

# HIGH COURT OF AUSTRALIA

KIRBY J

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CARLOS CABAL (PENICHE) & ANOR

APPLICANTS

AND

UNITED MEXICAN STATES & ORS

RESPONDENTS

*Cabal v United Mexican States [No 2]*  
[2001] HCA 43  
19 July 2001  
M39/2001

## ORDER

- 1. Admit the first applicant to bail upon the conditions ordered.*
- 2. Reserve liberty to apply in respect of the possession of the security documents.*
- 3. Reserve costs.*
- 4. Stay the coming into effect of the foregoing orders until 20 July 2001 at 4.30 pm.*

### Representation:

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

No appearance for the second applicant

G T Pagone QC with K P Hanscombe for the first respondent (instructed by Director of Public Prosecutions (Commonwealth))

No appearance for the second respondent

B E Walters for the third respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

## CATCHWORDS

### **Cabal v United Mexican States [No 2]**

Constitutional law – High Court and federal judiciary – Implied or inherent powers – Distinction between implied and inherent powers – Whether implied or inherent jurisdiction and power to grant bail pending hearing – Whether bail only available to prevent futility of proceedings – Purpose of constitutional jurisdiction and power.

Practice and procedure – Application for special leave to appeal referred for hearing before Full Court of the High Court – Proposed appeal concerns constitutional challenges to validity of *Extradition Act* 1988 (Cth) – Applicant subject to extradition determination applies for bail pending hearing of application before Full Court – Applicant in custody for more than 30 months – Severe conditions of custody.

Extradition – Bail – High Court – Implied or inherent power to grant bail – Purpose of implied constitutional jurisdiction and power to grant bail to applicant for special leave to appeal referred to Full High Court – Need for exceptional circumstances – Proof of prolonged detention in severe custodial conditions during pendency of proceedings – Discretionary considerations for the grant of bail – Terms and conditions appropriate to bail – Whether sureties and delivery of certificate of title, mortgage and transfer of mortgage over substantial property sufficient security for compliance with bail conditions.

Criminal law and procedure – Bail – *Extradition Act* 1988 (Cth) proceedings – Constitutional challenge to Act referred to Full High Court for argument as on appeal – Whether High Court has jurisdiction and power to grant bail in the absence of a grant of special leave to appeal – Whether bail may be granted under Act before grant of special leave – Whether bail may be granted pursuant to the Constitution – Whether exceptional circumstances established – Relevance of extended detention of applicant in severe custodial conditions unsegregated from convicted prisoners – Whether discretion to grant bail should be exercised – Terms and conditions relevant to the grant of bail – Function of sureties and financial security appropriate to the favourable exercise of the bail discretion – Expedition of the hearing of proceedings before Full Court – Relevance of discovery of false identity documents after arrest – Relevance of presumption favourable to personal liberty in the context of the Act – Sufficiency of sureties and security to ensure compliance with bail conditions.

Words and phrases – "appeal" – "exceptional circumstances".

*Extradition Act* 1988 (Cth), ss 21, 53.



1 KIRBY J. This is an application for bail by Carlos Cabal (Peniche) ("Mr Cabal").

The course of the proceedings

2 An earlier application by Mr Cabal was before me on 28 and 29 June 2001. At that time an application was also made by Mr Marco Pasini (Bertran) ("Mr Pasini") who, with Mr Cabal, is an applicant for special leave to appeal from a judgment of the Full Court of the Federal Court of Australia. On 22 June 2001, that application for special leave was referred to be heard by a Full Court of this Court.

3 On the previous occasion, I ordered expedition of the hearing of the application before the Full Court; I granted bail to Mr Pasini; and I refused bail to Mr Cabal<sup>1</sup>. However, I made it plain that the precondition to the grant of bail to Mr Cabal had been made out, as it had been in the case of Mr Pasini. For reasons which I then gave, Mr Cabal had established that exceptional circumstances were present in his case<sup>2</sup>. The sole reason for refusing bail to Mr Cabal was the failure of Mr Cabal, on that occasion, to establish (as Mr Pasini had done) that he was in a position to offer sureties and an appropriate security or other assurances against the risk that he might abscond<sup>3</sup> while subject to the bail conditions set by this Court.

4 In the earlier hearing, I made it plain that, had such sureties and security been provided by acceptable evidence<sup>4</sup> (or some other assurance afforded against the risk of flight), I would have been willing to consider admitting Mr Cabal to bail. I stated that, in my then opinion, I would not have been minded to grant bail to Mr Cabal without the sureties he then produced and without the additional provision of "a cash deposit or equivalent acceptable and enforceable security amounting or equal to \$2 million"<sup>5</sup>. Mr Pasini had been able to produce a surety who was willing to provide security in the sum of \$500,000. The result was that Mr Pasini was released on bail upon entering his bail conditions and arranging

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1 *Cabal v United Mexican States* [2001] HCA 42 ("*Cabal*").

2 *Cabal* [2001] HCA 42 at [40]-[47], [62]-[63].

3 In the earlier application, Mr Cabal's counsel suggested use of an electronic tag. See *Cabal* [2001] HCA 42 at [56]. This was not pressed in the present application.

