HIGH COURT OF AUSTRALIA

KIRBY J

CARLOS CABAL (PENICHE) & ANOR APPLICANTS

AND

UNITED MEXICAN STATES & ORS RESPONDENTS

Cabal v United Mexican States
[2001] HCA 42
29 June 2001
M39/2001

ORDER

1. *Expedite the hearing of the applications for special leave before the Full Court of this Court.*

2. *Admit to bail the second applicant upon the conditions ordered.*

3. *Refuse the application for bail of the first applicant.*

4. *Reserve costs.*

Representation:

G Griffith QC with D S Mortimer for the first applicant (instructed by Fernandez Canda Gerkens)

D Grace QC for the second applicant (instructed by Fernandez Canda Gerkens) at the hearing on 28 June 2001

D Grace QC and D S Mortimer for the second applicant (instructed by Fernandez Canda Gerkens) at the hearing on 29 June 2001

M M Gordon for the first respondent (instructed by Director of Public Prosecutions (Commonwealth))

No appearance for the second respondent

H C Burmester QC for the third respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Cabal v United Mexican States

Constitutional law – High Court and federal judiciary – Implied or inherent powers – Practice and procedure – Application for special leave to appeal referred for hearing to Full Court of High Court – Proposed appeal concerns constitutional challenges to validity of *Extradition Act* 1988 (Cth) – Applicants subject to extradition determinations apply for bail – Applicants in custody for more than 31 months – Whether implied or inherent jurisdiction and power to grant bail – Purposes of constitutional jurisdiction and power – Whether ousted by bail provisions of the Act.

Extradition – Bail – High Court – Implied or inherent power to grant bail – Purposes of implied constitutional jurisdiction and powers to grant bail to applicant for special leave to appeal referred to Full High Court – Need for proof of exceptional circumstances – Proof of prolonged detention in severe custodial circumstances – Terms and conditions appropriate to applications – Entitlement of applicants to be separately considered.

Criminal law and procedure – Bail – *Extradition Act* 1998 (Cth) proceedings – Constitutional challenge to Act referred to Full High Court for argument as on appeal – Whether High Court has jurisdiction and power in the absence of a grant of special leave to appeal to grant bail – Whether in the circumstances bail should be granted – Whether exceptional circumstances established to enliven Court's jurisdiction and powers – Whether discretion to grant bail should be exercised – Terms and conditions relevant to the grant of bail – Relevance of earlier considerations of bail applications by Federal Court of Australia – Relevance of extended detention of applicants in severe custodial conditions unsegregated from convicted prisoners – Relevance of security against risk of absconding established by the evidence – Whether electronic tag and home detention shown to be a lawful and suitable condition of bail – Extent of sureties and financial security appropriate to the favourable exercise of the bail discretion.

Words and phrases – "exceptional circumstances".

Extradition Act 1988 (Cth), ss 21, 53.
Director of Public Prosecutions Act 1983 (Cth), ss 6(1)(k) and (n).

1 KIRBY J. These are applications by Mr Carlos Cabal (Peniche) ("Mr Cabal") and Mr Marco Pasini (Bertran) ("Mr Pasini") ("the applicants") for bail pending a hearing, before a Full Court of this Court, of their applications for special leave to appeal against a judgment entered against them by the Full Court of the Federal Court of Australia.

The course of the proceedings

2 Both Mr Cabal and Mr Pasini (who is Mr Cabal's brother-in-law) are the subjects of determinations by a magistrate that they are eligible for surrender under the *Extradition Act* 1988 (Cth) ("the Act") to the United Mexican States ("Mexico"). The determinations were made in relation to a number of serious financial offences alleged to have occurred in Mexico involving the applicants and very large sums of money. On 17 December 1999, pursuant to s 19 of the Act, the magistrate found that the applicants were eligible for extradition. Since that time the applicants have been contesting that determination. They have initiated other litigation addressed to claims that they were entitled to protection visas as refugees under the *Migration Act* 1958 (Cth), to improve their conditions of detention, to seek the issue of writs of habeas corpus, to secure bail and otherwise.

3 The determinations by the magistrate were challenged in the Federal Court of Australia pursuant to s 21 of the Act. In that Court, French J, on 29 August 2000, dismissed the applicants' applications for judicial review[1]. Appeals against French J's orders were brought to the Full Court of the Federal Court. In the appeals, that Court comprised Hill, Weinberg and Dowsett JJ. On 18 April 2001, it unanimously decided that the appeals should be rejected, although minor errors in the primary judge's orders were corrected and for that purpose alone the appeals were formally allowed[2].

4 The applicants thereupon applied to this Court for special leave to appeal. Those applications were heard in Melbourne on 22 June 2001. On that occasion, the Court comprised Gummow and Callinan JJ and myself. The applications for special leave were resisted by Mexico and the Attorney-General of the Commonwealth ("the respondents").

