HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH AND GUMMOW JJ

UNITED MEXICAN STATES APPLICANT

AND

CARLOS CABAL (PENICHE) & ORS RESPONDENTS

United Mexican States v Cabal [2001] HCA 60
Date of Order: 31 July 2001
Date of Publication of Reasons: 24 October 2001
M74/2001

ORDER

1. *Leave to appeal granted, the draft notice of appeal to stand as the notice of appeal.*

2. *Appeal allowed.*

3. *Set aside orders 1, 2, 3, 4, 5, 6 and 7 of the orders made by Kirby J on 19 July 2001 and in place thereof order that the summons dated 12 July 2001 be dismissed.*

4. *The first respondent to pay the costs of the appellant of the appeal and of the proceedings at first instance, including any reserved costs, and to have a certificate under the Federal Proceedings (Costs) Act 1981 (Cth).*

On appeal from the High Court of Australia

Representation:

G T Pagone QC with K P Hanscombe and M M Gordon for the applicant (instructed by Director of Public Prosecutions (Commonwealth))

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

No appearance for the second respondent

D M J Bennett QC, Solicitor-General of the Commonwealth with B E Walters for the third respondent (instructed by Australian Government Solicitor)

CATCHWORDS

United Mexican States v Cabal

Criminal law – Practice and procedure – Bail – Whether High Court has power to grant bail – In what circumstances High Court will grant bail – What constitutes "special circumstances" – Whether special circumstances established where applicant subject to extradition determination, in custody for over 30 months and subject to extremely harsh conditions in detention – Whether risk of flight outweighs special circumstances.

Extradition – Bail – Whether High Court has power to grant bail pursuant to the *Extradition Act* 1988 (Cth) or pursuant to the Constitution – What constitutes "special circumstances" for the purposes of granting bail in extradition proceedings – Rationale for refusing bail in extradition cases.

High Court of Australia – Practice and procedure – Bail – Whether High Court has power to grant bail pursuant to appellate or original jurisdiction – Proper form of order for admitting prisoner to bail – In what circumstances High Court will grant bail – Where applicant for bail subject to extradition determination and application for special leave to appeal still pending – What constitutes "special circumstances" – Whether special circumstances established by applicant in this extradition proceeding – Whether risk of flight outweighs special circumstances.

High Court of Australia – Significance of referring hearing of application for special leave to appeal to Full Court of High Court.

Words and phrases – "special circumstances".

Extradition Act 1988 (Cth), ss 15, 19, 21.

1 GLEESON CJ, McHUGH AND GUMMOW JJ. On 31 July 2001, the Court made orders granting leave to the United Mexican States (Mexico) to appeal and allowing its appeal against orders made by a single Justice (Kirby J) on 19 July 2001. We now give our reasons for making the orders of the Court. But before doing so, it is necessary to say something about the orders made by Kirby J. They included an order directing that the first respondent (Mr Cabal) be admitted to bail. The order was in a form that has become common in bail matters in this Court in recent years. But that form is defective in a number of respects.

2 When Kirby J made the orders, Mr Cabal was in custody at the Sirius East Unit of the Port Phillip Detention Centre. He was held under a warrant, signed by the second respondent, a Magistrate, under s 19(9)(a) of the *Extradition Act* 1988 (Cth) ("the Act") and was awaiting surrender to Mexico. The order granting bail did not identify the custody from which Mr Cabal was to be bailed. It was not directed to the Governor of the Sirius East Unit. Nor did it identify any offence or other matter that had brought about his detention. Nor was there any order staying the warrant of imprisonment.

3 If the order for bail had stood, the person who had the custody of Mr Cabal would have been faced with two apparently conflicting directions – a warrant signed by a Magistrate committing Mr Cabal to prison and an order of this Court directing that he be admitted to bail. Yet this Court's order did not stay the warrant of imprisonment or identify the custody from which he was to be bailed or the matter in respect of which bail was granted. The person holding Mr Cabal in custody would have been within his rights in refusing to release Mr Cabal. That person was not a party to the proceedings – perhaps he should have been[1].

4 The orders made in this case were drawn up by the legal representatives of Mr Cabal and were consistent with the form of bail orders made by single Justices of this Court in other cases in recent years[2]. By reason of the omissions

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1 See the numerous *habeas corpus* cases arising out of immigration and extradition proceedings where the governor of the prison holding the applicant has been the first respondent to the proceedings: eg *R v Governor of Metropolitan Gaol; Ex parte Molinari* [1962] VR 156; *Ex parte Black; Re Morony* (1965) 83 WN (Pt 1) (NSW) 45 and the numerous cases in the Law Reports where the Governors of Brixton and Pentonville Prisons have been the first respondent.

2 See for example: *Peters v The Queen* (1996) 71 ALJR 309; *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711; *Marotta v The Queen* (1999) 73 ALJR 265; 160 ALR 525.

to which we have referred, the form of the orders is unsatisfactory. They depart from the form made by Fullagar J in *Re Cooper's Application for Bail*[3] – probably the first case in which the Court granted bail pending an appeal or special leave application in this Court. In *Re Cooper*, Fullagar J directed the "Governor of the Gaol at Port Moresby [to] deliver the [Applicant] to a duly authorized officer of the Territory of Papua and New Guinea for escort in custody to Melbourne there to enter into the abovementioned recognisance." The order made by his Honour also identified the conviction and sentence that Mr Cooper was serving at that time.

5 The orders made in the present case also departed from the form of orders used in the common law courts in past times and in the English High Court of Justice at the present time. Examples of such orders may be seen in Short and Mellor, *The Practice on the Crown Side* (1890)[4] and in the English White Book[5].

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3 [1961] ALR 584. The order is not set out in the Report.

4 In making an order for bail upon a summons under the Crown Office Rules 1886 (UK), for example, the order provided (omitting formal parts):

> "It is ordered that upon *A.B.* giving security by his own recognizance in the sum of _____ with [*two*] sufficient sureties in the sum of _____ each before one of Her Majesty's Justices of the peace in and for the county of _____ [*or* before a Judge in Chambers] for the personal appearance of the said *A.B.* at the next assizes … to be holden in and for the said county of _____ then and there to answer to all such matters and things as, on Her Majesty's behalf, shall be objected against him, he the said *A.B.* be discharged out of the custody of the Governor of Her Majesty's prison at _____ in the said county as to his commitment for [*here shortly state the offence as in commitment*]."