4 *Cabal* [2001] HCA 42 at [63].

5 *Cabal* [2001] HCA 42 at [63].

the provision of the security by his surety<sup>6</sup>. Mr Cabal remained in custody in the severe conditions of the Sirius East Unit of the Port Phillip Detention Centre, described in my earlier reasons<sup>7</sup>.

5 On the announcement of my orders at the last hearing, counsel for Mr Cabal asked for liberty to reapply to me if he could satisfy the conditions which I had foreshadowed. I considered that Mr Cabal had failed on the application as presented and that the application should be dismissed. If he wished to present a new case he should do so in fresh proceedings which would be heard by the Justice of this Court on duty at the time that his new application was returned.

6 Mr Cabal's lawyers made a fresh application for bail without delay. As chance would have it, I am this week, once again, the duty judge of this Court. The application has therefore been returned before me. I must determine it on the evidence. However, before turning to that evidence, I will mention three submissions of a legal character that were advanced in the course of the present proceedings.

Bail is not available under the *Extradition Act*

7 Both parties sought to reopen and reargue points upon which I expressed views in my earlier reasons. That was their right. For Mr Cabal it was submitted that I should reconsider my conclusion that he was not entitled to seek bail pursuant to the *Extradition Act* 1988 (Cth) ("the Act"). In expressing that conclusion<sup>8</sup> I followed the opinions stated in this Court by Mason CJ in *Zoeller v Federal Republic of Germany*<sup>9</sup> and by Gaudron J in earlier proceedings concerned with Mr Cabal<sup>10</sup>.

8 The argument turns on the meaning of the word "appeal" where it appears in s 21(6) of the Act. Uninstructed by authority, I would have been inclined to think that the word "appeal" in that context should be given a purposive meaning as referring to the engagement of the relevant appellate process of the court in

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6 *Cabal* [2001] HCA 42 at [50].

7 *Cabal* [2001] HCA 42 at [37], [41]-[46].

8 *Cabal* [2001] HCA 42 at [14].

9 (1989) 64 ALJR 137 at 138-139; 90 ALR 161 at 164.

10 *Cabal v United Mexican States* unreported, High Court of Australia, 31 May 2001 per Gaudron J.

question<sup>11</sup>. In this Court that process could only be attempted (except in very special circumstances) by an application for special leave to appeal. But the word "appeal" of itself is apparently used in the Act distributively to cover the different courts referred to where an appellate process is engaged. In s 21(6) of the Act, there is no differentiation, or special treatment, of this Court.

9 Generally speaking, statutes should be construed in ways that uphold civil rights such as the entitlement of a detained person to be at liberty where the law so allows<sup>12</sup>. On the other hand, the Act does refer to special leave applications, a point which was noted by Mason CJ in *Zoeller*<sup>13</sup>. An "appeal" is not, as such, engaged in this Court by an application for special leave but only by a grant of special leave, or leave, as the case may be. There is an anomalous exception under the *Family Law Act* 1975 (Cth) whereby the Family Court of Australia can grant a certificate pursuant to s 95(b) of that Act<sup>14</sup>. That exception does not apply in this case.

10 Whilst regarding the matter as arguable both ways, because of earlier expressions of opinion by Justices of this Court I will adhere to the conclusion that I expressed in my earlier reasons<sup>15</sup>. This application must be approached, at this stage, on the footing that an appeal to this Court has not yet been commenced. The application for special leave has been referred to a Full Court to be argued as on an appeal. But special leave has not yet been granted. The Act is, therefore, not engaged. Accordingly, any bail available to Mr Cabal is only available pursuant to the Constitution.

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11 cf *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA.

12 cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518, 523, 529, 547; *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352 at 361; *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 74-75. In the case of ambiguity in the meaning and application of the Constitution it is permissible and appropriate to refer to norms of universal human rights: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-422 [166]-[175].

13 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 163 referring to the Act, s 21(5).

14 *DJL v Central Authority* (2000) 201 CLR 226 at 235 [9], 257-261 [73]-[86].

15 *Cabal* [2001] HCA 42 at [14].

Implied and inherent constitutional powers

11 The first respondent, the United Mexican States ("Mexico"), argued that I had been mistaken in my earlier reasons in treating this Court's constitutional jurisdiction and power as "implied", as distinct from "inherent". Certainly the word "inherent" has been used by other Justices. Indeed, that was the word used by Mason CJ in *Zoeller*<sup>16</sup>.

12 The point of distinction that I was seeking to make was between courts that are, and are not, created wholly or mainly out of the Royal prerogative, pursuant to a Royal Charter, even if given effect by legislation, including Imperial legislation. The former courts may, in their inherent powers, partake of some of the monarch's residual Royal prerogatives to do justice to all people. Some, but not all, of the Supreme Courts of the Australian States were, in colonial times, so created<sup>17</sup>.

13 On the other hand, there are courts of the Judicature referred to in Ch III of the Constitution and other Australian courts which are either created by the Constitution<sup>18</sup> (as this Court arguably is) or wholly under federal, State or Territory legislation. In such a case, I presently hold the view that the jurisdiction and powers of such a court are spelt out in the Constitution and in the legislation concerned. They must be found, if anywhere, from the terms of the Constitution or such legislation, including within any implications derived from the express grants of power in the Constitution or in the legislation in question<sup>19</sup>.