5 The applicants' essential legal point in this Court was one which had failed in the Federal Court. It was an attack on the limited nature of judicial review provided by s 21 of the Act and an attempt to demonstrate that, measured against the requirements of Ch III of the Constitution, the section was invalid. This is a

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1 See *Cabal v United Mexican States (No 3)* [2000] FCA 1204.

2 See *Cabal v United Mexican States* [2001] FCA 427.

question which, as such, has not been determined by this Court. However, there are judicial dicta and analogous decisions which appear to stand in the way of the applicants' propositions. Even if the applicants were to succeed on the foregoing point, it would not, as such, avail them. It would leave the initial determinations of the magistrate standing. Recognising this, the applicants argued that s 21 of the Act was incapable of severance from the rest of the Act, being an essential part of the integrated scheme enacted by the Parliament. Accordingly, they submitted, the whole Act failed. Had they been refused special leave on 22 June 2001, it was open to the applicants to commence proceedings in the original jurisdiction of this Court pursuant to s 75(v) of the Constitution, challenging steps taken to give effect to the magistrate's determinations. Having regard to the history of their resistance to extradition, such proceedings could not be ruled out.

6 On the return of the special leave applications, the respondents supported the validity of the Act. They urged that the points sought to be argued by the applicants were without merit and should be dismissed. In the end, however, the panel of the Court hearing the matters referred the applications for special leave to a Full Court to be heard by all available Justices. Special leave was not granted. On the other hand, the applications were not dismissed, as the respondents had argued.

7 The Court, on 22 June 2001, directed that the parties should appear on the return of the applications prepared to argue the applications as on the hearing of an appeal. In the ordinary course, the applications would come on for hearing before a Full Court some time in the first half or middle of 2002.

The expedition of the hearing in the High Court

8 Accompanying the applicants' applications for bail was a summons seeking an order of expedition of the hearing of the foregoing proceedings. That application was made by Mexico. In the course of argument, it became clear that it was supported by the applicants. Whatever may be the outcome of the applications for bail, it is clear that a measure of expedition should be given to the hearing and disposal of the applicants' claims for special leave.

9 The scheme of the Act, which is designed to facilitate the fulfilment of Australia's obligations under international law, contemplates that the procedures of extradition should be orderly and expeditious. Although they have been exercising their legal rights, as they are entitled to do, the effect of the litigation has been to delay the resolution of the extradition requests concerning the applicants far beyond the time that would be normal. Moreover, as I will indicate, the conditions of custody in which the applicants are being kept are most severe, and even harsh. This appears to be contrary to the spirit, if not the letter, of s 53 of the Act, concerning the imprisonment of persons committed to prison, as the applicants have been, to await extradition. If the applicants, or either of them, were refused bail, it would be important to resolve their fate, so

far as extradition is concerned, as quickly as possible, to relieve them from their current prison conditions.

10 Equally, if the applicants, or either of them, were granted bail, it would be highly desirable that the interval during which they were on bail was reduced to a minimum. This would diminish the time during which they and their families would be subject to the strict requirements that would necessarily accompany admission to bail; it would reduce the cost to the Australian community, and to private persons, of ensuring that the applicants complied with their bail conditions; and it would lessen the period during which there was any continuing risk of flight, such as would interrupt or frustrate the applicants' compliance with the magistrate's determinations under the Act, should those determinations eventually be upheld as consistent with the Constitution.

11 For these reasons, I accept that expedition of the hearing should be provided. I so order.

The statutory jurisdiction and power is inapplicable

12 The applications for bail purport to invoke the jurisdiction and powers of this Court. In the Federal Court there have been several earlier applications for bail, brought on behalf of the applicants. They have been in custody for over 31 months, since they were arrested in Melbourne in November 1998. Since that time, except for an interval of bail granted to Mr Pasini to which I will later refer, both applicants have been in custody at the Port Phillip Prison in Victoria. That is where they are presently detained.

13 Two foundations for the jurisdiction of this Court to provide bail in extradition cases may be mentioned. The first is afforded by the Act itself. The Act provides expressly in relation to the grant of bail by the High Court and by other courts. Relevantly, in s 21(6) it provides:

> "Where the person or the extradition country:
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> …
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> (c) appeals to the High Court against an order made on that appeal;
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> the following provisions have effect:
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> …
>
> (f) if:
>
> (i) because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has not been released;

…

the court to which the application or appeal is made may:

(iii) order that the person be kept in such custody as the court directs; or

(iv) if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fit;

until the review has been conducted or the appeal has been heard".