(See Form No 71 in Short and Mellor, *The Practice on the Crown Side* (1890) at 618.)

Similarly, the order of "Notice of Bail upon Habeas Corpus" provided:

> "Whereas the Honourable Mr Justice _____ has granted a writ of Habeas Corpus, directed to the gaoler of Her Majesty's prison at _____ … commanding him to have the body of _____ before the Queen's Bench Division of Her Majesty's High Court of Justice [*or* before a Judge at Chambers] forthwith to undergo …
>
> Now take notice, that by virtue of the said writ, the said _____ will be brought before Her Majesty's said Court [*or* before a Judge at Chambers] at … in order that he, the said _____, may be admitted to bail personally to appear at the next session of oyer and terminer and gaol delivery to be holden …"

(Footnote continues on next page)

6 The orders contained in these books and the orders made by Fullagar J are precedents that are readily adaptable to orders granting bail in criminal and extradition cases in this Court. In our view, orders in bail cases in this Court

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(See Form No 74 in Short and Mellor, *The Practice on the Crown Side* (1890) at 619-620.)

5 The White Book contains the following "Order to release prisoner on bail":

"**IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION**

Claim No.

Before (*title and name of Judge*) [sitting in Private]

Applicant

Respondent

A Claim form for grant of bail was issued by the applicant on (*date*)

The Applicant (*name*) having been [remanded in custody] [convicted by (*court*) [and having given notice of appeal] *or as may be*] on (*date*)

And the Applicant being in the custody of the Governor of Her Majesty's Prison (*name of prison*)

The Judge read the written evidence filed

The Hearing was attended by ( )

IT IS ORDERED that the applicant (*name*), after complying with the conditions set out in Schedule 1 to this order and subject to the conditions set out in Schedule 2 to this order, be released on bail with a duty to surrender to the [magistrates' court at (*place*) on (*date*) at am/pm] [Crown Court at (*place*) on a date and time to be notified to the applicant by an officer of that court]."

(See Form No 98 "Order to release prisoner on bail (Schedule 1 – RSC O 79 r 9(6), (6A) and (6B))" in the White Book, *Civil Procedure* (2000), vol 1 at 1948 [F2-054].)

should follow these precedents, so that all those required to obey bail orders will have no doubt about their obligations.

The background to the proceedings

7 On 11 November 1998, Mr Cabal was arrested under a provisional warrant issued in accordance with the Act. He was taken before a Magistrate and remanded in custody. In December 1998, Mexico made a formal request for his extradition. Mexico alleged that Mr Cabal was guilty of 23 offences against the *Law of Credit Institutions of Mexico* and three offences against the *Federal Criminal Code in Matters of Common Law for the Federal District and in Federal Matters for the Republic of Mexico*. The maximum penalty for the offence contrary to the *Law of Credit Institutions* is 10 years imprisonment. For the offence contrary to the *Federal Criminal Code*, the maximum penalty is 12 years imprisonment. The offences involved allegations of fraud, taxation evasion and money laundering. Mexico alleged that the offences had caused economic loss of US$242,722,590 to a bank and three private companies[6].

8 After a long hearing, the Magistrate determined that Mr Cabal was eligible for surrender to Mexico under the provisions of s 19(9)(a) of the Act. The Magistrate signed a warrant committing Mr Cabal to the Melbourne Assessment Prison or Port Phillip Prison to await surrender to Mexico.

9 After being committed by the Magistrate, Mr Cabal challenged the determination of the Magistrate in the Federal Court of Australia. In August 2000, French J dismissed Mr Cabal's application for judicial review made under s 21(1)(a) of the Act[7]. In April 2001, an appeal against the decision of French J was unanimously dismissed by the Full Court of the Federal Court[8].

10 Mr Cabal then applied to this Court for special leave to appeal. On 22 June 2001, Gummow, Kirby and Callinan JJ heard the application. Their Honours referred the application to the Full Court of this Court for determination. They directed that at the hearing the parties should argue the matter as if it were an appeal. Mr Cabal has now withdrawn his special leave application.

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6 Affidavit of Daniel Donato Caporale, sworn 29 May 2001.

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

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

11 In the forefront of that application for special leave to appeal was the claim that s 21 of the Act is invalid. Mr Cabal contended that s 21 purports to direct the Federal Court to perform an administrative function and to exercise administrative powers in the performance of the function. He contended that this was an invalid attempt by the Federal Parliament to confer non-judicial powers on the Federal Court. He claimed that s 21 is a fundamental and non-severable element of the Act and that consequently the whole Act is invalid. If that is so, the Magistrate had no power to commit Mr Cabal to prison. Mr Cabal also contended that, insofar as ss 19(5) and 21(6)(d) of the Act prohibited him from adducing evidence in support of his case, they are invalid because they denied the judicial power of the Federal Court to stay proceedings in that Court when those proceedings are an abuse of process. Mr Cabal contended that these sections are not severable from the Act and that the whole Act is invalid. Finally, Mr Cabal contended that in any event the Full Court of the Federal Court had erred in finding that ss 19(5) and 21(6)(d) prohibited him from adducing evidence in support of his claim that an extradition objection had been established. He submitted that evidence would show that the extradition proceedings ought to be stayed as an abuse of process.

12 Shortly after the argument on the special leave application commenced, Gummow J said[9]:

> "As to the first point, that is section 21 on the Chapter III point, there may be some utility in us referring that aspect of the application into a Full Court. I say that at this stage because it occurs to us that there is always a potentiality of, as it were, a sideways movement into the original jurisdiction in any event on a constitutional ground."

13 Later Kirby J said to counsel for Mr Cabal[10]:

> "Therefore, if we were to deal with the first point [the constitutional invalidity point], having regard to the fact that in a sense your side could probably take that point in the original jurisdiction anyway and lift that into the Full Court and refer it to the Full Court, we may as well refer the other matter as well."

14 Counsel for Mr Cabal assented to that course.

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9 Transcript, 22 June 2001 at 2.

10 Transcript, 22 June 2001 at 9.

15 Shortly afterwards Kirby J raised the same point with counsel for Mexico, saying[11]:

> "Yes, but if you are looking at it from the point of view of the convenience of this Court, it can come now into the Court by special leave and we have a formulated question and we have the facts and we have the judgment of the Full Court, whereas if it comes up in the original jurisdiction in constitutional relief, it is a less convenient vehicle for determining it."