14 My views on this point may be right or wrong. The question has not been fully argued. Nothing turns on this point in this application. It was only mentioned by me in passing on the last occasion<sup>20</sup>, and on this, because the view

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16 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 163.

17 The establishment of the several Supreme Courts of the Australian colonies is described in Meagher, Gummow and Lehane, *Equity – Doctrines and Remedies*, 3rd ed (1992) at 10-21 [123]-[138]. See also Campbell, "The Royal Prerogative to Create Colonial Courts", (1964) 4 *Sydney Law Review* 343; Else-Mitchell and Bennett, "The Charter of Justice of New South Wales – Its Significance in 1974", (1974) 48 *Australian Law Journal* 262 at 265. The Supreme Court of New South Wales, for example, is not created by the *Supreme Court Act* 1970 (NSW) but the Court, as previously established, is "continued" (s 22).

18 Constitution, s 71.

19 *Cabal* [2001] HCA 42 at [15].

20 *Cabal* [2001] HCA 42 at [15]-[18].



I hold restrains me from the use of the expression "inherent powers". It is a view that I have previously expressed both in this Court<sup>21</sup> and in the New South Wales Court of Appeal<sup>22</sup>. It did not affect then, and it does not affect now, the substantive issues in Mr Cabal's application for bail. In either case, whether inherent or implied, the power is truly exceptional. It is reserved to extraordinary circumstances. If anything, contrary to the view suggested for Mexico, "inherent" powers, where they exist, may be wider than "implied" powers. This is because they may draw upon the Royal prerogative. In Ch III of the Constitution, the only express mention of the Queen's Royal prerogative is in s 74 which may no longer have application<sup>23</sup>. I will not stay, any more than I did on the last occasion, to explore further this interesting but non-determinative question.

The scope of the exceptional constitutional power to grant bail

- 15 Mexico next submitted that, in some way, my opinion on the last-mentioned issue had led me away from the purposes for which the exceptional jurisdiction and power is engaged in this Court in a case such as the present, namely to make good the exercise of its powers and to ensure that the exercise is not rendered futile<sup>24</sup>. Whilst I accept so far as it goes what Brennan J said in *Narain v Director of Public Prosecutions*<sup>25</sup>, I do not accept the submission of Mexico or that what Brennan J said represents a complete statement of the applicable jurisdiction and powers of this Court<sup>26</sup>.

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21 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422 [108]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 490 [166] ("*Pelechowski*"); cf *R v Forbes*; *Ex parte Bevan* (1972) 127 CLR 1 at 7; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624; *Grassby v The Queen* (1989) 168 CLR 1 at 16.

22 eg *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 at 585-586; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 16-17.

23 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464.

24 *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317 at 318 per Brennan J; 71 ALR 248 at 250.

25 (1987) 61 ALJR 317 at 318; 71 ALR 248 at 250; cf *Sinanovic v The Queen (No 1)* (2001) 179 ALR 520 at 522-523 [11].

26 Thus Gaudron J, in earlier proceedings involving Mr Cabal, said that the jurisdiction existed to "protect the judicial process and to serve the ends of justice": *Cabal v United Mexican States* unreported, High Court of Australia, 31 May 2001 at 52, line 2205. See also *Robinson v The Queen* (1991) 65 ALJR (Footnote continues on next page)

16 The grant of bail by Justices of this Court is rare. In part, this is because applications for bail are rare. The Court has repeatedly emphasised that exceptional circumstances must be shown<sup>27</sup> and, in a case to which the Act applies, the Parliament has made it clear that bail may only be granted in "special circumstances"<sup>28</sup>. When application is made for bail, and is refused, this normally reflects the exercise of the discretion of this Court rather than an opinion that the Court lacks the jurisdiction or power to grant bail to an applicant before it<sup>29</sup>.

17 Without a specific statutory provision to support the grant of bail, it has been provided by this Court on a number of occasions in reliance on the Constitution. For example, in *Peters v The Queen*<sup>30</sup> Dawson J granted bail to Mr Peters although special leave had not been allowed at the time of the application. In the event, Mr Peters lost his appeal and returned to prison<sup>31</sup>. In *Marotta v The Queen*<sup>32</sup>, where special leave had been afforded, Callinan J allowed bail to the appellants. His Honour also allowed bail in *Doggett v The Queen*<sup>33</sup>. Bail was also granted by Gummow J to Mr Pelechowski, then an applicant for special leave to appeal to this Court against an order of the Court of Appeal of the Supreme Court of New South Wales<sup>34</sup>. That order arose out of Mr Pelechowski's conviction on a charge of contempt. Pursuant to the order, Mr Pelechowski was imprisoned and was serving his sentence when granted bail. Such bail was later extended by order of this Court granting Mr Pelechowski

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519 at 519 where Gaudron J said that the power existed "to serve the ends of justice and to perfect the administration of justice".

27 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 519-520.