14 The applicants made earlier applications for bail from this Court. Those applications came before Gaudron J on 31 May 2001, that is to say, before their applications for special leave had been heard. Her Honour expressed the view that s 21(6)(c) of the Act was to be read as applying to circumstances where an "appeal" to this Court was actually on foot, being an "appeal" pursuant to a grant of special leave to appeal. As there has not been such a grant, and there was therefore no such "appeal" before this Court, it was argued for Mexico that there was no jurisdiction under the Act to provide bail. Gaudron J accepted that submission[3].

An implied constitutional jurisdiction and power is available

15 I shall assume that this is a correct view of the Act. Before me Mexico so submitted. The applicants proceeded upon that basis. However, there is a second foundation for the jurisdiction and power of this Court to grant bail to persons in the position of the applicants. I refer to the implied jurisdiction and powers of the Court derived from the Constitution. Such implied jurisdiction and powers are sometimes, inaccurately in my view, called the "inherent" powers of the Court[4]. The relevant implications would be derived from the provisions of the Constitution so as to ensure that the exercise by the Court of its constitutional jurisdiction and powers was not rendered futile or ineffective and so as to fulfil the constitutional purpose of affording to all persons, subject to the authority of the Constitution, the protection and justice of the law.

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3 *Cabal v United Mexican States*, transcript of proceedings, 31 May 2001, per Gaudron J at lines 38-87.

4 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422 [108]; cf *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267 at 272, approved in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624.

16 An immediate question is presented as to whether, the Parliament having expressly provided in the Act as it has done (assuming such provisions to be valid), the implied powers of this Court are to be taken as ousted, at least when they would be inconsistent or incompatible with the powers expressly granted by the Parliament. In my view, there is no such ouster or incompatibility in this case.

17 The implied constitutional jurisdiction and powers invoked by the applicants are not inconsistent with the express powers conferred by the Act. The implied powers cover the circumstances of this case where, although there has been no grant of special leave (and there is thus no "appeal" before this Court), three members of the Court have referred the applications to a Full Court with the direction that the parties should be in a position to argue the matters, when they are returned, as on the hearing of an appeal.

18 In this respect, therefore, the implied constitutional jurisdiction and powers of this Court supplement the express statutory powers. They address a point which the Parliament has not expressly covered by the terms of the Act. This conclusion appears to be compatible with the assertion of an implied (called "inherent") power to grant bail accepted by Mason CJ in *Zoeller v Federal Republic of Germany*[5]. The respondents did not contest the existence of a residual implied (or "inherent") jurisdiction and power to grant bail pursuant to the Constitution. I will therefore act on the basis that such jurisdiction and power exist.

The applications are not premature

19 For its part, Mexico argued that the applications for bail were premature, having regard to the terms of the disposition by Gaudron J of the applications for bail when they were before her. In effect, her Honour stood the applications over until the applications for special leave had been heard. I do not take Gaudron J to have considered explicitly the intermediate position which has now risen. Obviously, had special leave been refused on 22 June 2001 the question of bail would have been otiose. The Act would then have taken its course in accordance with the magistrate's determinations. Had special leave been granted, the question of bail would have arisen in terms of the Act.

20 The present is a situation between those two possibilities. In any case, I would be prepared, if necessary, to treat the present applications as fresh applications for bail from this Court. Each of them relies on a new situation said to have arisen from the orders made by the Court on 22 June 2001 where the applicants undoubtedly had what might be described as a partial success.

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5 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 163-164.

Certainly, Mexico did not enjoy a complete success because it had argued strongly that the applications for special leave should be refused outright and that argument was not accepted by the Court.

21 I would, therefore, reject the submission that these applications for bail are premature, either in terms of the earlier orders of Gaudron J or generally. In my view they can, and should, be decided.

The respondents are the proper parties

22 For their part, the applicants raised a preliminary objection to the participation of Mexico to contest their request for bail. They argued that the provision of bail, pending the hearing and determination of the proceedings in this Court, was a matter of interest only to the Australian government, which was seeking to ensure that it complied with its international obligations under the extradition treaty with Mexico and in accordance with the law enacted by the Parliament.

23 It was my view, stated during argument, that there was no substance in this objection. Mexico, as the requesting State, had sufficient interest to be heard in the proceedings. It is involved in the proceedings in accordance with a practice sanctioned by this Court in *Director of Public Prosecutions (Cth) v Kainhofer*[6]. In fact, the representation of that respondent, so named, is provided by the Director of Public Prosecutions of the Commonwealth ("the DPP"). I am satisfied that there is full power in the DPP to act in this way pursuant to ss 6(1)(k) and (n) of the *Director of Public Prosecutions Act* 1983 (Cth).