16 Given the statements by Gummow and Kirby JJ and the practice of the Court on other occasions, the better conclusion is that their Honours thought the most convenient course for conducting the proceedings was to refer the special leave application into the Full Court. That was because it was open to Mr Cabal and his fellow applicant, Mr Pasini, to commence proceedings in the original jurisdiction of the Court for a declaration that the Act was invalid. No conclusion should be drawn that their Honours thought that Mr Cabal had strong prospects of succeeding in his application for special leave to appeal or in the ultimate appeal. It is significant that their Honours did not grant special leave to appeal, but referred the application into the Full Court. A constitutional challenge to legislation is always a matter of public importance. If it has even reasonable prospects of success, special leave to appeal will be granted – almost as of course. That the Court referred the application to the Full Court instead of granting leave strongly indicates that on the materials in support of the application their Honours – or at all events a majority of them – thought that the application would probably fail.

17 Subsequently, Mr Cabal and Mr Pasini took out summonses in this Court seeking expedition of the hearing of the application for special leave and for an order admitting them to bail pending the determination of the proceedings in this Court.

18 On 28 and 29 June 2001, Kirby J heard the summonses. His Honour expedited the hearing of the applications for special leave before the Full Court. He admitted Mr Pasini to bail upon conditions. But he refused Mr Cabal's application for bail. His Honour intimated[12], however, that if Mr Cabal had provided "a cash deposit or equivalent acceptable and enforceable security amounting or equal to $2m" as well as the sureties which he had proffered, he "would have been willing to consider admitting him to bail."

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11 Transcript, 22 June 2001 at 10.

12 (2001) 180 ALR 593 at 608 [63].

His Honour's reasons for granting bail

19 Kirby J held that he had an implied jurisdiction under the Constitution to grant bail. His Honour said[13]:

> "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."

He went on to say that in extradition cases there were two principal purposes of justice that had to be reconciled in deciding whether "exceptional circumstances" were demonstrated[14]. They were[15]:

> "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[16]."

20 In considering whether special circumstances existed, his Honour said[17]:

> "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

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13 (2001) 180 ALR 593 at 601 [30].

14 (2001) 180 ALR 593 at 601 [31].

15 (2001) 180 ALR 593 at 601 [31].

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

17 (2001) 180 ALR 593 at 602 [36].

> 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."

21 His Honour then referred[18] to a number of other matters relied on by the applicants "to lift their cases into the exceptional class." They included:

- the extremely harsh conditions under which they were detained;
- the length of time they had been in custody – in the case of Mr Cabal, 31 months;
- the psychological conditions of the applicants;
- the quashing in Mexico of two warrants in relation to a charge of money laundering with the result that Mexican courts could admit Mr Cabal to bail; and
- the willingness of Australian citizens of good character to act as sureties.

22 In the case of Mr Pasini, Kirby J noted that he had been released on bail for a period between 20 December 2000 and 18 April 2001.

23 His Honour concluded that both Mr Cabal and Mr Pasini had proved "exceptional circumstances"[19]. His Honour said[20]:

> "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."

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18 (2001) 180 ALR 593 at 602-603 [37].

19 (2001) 180 ALR 593 at 604 [40].

20 (2001) 180 ALR 593 at 604 [40].

The grant of bail to Mr Cabal

24 Subsequently, Mr Cabal again applied to this Court for a grant of bail. On 19 July 2001, Kirby J ordered that bail be granted upon conditions. After referring to his earlier judgment, his Honour said[21] that "[f]or reasons which I then gave, Mr Cabal had established that exceptional circumstances were present in his case."

25 His Honour said that both parties had sought to re-open and re-argue points upon which he had expressed earlier views. One of them was that Mr Cabal was entitled to bail under the Act. His Honour said that uninstructed by authority he would have been inclined to hold that bail could have been granted under the Act[22]. However, his Honour followed the view expressed by Mason CJ in *Zoeller v Federal Republic of Germany*[23] and by Gaudron J in earlier proceedings in this Court concerning Mr Cabal[24]. Consequently, Kirby J held that bail was not available under the Act. After again holding that he had adequate power under the Constitution to grant bail, his Honour said[25]:

> "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[26] that prisoners awaiting extradition from 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

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21 (2001) 181 ALR 169 at 171 [3].

22 (2001) 181 ALR 169 at 172 [8].

23 (1989) 64 ALJR 137 at 138-139; 90 ALR 161 at 164.

24 *Cabal v United Mexican States* unreported, High Court of Australia, 31 May 2001.

25 (2001) 181 ALR 169 at 176-177 [23]-[24].

26 Referring to the Act, s 53: *Cabal* (2001) 180 ALR 593 at 605 [44].

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.

The circumstances have continued for more than 30 months[27]. 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[28]."

26 In our opinion, his Honour erred in the exercise of his discretion in granting bail. But before pointing to the factors that we think indicated error, it is convenient to deal with the question of the Court's jurisdiction to grant bail under the Act and more generally under the Constitution. It is also convenient at this stage to refer to the principles and factors that should be taken into account in exercising the discretion to grant bail.

Bail under the *Extradition Act*

27 Section 21 provides:

"**Review of magistrate's orders**

21(1) Where a magistrate of a State or Territory makes an order under subsection 19(9) or (10) in relation to a person whose surrender is sought by an extradition country:

(a) in the case of an order under subsection 19(9) – the person; or

(b) in the case of an order under subsection 19(10) – the extradition country;

may, within 15 days after the day on which the magistrate makes the order, apply to the Federal Court, or to the Supreme Court of the State or Territory, for a review of the order.

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27 *Cabal* (2001) 180 ALR 593 at 602 [37].

28 *Cabal* (2001) 180 ALR 593 at 602-605 [37]-[47].

…

(3) The person or the extradition country, whether or not the person or country was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.

…

(5) The High Court shall not grant special leave to appeal against the order of the Full Court made on the appeal referred to in subsection (3) if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made.