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

29 As to applicants for special leave see *Tait v The Queen* (1962) 108 CLR 620 at 622; *Pelechowski* (1999) 198 CLR 435 at 437; *Caratti v The Queen* (2001) 1 LegRep C1 per McHugh J; *Sinanovic v The Queen (No 1)* (2001) 179 ALR 520 at 522-524 [11]-[12].

30 (1996) 71 ALJR 309.

31 *Peters v The Queen* (1998) 192 CLR 493.

32 (1998) 73 ALJR 265; 160 ALR 525.

33 (2000) 19 LegRep C10.

34 *Pelechowski* (1999) 198 CLR 435 at 437.

special leave to appeal<sup>35</sup>. Later still, it was extended by order of the Court constituted to hear the appeal<sup>36</sup>. Subsequently, the appeals in the cases of *Marotta* and *Pelechowski* were allowed and the sentences of imprisonment, which would otherwise have continued to run, were quashed. In Mr Pasini's application I granted bail.

18 In all of the foregoing cases the persons granted bail observed the conditions imposed by this Court. In none of them could it be said that bail was required to prevent the proceedings in this Court being rendered futile in the absolute sense that Mexico suggested was necessary to enliven this Court's jurisdiction and power. None of the cases was as extreme as that which arose in *Tait v The Queen*<sup>37</sup> where the exercise by this Court of its implied (or "inherent") constitutional powers was required, literally, to preserve the life of a litigant before the Court who, at that stage, was not an appellant but an applicant for special leave<sup>38</sup>. Since the abolition of capital punishment, such extreme cases do not now arise. The mere fact that an applicant, denied bail, will continue to serve a term of imprisonment which may later be shown to have been unnecessary, is not sufficient of itself to establish the "exceptional circumstances" warranting the grant of bail under the Constitution<sup>39</sup>. But neither is it true to say that the jurisdiction and power of this Court to provide bail have been strictly confined to cases where to refuse bail would render the invocation of the Court's jurisdiction and powers totally futile and pointless. That was not the case in *Peters* or *Marotta* or *Pelechowski* or in other cases. This Court's power is adjunct to, and implied from (in the view of some, "inherent" in), this Court's large jurisdiction and powers under the Constitution<sup>40</sup>. It should not be given a narrow or confined definition.

19 It is true that the exceptional circumstances for invoking the constitutional jurisdiction and power to grant bail must be judged according to the primary jurisdiction and power invoked, in this case, namely that of an application to this Court for special leave to appeal. A Bench of three Justices has referred

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35 per Brennan CJ, Gummow and Callinan JJ; noted (1999) 198 CLR 435 at 437.

36 On 10 November 1998: Gaudron, McHugh, Gummow and Callinan JJ and myself; cf *Pelechowski* (1999) 198 CLR 435 at 490-491 [166]-[167].

37 (1962) 108 CLR 620.

38 *Tait v The Queen* (1962) 108 CLR 620 at 622.

39 *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317 at 318; 71 ALR 248 at 249.

40 *Pelechowski* (1999) 198 CLR 435 at 490 [166].

Mr Cabal's application to the Full Court for argument as on a full appeal<sup>41</sup>. Mexico said that the great delays that had arisen in this matter were the result of the slow and necessarily careful pace of justice in the courts. They also followed the decisions of Mr Cabal to exercise his rights under the Constitution and laws of Australia. Mexico did not contest the entitlement of Mr Cabal to do this.

The conditions of imprisonment pending disposal of the proceedings

20 It was not suggested on this occasion that the conditions of incarceration suffered by Mr Cabal were merely uncomfortable, as was said for Mexico on the last hearing<sup>42</sup>. But it was suggested (or at least implied) that the conditions were just something that had to be tolerated and were, in any case, not an "exceptional circumstance" for the purpose of the applicable test under the Constitution. I disagree. In my opinion, only the most formalistic view of the jurisdiction and powers of this Court under the Constitution would uphold that submission.

21 Read in these proceedings was an affidavit, additional to those placed before me in the earlier proceedings, relating to the conditions of Mr Cabal in the Sirius East Unit where he is held. Mr John Pace is a permanent resident of Australia and former senior United Nations officer, who has been helping Mr Cabal with a human rights complaint with which I am not directly concerned<sup>43</sup>. He deposes relevantly:

"I have come to know Mr Cabal quite well on a personal level under circumstances which are, for him, extraordinarily difficult. I have seen him only in prison, in prison uniform and subject to a prison regime which makes it extremely difficult for him to retain any sense of personal dignity, connection with and responsibility for his family (whom I have met and to whom he is, from my personal observations, utterly devoted) or to participate in his defence to his extradition proceedings as he would otherwise do. I have, for example, personally experienced with him the frustration of having limited phone access and in particular of not being able to call into the prison and speak to him. I have spoken to him on

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41 *Cabal* [2001] HCA 42 at [7].

42 *Cabal* [2001] HCA 42 at [38].