24 The bail applications are interlocutory to the proceedings that have been commenced in this Court. Mexico is named in the process of those proceedings. It has appeared as a party/respondent. Mexico has an interest in securing the return of the applicants to the Mexican courts. It has an interest to suggest that a grant of bail to the applicants, with the history that they have, would imperil a real chance of the applicants' return to Mexico should this Court eventually proceed to refuse special leave or, granting it, to dismiss their appeals. Mexico is thus a proper contradictor not only in the applications but also in the present proceedings concerning bail.

25 Upon questioning by me, it became clear that the representative of the Attorney-General of the Commonwealth (the third respondent) did not intend to repeat the submissions put on behalf of Mexico. The Attorney-General's concern was more limited, being directed principally to the separate question of whether the conditions under which the applicants are detained in custody do not comply

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6 (1995) 185 CLR 528 at 544.

with the Act or with the obligations of Australia under the International Covenant on Civil and Political Rights. These were matters raised in the arguments of the applicants. I would uphold the submissions of the Attorney-General in that respect. Although the conditions in prison are relevant to the bail applications, as I shall show, the foregoing questions, as such, are not relevant. They do not have to be decided by me. I therefore overrule the applicants' preliminary objection to the standing of Mexico in these proceedings.

The need to show exceptional circumstances

26 Under the Act, the Court may not order the release on bail of a person, unless "there are special circumstances justifying such a course"[7]. Those words were not included in the Act as originally enacted. They were added in 1990[8]. They reinforce the impression that the Act contemplates that the provision of bail by a court will be special and exceptional. The same is true of the jurisdiction and power invoked on this occasion, pursuant to the Constitution. It would be incongruous and contrary to principle if the jurisdiction and power of the Court, under that head, were less stringent than under the Act.

27 In other contexts, it has been said repeatedly that to obtain bail in furtherance of the Court's implied constitutional powers, exceptional circumstances must be shown[9]. In *Sinanovic v The Queen (No 1)*[10], I said that the jurisdiction was "extraordinary and exceptional". I remain of that view and it is applicable to this contest.

Avoiding segmented determinations

28 In the setting of the Act, where the somewhat analogous criterion of special circumstances must be shown, the courts have resisted, correctly in my view, an attempt to segment or compartmentalise the circumstances that will, or will not, meet the statutory standard. An over-precise or artificially rigid classification of qualifying or insufficient circumstances is not what is called for, any more under the Constitution than under the Act[11].

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7 The Act, s 21(6)(f)(iv).

8 See *Extradition Amendment Act* 1990 (Cth), s 6.

9 See *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518-520.

10 (2001) 179 ALR 520 at 522 [11].

11 See *Holt v Hogan (No 1)* (1993) 44 FCR 572 at 579; *Kainhoffer v Director of Public Prosecutions* (1993) 48 FCR 9 at 12-13 referring to *R v Giordano* (1982) 31 SASR 241 at 243.

29 What is essential is that the Court should consider all the circumstances in their totality. It is true, as Mexico said, that the precondition of exceptional circumstances must be affirmatively demonstrated before the Court turns to the exercise of the discretion and to the fashioning of any terms and conditions that should be imposed on a person admitted to bail. However, it would be artificial completely to divorce these separate steps, one from the other. Thus, a favourable exercise of the discretion might be contemplated upon certain strict terms and conditions, but regarded as completely out of the question were there to be no strict conditions or were the applicant for bail to be unable to meet those conditions.

30 Similarly, what might be regarded as "exceptional circumstances" warranting the grant of bail on certain stringent conditions might not be regarded as sufficiently "exceptional" if the view were propounded that the applicant should be set at liberty without terms and conditions at all. In truth, there is a composite set of ideas here. Complete segregation of them from each other is artificial. And whatever may be the requirements of the Act, having regard to its language and structure, the implied constitutional norm is not rigid. This Court has an implied jurisdiction and power to admit a person in custody to bail, where to do so is necessary in exceptional circumstances, to uphold the purposes of the Court's function in the proceedings, to defend the utility of those proceedings and thereby to contribute to the attainment of justice as the Constitution envisages. In this context, an overly segmented approach would frustrate the achievement of these objectives.

31 In extradition cases, such as the applications now before me, there are two principal purposes of justice that have to be reconciled in deciding whether "exceptional circumstances" are demonstrated. First, there is the policy of the law that the procedures of the Act will be effectively and expeditiously concluded. Doing this will avoid, as far as may reasonably be achieved, the interruptions or frustration of the process by the flight of the subject who secures liberty before the determination has been carried into effect. Secondly, there is the policy of the law that, in certain exceptional circumstances, the subject of an extradition determination will be restored to liberty out of deference to the general tendency of our law favourable to personal freedom and resistant to the detention of persons in custody where such detention is unnecessary to achieve the purposes, relevantly, of extradition and is arbitrary or oppressive in the circumstances and cannot be fully justified[12].