(6) Where the person or the extradition country:

(a) applies under subsection (1) for a review of an order;

(b) appeals under subsection (3) against an order made on that review; or

(c) appeals to the High Court against an order made on that appeal;

the following provisions have effect:

(d) the court to which the application or appeal is made shall have regard only to the material that was before the magistrate;

(e) if, because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has been released – the court to which the application or appeal is made may order the arrest of the person;

(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; or

(ii) the person has been arrested under an order made under paragraph (e);

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;

(g) if the court to which the application or appeal is made determines that the person is eligible for surrender, within the meaning of subsection 19(2), in relation to an extradition offence or extradition offences – the court shall include in its judgment on the review or appeal a statement to that effect specifying the offence or offences."

28 Section 15 of the Act provides:

"**Remand**

15(1) A person who is arrested under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.

(2) The person shall be remanded by a magistrate in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.

(3) If a person is remanded in custody after making an application for bail, the person cannot make another application for bail during that remand unless there is evidence of a change of circumstances that might justify bail being granted.

…

(6) A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand."

29 Does the Act give this Court jurisdiction to grant bail before special leave to appeal has been granted and a notice of appeal filed? In *Zoeller*, Mason CJ held that s 21(6) gave the Court no power to grant bail until there had been a

grant of special leave to appeal[29]. In our opinion, his Honour was correct in so deciding.

30 An application for leave or special leave to appeal is not an appeal. As Barwick CJ, Stephen, Mason and Jacobs JJ pointed out in *Collins v The Queen*[30], an "applicant for such leave or special leave is no more than an applicant desiring to obtain the Court's leave to commence proceedings in the Court." In *Collins*, the Court held that, for the purpose of s 78 of the *Judiciary Act* 1903 (Cth), an applicant for special leave to appeal is not a "party" in a court "exercising federal jurisdiction". In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*[31], Brennan J held that, because the power under s 77U of the *Judiciary Act* was exercisable only when "an appeal has been instituted", it could not be exercised before the grant of special leave[32].

31 In *Zoeller*[33], Mason CJ said that s 21(5), in referring "to an application for special leave to appeal indicates that the Parliament was alive to the difference between an application for special leave to appeal and an appeal to this Court." Because that is so, Mason CJ was correct in holding that "appeals" in s 21(6) must be taken to mean lodging an appeal in the sense identified in s 73 of the Constitution. It does not include filing an application for special leave to appeal.

32 In *Narain v Director of Public Prosecutions*[34] Brennan J said: "The Act confers no jurisdiction on this Court to grant bail pending an application for special leave and the applicant does not contend that there is any statutory foundation for the making of such an order."

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29 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 163.

30 (1975) 133 CLR 120 at 122.

31 (1986) 161 CLR 681 at 683.

32 Section 77U states:

> "When an appeal has been instituted, the High Court or the Court or Judge appealed from may order a stay of all or any proceedings under the judgment appealed from."

33 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 163.

34 (1987) 61 ALJR 317 at 318; 71 ALR 248 at 249.

33 Since *Narain* and *Zoeller* were decided, s 21 has been amended by Act No 76 of 1990. Now, under the Act, "special circumstances" must be proved before a person can get bail. If anything, the amending legislation strengthens rather than weakens the authority of the decisions in *Narain* and *Zoeller*. It has made the obtaining of bail under the Act harder than it was when those decisions were made.

34 Accordingly, we would hold that, notwithstanding the misgivings of Kirby J concerning the construction of s 21(6) of the Act, his Honour was correct in holding that the Court had no jurisdiction under the Act to grant bail to Mr Cabal.

The constitutional power to grant bail

35 On two previous occasions, Justices of this Court have assumed that the Court has inherent jurisdiction to grant bail to a person held under a warrant under the Act pending the grant of special leave to appeal. In *Narain*[35] Brennan J said:

> "Although the urgency of the present proceedings has not permitted full argument on the question of jurisdiction to grant bail or to make a similar order, my tentative view is that the limits of the inherent jurisdiction are set by the circumstances which necessitate its exercise and that there is no jurisdiction to make an order which goes beyond what is required to save the application for special leave from futility."

36 In *Zoeller*[36], Mason CJ referred to this statement of Brennan J and said that the order sought by Mr Zoeller could not be justified on that ground. Mason CJ then went on to say:

> "However, it is not necessary for me to base my decision on that view of the inherent jurisdiction. It may be that the jurisdiction is exercisable in other cases that are exceptional where, for example, the grant of special leave is irresistible and the appeal is bound to succeed as a result of a recent decision of this Court. Be this as it may, it can scarcely be supposed that the jurisdiction is enlivened by something less than exceptional circumstances. At the point when bail is sought pending the hearing of a special leave application, the ordinary processes of appeal

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35 (1987) 61 ALJR 317 at 318; 71 ALR 248 at 250.

36 (1989) 64 ALJR 137 at 138-139; 90 ALR 161 at 164.

> have been exhausted; they have resulted in a final order committing the applicant to prison. The process of appeal revives only in the event that this Court exercises its jurisdiction, an extraordinary jurisdiction, to grant special leave to appeal. There can be no assumption that the Court will, or is likely to, make such a grant. Hence, to justify an order for bail, something exceptional needs to be shown."

37 In our view, the power to grant bail in a criminal or extradition case is an incident of the power conferred by s 73 of the Constitution to hear appeals from the orders of certain courts. It is not a question of inherent jurisdiction. The grant of judicial power carries with it authority to do all that is necessary to effectuate its main purpose[37]. Because that is so, the Court has authority to do all that is necessary to effectuate the grant of appellate jurisdiction conferred by s 73 of the Constitution. It therefore has power to stay orders that are or may become the subject of its appellate jurisdiction. If the Court did not have power to stay an order the subject of an appeal, it might fail to do full justice to the appellant or potential appellant.

38 The Court has power, therefore, to stay orders in criminal cases – even orders concerned with sentences of death or imprisonment[38]. When the Court grants bail in a criminal case, it does so as an incident in the course of staying the order that is the authority for detaining the prisoner and to make the stay order effective. If there is an application for special leave to appeal or an appeal under s 73 of the Constitution against an order of imprisonment, this Court has jurisdiction to stay that order. It also has jurisdiction to grant bail so as to make the stay order effective. Although orders staying proceedings or admitting to bail make the *appellate* jurisdiction of the Court effective, the orders are made in the *original* jurisdiction of the Court[39].