43 *Cabal* [2001] HCA 42 at [45]. See also fn 15 referring to the International Covenant on Civil and Political Rights, 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. Australia entered a reservation to its signature of the Covenant stating that the principle of segregation was accepted as an object to be achieved progressively.

many occasions about the affronts to his personal dignity which are involved in procedures such as strip searching and 'cavity inspections' and of the enormous personal and emotional stress he experiences having to live with and sometimes pander to men convicted of the most heinous crimes, some of which involve victims the same age as his daughters.

As a resident of Australia, as a lawyer, and most of all as an advocate for the respect of an individual's human rights, I am dismayed by the way Mr Cabal (and Mr Pasini for that matter) has been treated, in terms of the conditions of imprisonment to which he has been subjected and the consistently degrading treatment he has experienced. The use of shackles, to be locked up incommunicado for 23 hours a day whenever the staff are on strike, to have to live, for over two and a half years in a prison regime designed for maximum security prisoners, the obligation to carry a 'Criminal Record Number' and to be obliged every single day to invoke this number as the sole means of identification. To my mind, the treatment to which Mr Cabal has been subjected has made a mockery of the presumption of innocence, to which he is fully entitled. My dismay, combined with my personal frustration at not being able to assist him directly to change his conditions, are what lead me to make this affidavit in support of Mr Cabal's bail application, and to offer to stand as surety for the sum of \$10,000.

I am conscious that this amount of surety may not seem great. However, due to my own personal and financial circumstances, it is all I am able to offer."

22 Mr Pace was not cross-examined on his affidavit, although I assume that he was available for that purpose. I accept what he has said<sup>44</sup>. It supplements the evidence that was placed before me on the last occasion and that was read again on this.

23 In my opinion, the very long delay of the proceedings and the extreme conditions to which Mr Cabal has been subjected, and which were proved in evidence, constitute exceptional circumstances for the purposes of this bail application. The proceedings involve a person who has not been convicted either under the law of Mexico or the law of Australia. He is in conditions of custody which appear to contravene at least the spirit, expectation and ordinary intendment of the Federal Parliament<sup>45</sup> that prisoners awaiting extradition from

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<sup>44</sup> cf *Golder v United Kingdom* (1975) 1 EHRR 524; *Blanchard v Minister of Justice, Legal and Parliamentary Affairs* 1999 (4) SA 1108 (ZSC); *Dougoz v Greece* (No 40907/98) and *Pantea v Romania* (No 33343/96), unreported decisions of the European Court of Human Rights, 6 March 2001.

<sup>45</sup> Referring to the Act, s 53; *Cabal* [2001] HCA 42 at [44].

this country will normally be retained in custody separate from prisoners who have been convicted. Mr Cabal, who is no physical threat to anyone in the Australian community, has been kept in the extreme conditions that are described in the evidence which is not contradicted. This, I would infer, is only because uniquely there is no separate facility in the State of Victoria for remand prisoners and because the process of the law in Australia, which he has invoked, as is his right, has taken so much time.

- 24 The circumstances have continued for more than 30 months<sup>46</sup>. Those circumstances are now inextricably linked with the procedures before this Court and with their constitutional character. They are linked by the fact that they are the direct or indirect consequence of Mr Cabal's exercising his conceded constitutional and legal rights to seek to invoke the jurisdiction of this Court. I will not repeat all of the other considerations that I recorded on the last occasion. I remain of the views that I there expressed<sup>47</sup>.

The constitutional prerequisite to the grant of bail is established

- 25 Accordingly, on the three points that have been reargued, I would, first, assume that the Act does not apply to afford a statutory basis for the grant of bail. I will proceed on that footing. Secondly, I would hold that exceptional circumstances have been proved for invoking the jurisdiction and power of this Court under the Constitution to grant bail to Mr Cabal. Thirdly, I would reject the narrow view propounded by Mexico for the implied or inherent jurisdiction and power of this Court to grant bail in a case such as the present. This Court is the final court of the Australian Judicature. Its implied (or "inherent") powers are very large. They are not, and should not be, confined to a narrow compass.

- 26 I also reject any suggestion that I am controlled or limited in the exercise of this Court's jurisdiction and powers by what other judges in another court, on different evidence, in different circumstances, at an earlier time, have concluded<sup>48</sup>. The jurisdiction and power of this Court being established, as I hold they are, I must exercise them for myself and I proceed to do so. I therefore turn, as on the last occasion, to the consideration of the discretionary questions presented by this application and the terms upon which bail might be granted to Mr Cabal if the discretionary considerations favour that course<sup>49</sup>.

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<sup>46</sup> *Cabal* [2001] HCA 42 at [37].

<sup>47</sup> *Cabal* [2001] HCA 42 at [37]-[47].

<sup>48</sup> *Cabal* [2001] HCA 42 at [34].

<sup>49</sup> *Cabal* [2001] HCA 42 at [47].

Four considerations relevant to the bail discretion

27 It was inherent, and in some respects expressed, in my reasons in Mr Cabal's earlier application that I have taken into account, in deciding his application, and in exercising my discretion and formulating the conditions of bail, a number of considerations raised during argument. On this occasion, I would mention four of them.