32 In short, admission to bail is "exceptional". But both under the Act and under the implied jurisdiction and power afforded to this Court by

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12 See *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 74-75.

the Constitution, it is available. Neither the Act nor the Constitution absolutely forbids bail whatever the circumstances. To this extent, Australian law recognises that an absolute assurance is not required that surrender of a person subject to an extradition determination will take place. That could only be guaranteed by a blanket refusal of bail in every case. That is not what the Act provides. Nor is it what the Constitution implies. Nor is it the practice of the authorities or of the courts of this country.

33 This being so, it must be accepted that where bail is granted, there will inevitably be some risk that the person concerned will abscond and thereby interrupt or frustrate the extradition procedures. The purpose of obliging the applicant for bail to demonstrate "special" or "exceptional" circumstances is to focus the attention of the court on the reasons why detention in custody pending surrender is the normal rule. And why something unusual and extraordinary is necessary to depart from that rule.

Three considerations which are not determinative

34 I have had the advantage of considering the opinions of the judges of the Federal Court, who, at earlier stages in these proceedings, have had to determine applications for bail made under the Act to that Court. I am not bound by any of those determinations. They were made to a different court, in earlier cases, upon different evidence, and based upon a different legal foundation. It would be quite wrong to limit the exercise of the jurisdiction and powers of this Court to those of other courts. I am obliged to decide the applications for myself. Necessarily, different judicial officers in different courts may react even to the same evidence and argument in different ways. My duty is to express my own opinion on the material before me.

35 Nor, as a matter of law, do I think it necessary for the applicants to show a change of circumstances since the matter was before Gaudron J in May 2001, in order to be entitled to invoke the jurisdiction and powers of this Court as exercised by me. However, it is unnecessary to decide that point finally because there has been a relevant change of circumstances, namely that on 22 June 2001 the applications for special leave were referred by three Justices of the Court to a Full Court for argument as on the return of an appeal. I would accept that this fact falls short of a grant of special leave. Furthermore, even such a grant would be no guarantee of the existence of special, still less, exceptional, circumstances warranting the provision of bail. So much is made clear by past decisions of this Court[13].

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13 eg *Zoeller v Federal Republic of Germany* (1989) 64 ALJR 137 at 138; 90 ALR 161 at 164.

36 I could not say that, in these cases, an eventual grant of special leave is irresistible, or that the applicants are bound to succeed in their applications or in the appeals pursuant to special leave were such leave granted. Nevertheless, it is inherent in the action of referring the matters to a Full Court to be argued as on appeal, that the applicants' submissions were regarded as arguable and warranting a decision by all available Justices. Clearly, the removal of any doubt about the validity of the Act is a matter of high constitutional and practical importance. To this extent, the order made on 22 June 2001 involved, as Mexico properly conceded, an improvement in the position of the applicants from the position which they faced when they were before Gaudron J.

The exceptional circumstances propounded by the applicants

37 In addition to the reference of their applications to the Full Court, the applicants propounded a number of considerations to lift their cases into the exceptional class. The considerations principally relied upon were:

(1) The extremely harsh conditions in which they are being detained in custody and in which they have been detained pending the resolution of their legal challenges;

(2) The length of time that they have already been detained, and the likely future time that they would be so detained were they refused bail pending the hearing and the determination of their proceedings by the Full Court. Mr Cabal has been in custody since 11 November 1998, a period of over 31 months. Mr Pasini has been in custody for the same time save for four months when he was admitted to bail;

(3) The medical and personal evidence for, and by, the applicants concerning their deteriorating psychological conditions by reason of their severe incarceration, separation from their families and anxiety about the impact which such incarceration was having on their families, and especially, in the case of Mr Cabal, upon his children;

(4) The quashing in Mexico, through a procedure known as Amparo, of two warrants in relation to a charge of money laundering, the subject of the extradition request by Mexico in the case of Mr Cabal. This development removes from the offences for which extradition is sought the most serious offence, which, I was informed, was the only offence that was not, in law, subject to the provision of bail by the Mexican courts;

(5) The presence in Australia of the spouses and, in the case of Mr Cabal, the children of the applicants, the support given to the applicants by Australian citizens of good character who know them and the willingness of those citizens to act as sureties to ensure the appearance of the

applicants to answer the determination of their applications by this Court; and

(6) In the case of Mr Pasini the additional fact that, on 20 December 2000, Gray J released him to bail and thereafter that he complied scrupulously, as it was agreed, with the bail conditions fixed by his Honour until his surrender and return to custody on 18 April 2001, the day of the decision of the Full Court of the Federal Court[14].