Criminal cases

39 In determining whether to stay an order of imprisonment and give bail to the applicant or appellant, the court must consider not only the position of the applicant or appellant but also the position of the Crown. To stay an order of imprisonment before deciding the appeal is a serious interference with the due

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37 *R v Murphy* (1985) 158 CLR 596 at 614; cf *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

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

39 *Patton v Minister for Defence* (1987) 13 FCR 476 at 478.

administration of criminal justice. As Thomas J pointed out in *Ex parte Maher*[40], to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned:

- makes the conviction appear contingent until confirmed;
- places the court in the invidious position of having to return to prison a person whose circumstances may have changed dramatically during the period of liberty on bail;
- encourages unmeritorious appeals;
- undermines respect for the judicial system in having a "recently sentenced man walking free";
- undermines the public interest in having convicted persons serve their sentences as soon as is practicable.

40 Consequently, the doctrine of this Court is that in a criminal case an order granting bail will only be made if there are exceptional circumstances[41].

41 The history of decisions of this Court shows that ordinarily it will grant bail in criminal cases only if two conditions are satisfied. First, the applicant must demonstrate that there are strong grounds for concluding that the appeal will be allowed. The grant of special leave will often – perhaps usually – indicate that there are strong grounds for so concluding. Second, the applicant must show that the sentence, or at all events the custodial part of it, is likely to have been substantially served before the appeal is determined. Thus, in *Marotta v The Queen*[42], Callinan J granted bail after special leave had been granted. His Honour thought that substantial parts of the custodial sentences

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40 [1986] 1 Qd R 303 at 310.

41 *Robinson v The Queen* (1991) 65 ALJR 519; *Chew v The Queen (No 2)* (1991) 66 ALJR 221; *Peters v The Queen* (1996) 71 ALJR 309; *Parsons v The Queen* (1998) 72 ALJR 1325; *Marotta v The Queen* (1999) 73 ALJR 265; 160 ALR 525; *Weston v The Queen* (2000) 16 LegRep C2; *Sullivan v Director of Public Prosecutions* (2000) 17 LegRep C13; *Velevski v The Queen* (2000) 18 LegRep C2; *Caratti v The Queen* (2001) 1 LegRep C1; *Sinanovic v The Queen (No 1)* (2001) 179 ALR 520.

42 (1999) 73 ALJR 265; 160 ALR 525.

were likely to have been served and possibly completed in one case by the time the Court gave its decision on the appeal. Furthermore, the grant of special leave indicated that the applicants had at least reasonable prospects of succeeding in their appeals.

42 However, a very strong case is required for the grant of bail in a criminal case before the Court has granted special leave to appeal. As Dawson J pointed out in *Peters v The Queen*[43]:

> "[S]ince an application for special leave to appeal against conviction or sentence or both will ordinarily be made after an appellate court has considered the case and found no error, the occasions on which this Court will grant bail are rare indeed."

43 Ordinarily, a person will be admitted to bail *before* the grant of special leave in a criminal case only where the Court is satisfied there are *very* strong grounds for concluding that leave will be granted. The applicant will also need to show that it is likely that the custodial sentence or the greater part of it will have expired before the application for leave is heard. It is true that in *Pelechowski v Registrar, Court of Appeal*[44] bail was granted to a person convicted of contempt of court by the Court of Appeal even though the prospects of succeeding in the application were not regarded as high. But that case had two special factors. First, the whole or substantially most of the custodial sentence would have been served by the time the special leave application was determined. Second, there had been no intermediate appellate review of the decision. Thus, the case was not one where "an appellate court has considered the case and found no error".

Extradition cases

44 Just as the Court has jurisdiction to grant bail in an ordinary criminal case, so it has jurisdiction to grant bail in an extradition case like the present. Mr Cabal was in custody by reason of the order of the Magistrate. That order was confirmed by a single judge of the Federal Court and the order of the Full Court that is the subject of the special leave application. If special leave were granted and the appeal allowed, the order of imprisonment would be quashed. To make its s 73 jurisdiction effective, therefore, the Court had jurisdiction to stay the order committing Mr Cabal to prison. To render the stay more perfect, it

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43 (1996) 71 ALJR 309 at 310.

44 (1998) 72 ALJR 711 at 712.

also had jurisdiction to order the release of Mr Cabal, pending the hearing of this application, on such terms and conditions as the Court should think fit.

45 However, it does not follow that the principles that apply in criminal cases are fully applicable to extradition cases. First, Australia's international relations and standing are involved in extradition cases. They are seldom involved in domestic criminal cases. Second, the Court must take account of the purpose and policy of the Act. It would be a serious error to take the view that the enactment of the Act has no bearing on the application of the Court's incidental power to make an order granting bail to a person held under a s 19(9)(a) warrant[45]. That enactment cannot alter the power implicit in s 73 of the Constitution. But it can affect its application to the circumstances of the particular case. That is because the provisions of the Act illuminate the object of the proceedings that give rise to the application or appeal to this Court.

46 Before dealing with the constitutional power to grant bail in extradition cases, it is convenient to deal with the principles for granting bail in cases falling within s 15(6) or s 21(6) of the Act. Both these provisions of the Act make it a condition of bail that "special circumstances" exist.

The United States cases

47 There can be little doubt that the provenance of the "special circumstances" requirement is United States extradition case law. In *Wright v Henkel*[46], the United States Supreme Court rejected an application for release on bail pending the extradition hearing of Whitaker Wright, a well-known English financier. The United Kingdom Government sought Wright's extradition to prosecute him in respect of offences concerning a corporation. The extradition judge rejected his claim for bail, a claim made on the ground that he had bronchitis and might develop pneumonia if kept in gaol. The judge held that he had no power to admit on bail. The Supreme Court rejected Wright's appeal pointing out that there was no statute permitting bail. After referring to sections

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45 cf *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311 at 318 per Barwick CJ and McTiernan J: "It is unacceptable, in our opinion, to say, as the applicant submits, that the enactment of such a provision as that contained in O 63, r 6 leaves unaffected an inherent power which the court is said to have to make an order of the kind for which that rule provides."

46 190 US 40 (1903).

in the legislation that provided for the committal of the defendant, if the commissioner or judge found the evidence sufficient, the Court said[47]:

> "The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination."

48 In the penultimate paragraph of their Honours' judgment, however, they said[48]:

> "We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the *special circumstances*, extend that relief." (emphasis added)

Their Honours said that there was no occasion to determine whether there was such power "as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail".