28 First, by reason of the order of expedition of the hearing of the application to the Full Court, this will now take place in September or October 2001, rather than in 2002 as otherwise it would have done<sup>50</sup>. Whilst this consideration lessens the time that Mr Cabal would remain in custody were bail refused, it also reduces the period during which he would be on bail and subject to any risk of absconding<sup>51</sup>.

29 Secondly, it is true (as Mexico emphasised) that Mr Perry (who will shortly be mentioned and who lives abroad) and Mr Pace (who lives in Sydney) would not be present in Melbourne and able, by their physical proximity, to offer to Mr Cabal an effective assurance that he complies with his bail conditions<sup>52</sup>. However, that leaves as sureties three persons of good character who are acquainted with Mr Cabal and his family, who live in Melbourne, who have expressed the conviction that he will comply with his bail conditions and who have offered security, according to their means, as a warrant of what they have said.

30 Thirdly, it was established by Mexico that, after his arrest, further false identity documents or applications for false documents were discovered in relation to Mr Cabal. The possibility of the existence of still further such documents cannot be completely ruled out. However, such documents relate to a time when Mr Cabal was an undoubted fugitive. He is now under the control of the Australian courts and authorities. A requirement of twice daily reporting to police would permit an alert to be sounded within a very short time of any decision by him to return to a life on the run<sup>53</sup>.

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50 After these reasons were delivered and orders pronounced, the hearing of the special leave application before the Full Court was fixed for 6-7 September 2001.

51 cf *Cabal* [2001] HCA 42 at [10].

52 cf *R v Southampton Justices; Ex parte Green* [1976] QB 11 at 19; *R v Waltham Forest Justices; Ex parte Parfrey* [1980] Crim LR 571; *Schoenmakers v Director of Public Prosecutions (No 2)* (1991) 31 FCR 429 at 436-440.

53 cf *Cabal* [2001] HCA 42 at [38].

31 Fourthly, the only way that every conceivable risk that Mr Cabal might abscond could be totally avoided would be by denying him and anyone like him bail, whatever were the other "special" or "exceptional" circumstances of the case. This is neither the standard of the Act<sup>54</sup> (where it is applicable) nor of the Constitution<sup>55</sup>. Mrs Cabal was retained in detention for several months. When released, she did not abscond. Mr Pasini was kept in the conditions of imprisonment which I have described for more than two years. When released on bail, first by order of Gray J in the Federal Court and then by my order, he did not abscond. Although there is always a risk with any grant of bail that the terms will be breached, the conditions which I would contemplate would be so substantial and rigorous that the risk will be tolerably small. To refuse bail upon such propounded terms would, in my view, serve, as his counsel submitted, to "crush the spirit" of Mr Cabal so as, in effect, to discourage him from exercising the rights which he enjoys under the Constitution and under Australian law. Those rights exist not only for the benefit and self-respect of Mr Cabal. They exist for the benefit and self-respect of the Australian people and all those who seek to invoke the protection and justice of their Constitution<sup>56</sup>.

The evidence of the security offered to ensure bail compliance

32 The evidence before me, relevant to my decision and to the conditions upon which bail might be considered, falls into several categories. Much of the evidence is designed to supply an enforceable security in the sum of at least \$2 million, which, in the earlier hearing, I indicated was my then view as to the minimum security that I would require as a condition of bail in addition to the personal sureties and the provision of security by them in further but lesser sums<sup>57</sup>. The critical security propounded is over a substantial property in Armadale, a Melbourne suburb.

33 Mr Craig Kilby, a qualified valuer, deposed in his affidavit which was not challenged that, subject to assumptions and qualifications expressed in the affidavit, the estimated value of the property is \$2,500,000. On the property stands the home in which Mrs Cabal and her children live and to which Mr Cabal would return if he were granted bail.

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54 Referring to the Act, s 21(6)(f)(iv).

55 Referring to *Zoeller* (1989) 64 ALJR 137 at 138-139; 90 ALR 161 at 164.

56 cf *Mickelberg v The Queen* (1989) 167 CLR 259 at 288; *Eastman v The Queen* (2000) 74 ALJR 915 at 959 [249]; 172 ALR 39 at 98-99.

57 *Cabal* [2001] HCA 42 at [63].



34 In his affidavits Mr Cabal deposes that, following my earlier decision, he required his lawyer to endeavour to obtain an enforceable security over the Armadale property. He states that he instructed his lawyer to ask a friend, Mr (Withrop) Scott Perry, if he, Mr Cabal, could use the property as security for the purpose envisaged. The registered proprietor of the property is an Australian shelf company. That company acquired the property substantially out of capital sent from overseas to its then solicitors for the benefit of Mr Cabal and his family. The capital was provided by a company named Dosca Ltd. That company is registered in the British Virgin Islands. According to Mr Cabal, and also according to Mr Perry, it is effectively controlled by Mr Perry. A first mortgage was granted by the registered proprietor to Dosca Ltd and that mortgage is registered on the certificate of title. It is the only interest so recorded.