The submissions of the principal respondent

38 Mexico urged that there was nothing, or nothing sufficiently exceptional, in the foregoing considerations to warrant treating the applicants' cases as "exceptional". Principally, it urged that:

(1) Although the applicants' conditions in custody were, as they were described, "not comfortable", they are those required by law and are necessary to ensure the proper carrying into effect of the terms of the Act;

(2) The applicants' lengthy period in custody has been occasioned, in part, by protracted litigation, some of it upon side issues which have needlessly extended the applicants' loss of liberty;

(3) The psychological conditions of the applicants were those that might be expected in the case of "white-collar criminals" subjected to incarceration for the first time;

(4) Quite apart from the money-laundering charge now quashed, each applicant was charged in Mexico with serious criminal offences. In the case of Mr Cabal they involved economic loss to a bank and to three private companies in Mexico in the sum of approximately $US242 million (about $478 million). Those charges carry a maximum penalty of 9, 10 and 12 years imprisonment. In the case of Mr Pasini there are two arrest warrants containing three offences. The maximum penalty for two of them is nine years imprisonment and, for the other, three years imprisonment;

(5) Each of the applicants is a fugitive who already has a history of absconding to escape the criminal process of the courts of Mexico;

(6) Each of the applicants, although citizens of Mexico by birth, had, on their arrest, passports in false names issued by the Dominican Republic. Their

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14 See *Cabal v United Mexican States* [2000] FCA 1892.

spouses and family members travelled on, or with, passports in false names and each had additional identity cards from the Republic of Uruguay issued in false names, since impounded;

(7) Each of the applicants had no significant ties with Australia. The applications made by the family of Mr Cabal and by Mr Pasini and his wife for protection visas under the *Migration Act* had failed in the initial determination, before the Refugee Review Tribunal, before a single judge of the Federal Court and before the Full Court of that Court. Mr Cabal, in particular, had access to visitors and advisers from Mexico. Whilst this might be inconsequential whilst he was in custody, such visits, if he were on bail, could possibly initiate or facilitate flight;

(8) The very number, variety and persistence of the applications to the Australian courts demonstrated (as it was put) the lengths to which the applicants would go in order to escape return to Mexico. This made the option of flight, if the applicants were granted bail, a risk even greater in their cases than the fact that they were fugitives would suggest; and

(9) Alternatively, recent media statements issued by Mr Cabal suggested that he might be contemplating voluntary return to Mexico for the sake of his family, the former employees of the bank in Mexico and, as he put it, "the public of Mexico". Were he to do this, his application to the Full Court of this Court would lapse. Mr Pasini, on the other hand, made it clear that he intended to pursue his application whatever Mr Cabal decided to do.

39 I acknowledge the force of these submissions for Mexico. I also accept that there would be certain risks of absconding if bail were provided, especially in the case of Mr Cabal. This would be so whatever terms and conditions the Court fashioned. Absolute assurance can only be achieved by refusing bail to every applicant.

Conclusion: exceptional circumstances are demonstrated

40 Nevertheless, in my view, "exceptional circumstances" have been established to warrant the provision of bail to each of the applicants. Critical to this conclusion is the action taken on 22 June 2001 to refer the proceedings into the Full Court. Also highly relevant are the extreme conditions in which the applicants are being detained and the evidence of the understandable deterioration in the psychological conditions of each of them in consequence of their situation and their prolonged isolation from their families. This is specially true in the case of Mr Pasini, who is described as "severely depressed" and "crushed by his current circumstances". However, I also find that it is true in the case of Mr Cabal.

41 The particular problem for the custody of the applicants arises from the fact that, in the State of Victoria, there is no separate facility for remand prisoners in which the applicants could otherwise be detained pending the final outcome of the extradition proceedings. They have never been convicted of an offence. Still less of an offence against the law of Australia. Even less of a grave crime such as would normally be a precondition to their admission to the Sirius East Unit in which they are held in the Port Phillip Prison.

42 Prior to these proceedings, each of the applicants was entitled to be treated as a person of good character. Neither is a danger to the Australian community. Neither has manifested any propensity to violence.

43 The applicants are incarcerated in a most severe custodial regime, involving unremittingly severe discipline ordinarily reserved for the most dangerous and recalcitrant Australian prisoners. They are subjected to strip searches. During transportation they are confined by short-chain shackles. They have no more than restricted access to recreational, work, library, educational and religious activities. In total, this regime can only be regarded as "exceptional". Indeed, it is "exceptional" by the standard of the Act.

44 Section 53 of the Act contemplates that prisoners such as the applicants, awaiting extradition, will be subjected to conditions of imprisonment equivalent to those undertaken in Australia by prisoners awaiting trial. It is said that this is only "so far as they are capable of application" and that in Victoria this provision of the Act is not capable of other application because of want of a remand facility. This was a peculiarity of the applicants' fate because they were detained in Victoria. In default of proof to the contrary by the respondents, I would be prepared to accept that this is so.