49 Some years later in *In re Mitchell*[49], Learned Hand J held that the existence of the power to grant bail "was distinctly affirmed by the Supreme Court" in *Wright v Henkel*[50]. His Honour said that the Supreme Court had also indicated "that the power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely

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47 190 US 40 at 62 (1903).

48 190 US 40 at 63 (1903).

49 171 F 289 at 289 (SD NY 1909).

50 190 US 40 (1903).

peremptory"[51]. In *Mitchell*, Learned Hand J held[52] that special circumstances existed because the defendant was "entirely unable to consult with his counsel and prepare for the remainder of" a trial involving "all the fortune of the prisoner."

50 Since *In re Mitchell*, numerous cases in the United States have held that bail cannot be granted unless special circumstances are established[53]. In *Parretti v United States*[54], however, the Court of Appeals for the Ninth Circuit (Norris and Reinhardt JJ, Pregerson J dissenting) held that requiring a detainee to show special circumstances before admission to bail violates the Due Process Clause of the Fifth Amendment. Although the special circumstances test no

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51 171 F 289 at 289 (SD NY 1909).

52 171 F 289 at 289 (SD NY 1909).

53 *Beaulieu v Hartigan* 554 F 2d 1 at 1-2 (1st Cir 1977); *United States v Williams* 611 F 2d 914 at 914 (1st Cir 1979); *Hu Yau-Leung v Soscia* 649 F 2d 914 at 920 (2nd Cir 1981); *United States v Leitner* 784 F 2d 159 at 160 (2nd Cir 1986); *Matter of Extradition of Russell* 805 F 2d 1215 at 1217 (5th Cir 1986); *United States v Tang Yee-Chun* 657 F Supp 1270 at 1271 (SD NY 1987); *Salerno v United States* 878 F 2d 317 at 317 (9th Cir 1989); *United States v Taitz* 130 FRD 442 at 444 (SD Cal 1990); *Koskotas v Roche* 740 F Supp 904 at 918 (D Mass 1990); *Matter of Extradition of Heilbronn* 773 F Supp 1576 at 1582 (WD Mich 1991); *United States v Hills* 765 F Supp 381 at 385 (ED Mich 1991); *Matter of Extradition of Smyth* 976 F 2d 1535 at 1535 (9th Cir 1992); *Martin v Warden, Atlanta Pen* 993 F 2d 824 at 827 (11th Cir 1993); *Matter of Extradition of Rouvier* 839 F Supp 537 at 539 (ND Ill 1993); *Matter of Extradition of Nacif-Borge* 829 F Supp 1210 at 1213 (D Nev 1993); *Matter of Extradition of Morales* 906 F Supp 1368 at 1373 (SD Cal 1995); *Matter of Extradition of Sutton* 898 F Supp 691 at 694-695 (ED Mo 1995); *In Matter of Requested Extradition of Kirby* 106 F 3d 855 at 863 (9th Cir 1996); *Matter of Extradition of Mainero* 950 F Supp 290 at 294 (SD Cal 1996); *Matter of Extradition of Rovelli* 977 F Supp 566 at 567 (D Conn 1997); *Duran v United States* 36 F Supp 2d 622 at 628 (SD NY 1999); *In re Extradition of Gonzalez* 52 F Supp 2d 725 at 735 (WD La 1999); *Hababou v Albright* 82 F Supp 2d 347 at 351 (DNJ 2000).

54 122 F 3d 758 (9th Cir 1997). The Ninth Circuit ordered Parretti's release before handing down its reasons for judgment (at 763). It appears from the dissenting judgment (at 787) that upon being released "from custody on bail" Parretti "fled the country".

longer represents the law for the Ninth Circuit, it continues to be the law for the other federal circuits in the United States[55].

51 The principles applicable in the other federal circuits of the United States are well summarised in *Matter of Extradition of Nacif-Borge*[56]:

> "Therefore, a person subject to international extradition may overcome the presumption against bail by presenting clear and convincing evidence demonstrating 'special circumstances' justifying release pending extradition proceedings and that the person will not flee or pose a danger to any other person or to the community."

52 The United States cases give valuable guidance as to what constitutes special circumstances. At an early stage, the view was taken that "admission to bail and extradition should be in practice an unusual and extraordinary thing, for the whole proceeding is opposed to our historical ideas about bail."[57] It is therefore accepted that special circumstances "need to be extraordinary and not factors applicable to all defendants facing extradition."[58] It is not necessary that any particular circumstance should be regarded as special. Several factors in combination can constitute special circumstances justifying bail[59].

53 A high probability of success in resisting the extradition proceedings may constitute special circumstances[60]. So may age together with lack of a suitable facility for holding the defendant[61]. So may imprisonment causing a serious

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55 *Duran v United States* 36 F Supp 2d 622 at 628 (SD NY 1999); *In re Extradition of Gonzalez* 52 F Supp 2d 725 at 735 (WD La 1999); *Hababou v Albright* 82 F Supp 2d 347 at 351 (DNJ 2000).

56 829 F Supp 1210 at 1215 (D Nev 1993).

57 *United States ex rel McNamara v Henkel* 46 F 2d 84 at 84 (SD NY 1912).

58 *Matter of Extradition of Morales* 906 F Supp 1368 at 1373 (SD Cal 1995); see also *Matter of Extradition of Smyth* 976 F 2d 1535 at 1535-1536 (9th Cir 1992); *Matter of Extradition of Nacif-Borge* 829 F Supp 1210 at 1216 (D Nev 1993).

59 *Matter of Extradition of Morales* 906 F Supp 1368 at 1373 (SD Cal 1995).

60 *Salerno v United States* 878 F 2d 317 (9th Cir 1989); *Matter of Extradition of Mainero* 950 F Supp 290 at 294 (SD Cal 1996); *In re Extradition of Gonzalez* 52 F Supp 2d 725 at 738, 741 (WD La 1999).

61 *Hu Yau-Leung v Soscia* 649 F 2d 914 at 920 (2nd Cir 1981).

deterioration of health[62]. In *In re Mitchell*[63], Learned Hand J regarded the necessity of the defendant to prepare his defence in a civil action where his entire fortune was at risk as special circumstances. But the general view in the United States is that the need to prepare litigation – whether for the extradition proceedings or other civil litigation – does not constitute special circumstances[64]. As the Ninth Circuit pointed out in *Matter of Extradition of Smyth*[65], "[t]he need to consult with counsel, gather evidence and confer with witnesses, although important, is not extraordinary; all incarcerated defendants need to do these things."