35 Mr Perry authorised Dosca Ltd to grant to Mr Jeremy Davies (a person in the United Kingdom with whom Mr Perry had close business connections) a power of attorney with a view to executing the necessary documents to ensure the transfer of Dosca Ltd's interests as mortgagee of the property to the Commonwealth of Australia for the object of securing Mr Cabal's bail conditions. Pursuant to these instructions Mr Davies handed to Mr Cabal's present solicitor, Mr Ben Ami Frenkel, the relevant duplicate certificate of title, the registered mortgage and an executed transfer of the mortgage in favour of the Commonwealth. These documents were brought into Court by Mr Frenkel.

36 Mr Perry gave oral evidence by video link from London. He is a businessman, apparently of United States derivation, resident in Montevideo, Uruguay. Before giving his oral evidence, he had sworn a declaration in London that he had a long business relationship with Mr Cabal; that there had been ups and downs in that relationship; however that he trusted Mr Cabal to comply with his bail conditions. He had travelled to Australia to see him on two occasions, visiting him in prison. Indeed, he travelled to London from Spain specifically to give his evidence in the present application.

37 Mr Perry deposed that in 1999 he had contacted Mrs Cabal with a view to improving the accommodation in which she and her children were resident in Melbourne. He had then offered to fund the purchase of the property at Armadale through an Australian company with the mortgage to Dosca Ltd, a company which he controlled. In his declaration Mr Perry deposed that he was agreeable to the assignment of that property to the Commonwealth, in effect in escrow, as security for Mr Cabal's compliance with such bail conditions as this Court might impose. Mr Perry was subject to lengthy and detailed cross-examination by counsel for Mexico.

38 I was most impressed by the oral evidence of Mr Perry. He gave his testimony in a straightforward and apparently honest way. He is obviously an intelligent man and an experienced person of commerce. He spoke of his

dealings with Mr Cabal, not all of which had been agreeable. In the 1990s he had been engaged in litigation in New York with Mr Cabal and companies under Mr Cabal's control. However, that litigation was eventually settled. He now regarded himself as a friend of Mr Cabal. In answer to questions, he made it clear that he had control of Dosca Ltd, that he had given instructions to that company and, specifically, that he had instructed the issue of a power of attorney to Mr Davies, to do all things necessary to execute whatever documents were essential to provide security to the Commonwealth against any risk that Mr Cabal might not comply with his bail conditions.

39 Mr Perry seemed concerned when it was made plain to him during questioning that he stood at risk of losing more than \$2 million if Mr Cabal did not comply with all of the conditions of bail, such as reporting. However, ultimately, when it was made clear that this could indeed be the requirement of the bail conditions, he accepted that possibility as inherent in the step which he was taking.

40 Mr Perry impressed me as a person accustomed to moving very large sums of money around the world. He has business interests in many countries. He denied that the funds which he was making available belonged to Mr Cabal or his family in any way. He said that they were the funds of companies which he controlled and that they were being deployed out of friendship for Mr Cabal and belief in his trustworthiness and honour. I accept the evidence of Mr Perry.

41 Counsel for Mexico suggested that I should accept that, for Mr Perry, the loss of \$2 million would not be as significant as it would be for most individuals. I agree with that submission. However, I do not agree that Mr Perry would suffer such a loss with a shrug of the shoulders. On the contrary. I regard him as an astute businessman who is very conscious of the value of capital. The important thing to note is that Mr Perry was willing to trust Mr Cabal to comply with his bail conditions. He was prepared to advance a very substantial security on the faith, and in the confidence, that Mr Cabal would do so.

42 It is on that footing that I regard Mr Perry's evidence as very significant. He is not able to ensure, physically, that Mr Cabal answers to his bail conditions. He lives on the other side of the world. But he is willing to stake what is objectively a very large sum of capital because he considers that Mr Cabal will fulfil the duty that he would owe to the Court, and to him, against the risk that, if he does not do so, Mr Perry will lose not only his confidence in Mr Cabal as his friend but also a very substantial capital investment.

#### The adequacy of the sureties propounded

43 In addition to Mr Perry's declaration, affidavits were read from three Australian citizens, and, in the case of Mr Pace, a permanent Australian resident, willing to act as local sureties to ensure that Mr Cabal answers to his bail

conditions. These persons are Mr Christopher Canavan QC, who offers security in a sum of \$50,000; Mr Kenneth Watson, who offers as security a similar sum; Mrs Josephine Curry-Hyde, who is willing to venture a vehicle and caravan with which she hopes to make a tour of Australia; and Mr Pace, who, as disclosed by his affidavit, is willing to offer security of \$10,000 and act as surety for Mr Cabal<sup>58</sup>.

44 I have considered these affidavits. I find them impressive. No cross-examination was directed to any of the proposed sureties. This strengthens my inclination to accept what they say without reservation. Each of the proposed sureties speaks of their faith and confidence that Mr Cabal will, if granted bail, fulfil his bail conditions to the letter.

The adequacy of the proffered security documents

45 I also accept unhesitatingly the testimony of Mr Frenkel. Mr Frenkel gave oral evidence when producing documents pursuant to a subpoena. In paragraphs 9 and 10 of his affidavit he deposes as follows:

"I have been instructed by Mr Jeremy Davies, acting under Power of Attorney for Dosca, to make available each of the certificates of title ... the mortgage ... and the transfer of mortgage ... to the Commonwealth of Australia in support of any security that may be required in connection with the release on bail of [Mr Cabal]. I now hold these documents with a direction from Dosca Ltd that they be made available to the Commonwealth of Australia for such purposes upon appropriate Order or Orders being made by this ... Court.