45 I am not concerned about wider questions related to the suggested breach involved in these circumstances of Australia's obligations under international human rights law[15]. However, I am concerned with the consequences of such conditions upon the applicants. Such conditions might be endured with fortitude for a time. For a time, the courts might conclude that there was nothing special or exceptional in them. However, to subject the applicants for so many months to such conditions is undoubtedly exceptional. It is so by ordinary Australian custodial standards and by the standards which the Parliament clearly contemplated when it enacted the ameliorating instruction of s 53 of the Act.

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[15] International Covenant on Civil and Political Rights, Art 10(2)(a) which provides: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons"; done at New York on 19 December 1966; (1980) *Australia Treaty Series* No 23 (entered into force 13 November 1980); (1976) 999 *United Nations – Treaty Series* 171; (1967) 6 ILM 368.

46 It is to the implied jurisdiction and powers afforded to this Court by the Constitution that the applicants appeal. In my opinion, the Constitution does not turn a deaf ear, at least at this stage of their ordeal. Only the most formalistic view of the Constitution and of "exceptional circumstances" would sustain the contrary conclusion.

47 The precondition for the exercise of the jurisdiction and powers of this Court to provide bail pursuant to the Constitution is, therefore, established in the case of each applicant. Accordingly, I pass to whether, in each case, the discretion to provide bail should be exercised in their favour and, if so, upon what conditions.

The exercise of discretion: application of Mr Pasini

48 It is convenient to deal first with the case of Mr Pasini for I regard his matter as comparatively straightforward. In a sense, the conditions relevant to a provision of bail to Mr Pasini have already been considered and expressed by Gray J on the evidence as it stood at that time. There is no evidence that any of the considerations that led his Honour to grant bail to Mr Pasini upon the conditions which he did have disappeared or diminished. On the contrary, I would accept that Mr Pasini's position is now aggravated by:

(1) The greater aggregate length of time that he has been subject to the regime at the Sirius East Unit at Port Phillip Prison;

(2) The added burden, having been on bail, of being returned to such severe custodial conditions after a period of freedom; and

(3) The special burden of being separated from his sister, who is Mr Cabal's wife. In accordance with the conditions of bail imposed by Gray J (condition (h)) he was forbidden, whilst on bail, to have any communication with Mr Cabal, his spouse or their children.

49 In the conclusion to which he came, Gray J was greatly affected by the favourable impression which he reached concerning the evidence of Mrs Margaret Davies, who, with her husband, was willing to act as a surety for Mr Pasini. Mr and Mrs Davies were willing, if necessary, to encumber their house as security to assure Mr Pasini's appearance to abide the determination by the Full Federal Court. Although I have not seen Mrs Davies or her husband give evidence, I am prepared to accept the impression expressed by Gray J. It was vindicated by Mr Pasini's conduct when he was admitted to bail. I have been informed that Mr and Mrs Davies remain willing to act as they did in December 2000.

50 Mr Pasini is entitled to the separate consideration of his application for bail. Approaching the matter in that way, in the exercise of this Court's discretion, I would be prepared to admit Mr Pasini to bail upon the same conditions as those set by Gray J subject to the following variations:

(1) That condition (h) be varied to permit the applicant to meet his sister and her children at intervals of not more than once a week, in the presence and hearing of a police officer who is fluent in the Spanish language or in the presence and hearing of a police officer and a Spanish interpreter, the costs of which interpreter are paid for by Mr Pasini;

(2) That condition (k) be amended to read:

"That he attend at the Victorian Registry of the Federal Court of Australia, 305 William Street, Melbourne at 10 am on the occasion of the return before the Full Court of the High Court of Australia of his application for special leave, to abide the order of the Full Court on that occasion or any further or other order of the High Court or of a Justice thereof as to his custody"; and

(3) That the liberty reserved by order 2 should be reserved to permit application to the High Court of Australia or a Justice thereof and the liberty should, as expressed, be amended to read "will not appear on the return of his application for special leave before the Full Court of the High Court or as ordered by that Court".

51 I reserve the question of costs.

The exercise of discretion: application of Mr Cabal

52 In the case of Mr Cabal the position is more complicated. Like Gray J, I would conclude that the evidence in these applications indicates that Mr Pasini was a follower; Mr Cabal took the leading role in their relationship and activities; and Mr Pasini followed Mr Cabal, in part, because of the family relationship. Obviously, the admission of each applicant to bail, at the same time and in the same city, would, without more, increase the risks of absconding by each, which the separate admission to bail of Mr Pasini avoids, or at least minimises.