54 That the extradition proceedings may be lengthy will not constitute special circumstances unless there has been some unusual delay[66]. In *Hababou v Albright*[67], the District Court refused bail although the defendant's extradition hearing might be delayed for at least a year because he had to answer criminal charges in the United States as well as the extradition charges. That the defendant holds an important position and the community will be deprived of his services during detention does not constitute special circumstances[68]. Nor does the fact that another court has granted bail to the defendant's brother on the same charges[69]. Nor that there is a low risk of flight[70]. That the detainee would be entitled to bail in the country to which he was extradited does not constitute

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62 *Salerno v United States* 878 F 2d 317 (9th Cir 1989); *United States v Taitz* 130 FRD 442 at 446 (SD Cal 1990).

63 171 F 289 (SD NY 1909).

64 *Matter of Extradition of Russell* 805 F 2d 1215 at 1217 (5th Cir 1986); *Koskotas v Roche* 740 F Supp 904 at 918-919 (D Mass 1990); *Matter of Extradition of Smyth* 976 F 2d 1535 at 1535-1536 (9th Cir 1992).

65 976 F 2d 1535 at 1535-1536 (9th Cir 1992).

66 *United States v Williams* 611 F 2d 914 at 915 (1st Cir 1979); *Salerno v United States* 878 F 2d 317 at 317 (9th Cir 1989); *Hababou v Albright* 82 F Supp 2d 347 at 351 (DNJ 2000).

67 82 F Supp 2d 347 (DNJ 2000).

68 *Matter of Extradition of Heilbronn* 773 F Supp 1576 at 1581 (WD Mich 1991).

69 *United States v Williams* 611 F 2d 914 at 915 (1st Cir 1979).

70 *United States v Leitner* 784 F 2d 159 at 161 (2nd Cir 1986).

special circumstances either. In *In re Extradition of Siegmund*[71], the Court said that the purpose of an international extradition proceeding was "not to mirror the internal bail practices of the requesting country, but, rather, to deliver the extraditee to that country". So in *Matter of Extradition of Sutton*[72], the District Court refused bail to an Australian although there was evidence before the Court that, upon being returned to Australia, he would very likely be granted bail pending the hearing of the committal proceedings.

Special circumstances not established

55 An examination of the particular circumstances relied on in the United States cases and the decisions in respect of those circumstances is instructive. In *United States v Kin-Hong*[73], the Court denied that there were special circumstances where the applicant relied on the complexity of the legal issues and the likelihood of delay involved in the impending reversion of Hong Kong (the extraditing country) to the People's Republic of China. In *United States ex rel McNamara v Henkel*[74], the Court rejected the likelihood of delay as a special circumstance. In *In re Klein*[75], the Court held that discomfort in gaol and the likelihood of delay in the hearing were not special circumstances. In *United States v Messina*[76], the likelihood that the applicant would be acquitted when prosecuted on his return was held not to be a special circumstance. In *Koskotas v Roche*[77], the Court held that special circumstances did not exist when the applicant agreed to submit to house arrest, claimed the need to be actively involved in defence of the extradition proceedings and wished to prepare for pending civil litigation. In *Matter of Extradition of Hamilton-Byrne*[78], the Court held that risks to the defendant's health did not constitute special circumstances.

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71 887 F Supp 1383 at 1387 (D Nev 1995).

72 898 F Supp 691 (ED Mo 1995).

73 83 F 3d 523 at 525 (1st Cir 1996).

74 46 F 2d 84 (SD NY 1912).

75 46 F 2d 85 (SD NY 1930).

76 566 F Supp 740 (ED NY 1983).

77 740 F Supp 904 (D Mass 1990).

78 831 F Supp 287 (SD NY 1993).

In *Matter of Extradition of Rouvier*[79], the Court held that special circumstances were not established by the risk to the defendant's health, that the offence may have been bailable in the extraditing country and that the defendant was likely to be acquitted of the underlying charge. In *Lo Duca v United States*[80], the Court held that the ailing health of the defendant's wife was not a special circumstance. In *Matter of Extradition of Heilbronn*[81], the Court rejected as special circumstances a claim that the defendant's release would benefit the public because he was a doctor and that there was a likelihood of delay in hearing the extradition proceedings. In *Matter of Extradition of Russell*[82], the Court held that special circumstances were not established when the defendant claimed that his detention would result in a large loss of business, that his family was financially dependent upon him, that he was involved in civil litigation that required his attention and that the charges the subject of the extradition were complex. In *Cherry v Warden*[83], the Court held that a constitutional challenge to the extradition statute did not constitute special circumstances. In *In re Extradition of Siegmund*[84], the Court held that the non-violent nature of the offences the subject of the extradition and that they were bailable in the country seeking extradition were not special circumstances. In *United States v Tang Yee-Chun*[85], the Court held that the defendant's difficulty in defending the extradition by reason of his need for a translator did not amount to special circumstances. In *United States v Leitner*[86], the Court held that family ties in the United States and the lack of a prior criminal record did not constitute special circumstances.

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79 839 F Supp 537 (ND Ill 1993).

80 1995 US Dist LEXIS 21155 (ED NY 1995).

81 773 F Supp 1576 (WD Mich 1991).

82 647 F Supp 1044 (SD Texas 1986).

83 1995 US Dist LEXIS 14828 (SD NY 1995).

84 887 F Supp 1383 (D Nev 1995).

85 657 F Supp 1270 (SD NY 1987).

86 784 F 2d 159 (2nd Cir 1986).

