of Drummond J of 24 June 1999 be upheld; the order of Drummond J set aside; and there should be substituted a declaration that the decision of the respondent to issue a warrant on 30 March 1999 under s 23 of the *Extradition Act* 1988 (Cth) for the surrender of Peter Clarence Foster to the United Kingdom was not made according to law. I also favoured the issue of an injunction to compel the respondent to revoke the said warrant and an order that the respondent pay the appellant's costs in this Court, in the Full Court of the Federal Court and before Drummond J. The foregoing are my reasons for those orders.