53 I would not be prepared to admit Mr Cabal to bail upon precisely the same terms and conditions as those imposed on Mr Pasini. Their circumstances are distinct. I judge Mr Cabal to be much more resourceful. It is he who is visited by advisers from overseas. It is he who, I would infer, would have much wider contacts, experience and opportunities for absconding, if that were his intention, than Mr Pasini. Through his counsel Mr Cabal offered to submit to any conditions that the Court imposed, save for a condition forbidding him from

contact with his extended family. In the circumstances, I took this to mean contact with Mr Pasini and his wife.

54 I would not be prepared to contemplate conditions of bail which would permit contact between Mr Cabal and Mr Pasini. Prohibiting such contact was central to the conditions of bail set by Gray J. However, I would be willing to contemplate contact between Mr Cabal and Mr Pasini's wife upon conditions similar to those that I have set in the case of Mr Pasini's contact with Mrs Cabal and her children.

55 However, this leaves a serious difference in the position of Mr Cabal when compared with Mr Pasini. Mr Cabal has no equivalent to Mr and Mrs Davies. He has produced two Australian citizens of good reputation who offer to be sureties for him. However, the limits of their financial commitment is respectively $50,000 in each case. I would not consider admitting Mr Cabal to bail on those sureties alone.

56 When I made this clear to Mr Cabal's counsel during argument, he indicated that his client would be willing to submit to home detention with an electronic tag which would permit ready detection in case of flight. However, this proposal was offered without any evidence as to what would be involved or proper argument as to whether it would be lawful, feasible, reasonable or desirable in the circumstances. Without such materials and argument, I would not be prepared to contemplate imposition of such a condition.

57 When this was made clear, counsel offered an alternative condition as security against flight. This involved the filing and service in the Registry of this Court of affidavits sworn by a director of the registered proprietor of the land upon which stands the substantial house in Armadale in Melbourne occupied by Mrs Cabal and the couple's children; together with a certificate of a valuer verifying the value of the property; and signification by the mortgagee of the property of its irrevocable agreement to give priority to the claim of the Commonwealth to ensure Mr Cabal's compliance with his bail conditions and, in particular, his obligation to present himself to abide the decision of this Court on his application.

58 I accept the submissions for Mexico that these arrangements are not adequate to permit terms and conditions to be framed that would afford a sound foundation for the exercise at this time of a bail discretion in favour of Mr Cabal. Amongst other reasons, it is appropriate to mention that the responsibility for exercising the discretion, and of fixing the terms and conditions, is mine. It could not be delegated to the Registry of this Court. Whether the discretion is exercised favourably to the grant of bail depends, in part, upon the conditions that could be fixed. The conditions could not be fixed at this time without proof of the adequacy, legality and enforceability of the security that is offered.

59 Furthermore, the amounts of that security could not be finally settled without at least some idea of whether, amongst all the assets to which Mr Cabal has access, forfeiture of the proposed security would constitute a sufficient disincentive so as to restrain Mr Cabal from absconding. As well, Mexico and the Commonwealth assert that they are beneficiaries of costs orders against Mr Cabal which amount, in aggregate, to about $2 million. These could not be enforced were he to abscond without leaving adequate security.

60 I have considered whether I should fix a monetary condition for the grant of bail and then leave it to Mr Cabal to attempt to raise such a sum. However, I have concluded that, at this stage, Mr Cabal has not established by admissible evidence his capacity and willingness to provide security in a sufficient sum, or in an appropriate form from an acceptable source, that, having been tested if necessary before this Court, would afford a foundation for the expression of the terms and conditions upon which Mr Cabal could be admitted to bail.

61 For these reasons, in Mr Cabal's case, on the material placed before me, I would exercise my discretion against the grant of bail and would reject his application.

62 Having said this, it is inherent in my finding of "exceptional circumstances" that it is my view that the jurisdiction and power of this Court might be exercised, given appropriate terms and conditions, in favour of a grant of bail to Mr Cabal. It is open to him to reapply with more substantial evidence as to security. If that evidence were accepted by the Justice considering the matter, it could establish a basis for his admission to bail upon terms and conditions adapted from those ordered in the case of Mr Pasini.

63 For my own part I would not presently have been minded to grant bail to Mr Cabal without the sureties whom he nominated and without the provision of a cash deposit or equivalent acceptable and enforceable security amounting or equal to $2 million. If Mr Cabal is in a position to provide that security, or some other equivalent assurance against absconding such as was mentioned by his counsel in argument (but not supported by evidence), he may, of course, reapply for bail. Had such evidence been available, because of the exceptional circumstances to which I have referred, I would have been willing to consider admitting him to bail.

Orders

64 The following orders are therefore made:

(1) Expedite the hearing of the applications for special leave before the Full Court of this Court;

(2) Admit to bail the second applicant, Marco Pasini (Bertran), upon the conditions indicated;

(3) Refuse the application for bail of the first applicant, Mr Cabal; and

(4) In both matters reserve costs.