Upon the handing over of those documents and should Mr Cabal breach any of the bail conditions imposed upon him by the Court, the Commonwealth will be in a position at any time to call for the amount secured by the mortgage up to an amount of \$2.4m to be paid by the registered proprietor ... against the security of the property."

46 Counsel for Mexico said that he was not sure that what Mr Frenkel said was correct. I invited him to assist me if, contrary to his submissions, I were minded, in the exercise of the Court's discretion, to grant bail so as to ensure that my intent would be fulfilled, namely that upon any default by Mr Cabal the Commonwealth would have immediate access to the property at Armadale, Victoria as security forfeited to the Commonwealth for such default. He was not able to suggest any way by which that end could be attained other than by the means proposed by Mr Frenkel.

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58 See above at [21].

47 I am satisfied that what Mr Frenkel, an experienced solicitor, says is correct. I am satisfied that no person or body has any relevant enforceable legal or equitable interest in the Armadale property other than Dosca Ltd and that the provision to the Commonwealth of the documents proposed will fully protect the Commonwealth in the event of a default by Mr Cabal in compliance with his bail conditions.

48 Accordingly, in my view the requirements necessary to the exercise of my discretion in favour of Mr Cabal are, on this occasion, fulfilled subject to settling the applicable conditions.

The applicable conditions of bail

49 The conditions of bail for Mr Cabal should follow those which were required of Mr Pasini, with necessary amendments to reflect the different family members and their names, the provision of the security documents over the Armadale property to the representative of the Commonwealth and the entry by the four named sureties of the necessary documents to give effect to their undertakings as sureties and in relation to the securities which they severally offer.

50 The notice of undertaking of bail should, therefore, contain the following conditions applicable to Mr Cabal:

- (a) That he surrender all passports and other travel documents, whether in his own name or in any other name and whether genuine or otherwise, in his possession or control.
- (b) That he will not carry or have in his possession or control any documents of identity other than a document of identity in his own name.
- (c) That he will not apply for, or otherwise seek to obtain, any passport or other travel document, whether in his own name or any other name and whether genuine or otherwise.
- (d) That he reside with his spouse, Teresa Cabal, at her home in a place which will be included in the terms and conditions in Armadale in Victoria or at such other address as may be approved in writing by the Director of Public Prosecutions for the Commonwealth, such approval to be obtained prior to taking up such residence.
- (e) That he not travel outside the radius of 50 kilometres from the Commonwealth Law Courts Building, 305 William Street, Melbourne, Victoria.

- (f) That he not attend within one kilometre of Melbourne Airport at Tullamarine, Victoria or any other airport or airfield or attend at any port of international departure.
- (g) That he will refrain from communication, direct or indirect, with Marco Pasini (Bertran) and his spouse Montserrat Gonzalez (Karras) save that he be permitted to meet Montserrat Gonzalez (Karras) 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 cost of which interpreter will be paid for by Mr Cabal.
- (h) That he report twice daily, once between the hours of 6.00 am and 8.00 am and once between the hours of 6.00 pm and 8.00 pm to the Victoria Police, Prahran Police Station, Malvern Road, Prahran, Victoria.
- (i) That he report at the Registry of the High Court of Australia, 305 William Street, Melbourne at 10.00 am on the occasion of the return before the Full Court of the High Court 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.

51           It is a condition of the grant of bail that Mr Cabal enter into a recognisance acknowledging the above conditions for his release on bail and that he understands that if he fails to comply with, or contravenes, a term of the conditions of the recognisance on which bail is granted, he may be arrested immediately and brought before this Court and that his recognisance may be forfeited to the Commonwealth.

52           It is a further condition of the grant of bail that undertakings be received from the sureties named in the application, namely Mr Christopher Joseph Canavan QC in the sum of \$50,000; Mr Kenneth Ernest Watson in the sum of \$50,000; Mrs Josephine Curry-Hyde on condition that, in the event of default by Mr Cabal with any of the foregoing conditions of bail, she forfeits to the Commonwealth the vehicles (being a Jeep and caravan) described in paragraph 9 of her affidavit of 18 July 2001 and Mr John Pace in the sum of \$10,000.

53           It is also a condition of the grant of bail that the solicitor for Mr Cabal, Mr Frenkel, deliver to the solicitor for the first respondent for safe keeping by that solicitor, pending further order of this Court or the carrying into effect of the consequences of any breach of the conditions of bail, the three security documents referred to in the affidavit of Mr Frenkel previously mentioned in

these reasons to be security for the compliance by Mr Cabal with his bail conditions.

54           The undertakings of the sureties may, if necessary, be entered upon a document separate from the recognisance to be entered by Mr Cabal but the conditions of bail shall be annexed to that document. Liberty is reserved to both parties to apply in respect of the possession of the security documents referred to. Costs are reserved.

55           The coming into effect of the foregoing orders is stayed until 4.30 pm on 20 July 2001.