Special circumstances established

56 In *Beaulieu v Hartigan*[87], the Court held that special circumstances were established when there was a likelihood of delay, the defendant had no passport and was not a danger to the community and his parents were responsible people who would ensure his presence at the trial. In *Artukovic v Boyle*[88], the Court held that special circumstances existed where the charge was vague and the defendant had a wife and four children in the United States, had made no attempt to conceal his identity, and had allegedly committed the offence while overseas on Army service. In *Hu Yau-Leung v Soscia*[89], the Court held that special circumstances existed by reason of the defendant's background, his age – 16 years – and the lack of a suitable facility in which to detain him. In *Kin-Hong v United States*[90], the Court held that special circumstances existed by reason of the probability of delay in finalising the proceedings and the existence of a pending constitutional challenge to the extradition law. In *Matter of Extradition of Morales*[91], the Court held that a number of matters in combination constituted special circumstances. They included a defect in the arrest warrant, the defendant's ability to make restitution for the crime, the likelihood of continued delay in the extradition proceedings and the availability of bail upon being returned to Mexico. In *United States v Taitz*[92], the Court also held that a combination of matters constituted special circumstances. They included the likelihood of delay, the risk to the defendant's health, the absence of danger to the community, the inability of the defendant to observe his religious rites in gaol and the practice of granting bail to persons in the extraditing country. In *In Matter of Requested Extradition of Kirby*[93], the Court of Appeals also held that special circumstances existed by reason of a combination of matters. They included the likelihood of delay, the pending constitutional challenge to the extradition statute, the inability of the defendants to get credit for time spent in detention in the United States if they were sentenced in the extraditing country and the likelihood that the granting of bail would promote harmony among warring factions in Northern Ireland.

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87 430 F Supp 915 (D Mass 1977); affirmed 554 F 2d 1 (1st Cir 1977).

88 107 F Supp 11 (SD Cal 1952).

89 649 F 2d 914 (2nd Cir 1981).

90 926 F Supp 1180 (D Mass 1996); reversed 83 F 3d 523 (1st Cir 1996).

91 906 F Supp 1368 (SD Cal 1995).

92 130 FRD 442 (SD Cal 1990).

93 106 F 3d 855 (9th Cir 1996).

The risk of flight

57 In the United States, the practice is to consider the risk of flight and only then to consider whether special circumstances exist. If there is a real risk of flight, the application for bail is refused whatever the special circumstances may be. In Australia, the existence of special circumstances is an essential condition of the grant of bail. It seems proper, therefore, to determine whether special circumstances exist before considering the question of flight, a matter that is highly relevant in the exercise of the general discretion. It may be going too far to say that, if there is any risk of flight, the Act requires that bail be refused, even if there are special circumstances. In a particular situation, the special circumstances may be so cogent that bail should be granted although there is a slight risk of flight. Nevertheless, to grant bail where there is a real risk of flight could only be justified in the most extraordinary circumstances. In the vast majority of cases, the proper exercise of discretion requires the refusal of bail if there is such a risk. To grant bail where a risk of flight exists is to jeopardise Australia's relationship with the country seeking extradition and to jeopardise our standing in the international community.

The rationale for refusing bail in extradition cases

58 Where a person is found in Australia and an extraditable offence is alleged against him or her, this country is obliged to return that person to the country seeking extradition. Australia therefore has a very substantial interest in surrendering the person in accordance with its treaty obligations. If Australia fails, when requested, to return a person against whom there is probable cause for concluding that he or she has committed an extraditable offence, it breaches its obligations under international law[94]. If Australia fails to comply with a treaty, the rules of international law entitle the other party to the treaty to repudiate or suspend the performance of its own obligations under the treaty[95]. A repudiation or suspension by another country of its extradition treaty obligations to Australia would hinder this country's ability to enforce its own laws. In an era where much crime is transnational, the breakdown of international co-operation in apprehending criminals would be disastrous for the peoples of the countries concerned. Such a breakdown may do more than inhibit the apprehension of persons who have committed crimes against Australian law. If other countries

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94 *Wright v Henkel* 190 US 40 at 62 (1903).

95 Vienna Convention on the Law of Treaties, (Vienna, 23 May 1969), Art 60: 1974 ATS No 2; 1155 UNTS 331.

think it not worthwhile to seek extradition from Australia, Australia may become a haven – at least for a time – for those who have committed serious crimes in other countries. They may well commit similar offences here.

59 If the defendant flees Australia after being granted bail, the expense of enforcing Australia's treaty obligations has been incurred for no gain to this country. Even if the defendant is re-captured, further public money will have been expended. The cost of extradition proceedings is often substantial. In the present case, for example, there were extremely lengthy proceedings before the Magistrate, an appeal to the Federal Court, and an appeal to the Full Court of the Federal Court. In the proceedings before Kirby J, Mexico and the Commonwealth asserted that they were the "beneficiaries of costs orders against Mr Cabal which amount, in aggregate, to about $2m."[96] But the cost of any extradition proceeding is certain to be considerable. It is obvious that Australia and often the extraditing State may have to spend large sums on extradition proceedings, most of which may be irrecoverable from the defendant. To these costs must be added the cost of keeping the defendant in custody. All this expenditure is put at risk when a defendant is granted bail.

60 Because the typical extraditee is a person who has fled from another country after committing a serious crime, granting bail to that person provides a further opportunity for him or her to flee from the reach of the extraditing country. The ever present risk of flight in extradition situations was the rationale for the "special circumstances" requirement of s 15(6) of the Act[97]. The Explanatory Memorandum stated[98]:

> "Sub-clause (6) provides that a person shall not be granted bail unless there are special circumstances. Such a provision is considered necessary *because experience has shown that there is a very high risk of persons sought for extraditable offences absconding*. In many cases the person is in Australia to avoid arrest in the country where he is alleged to have committed the offence, ie the person left the jurisdiction to avoid justice." (emphasis added)

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96 (2001) 180 ALR 593 at 607-608 [59].

97 **"(6)** A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand."

98 Extradition Bill 1987, Explanatory Memorandum at 18.

No similar explanation was given for the later enactment of the "special circumstances" requirement in s 21(6)(f)(iv). But there can be no doubt that that provision has the same rationale as s 15(6).

61 Given this background and the rationale for the "special circumstances" condition, bail in extradition cases should be granted only when two conditions are fulfilled. First, the circumstances of the individual case are special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure when regard is had to the nature and extent of the extradition charges. This means that the circumstances relied on must be different in kind from the disadvantages that all extradition defendants have to endure. To constitute "special circumstances", the matters relied on "need to be extraordinary and not factors applicable to all defendants facing extradition."[99] Second, there must be no real risk of flight. Absence of a real risk of flight is ordinarily a necessary but not a sufficient condition of bail. When there is a real risk of flight, ordinarily bail should be refused. Further, the risk of flight should be considered independently of the effect of the proposed bail conditions. In this area of law, the history and character of the defendant and the potential punishment facing the defendant are likely to be surer guides to the risk of flight than bail conditions – even rigorous conditions. A person, fearing punishment and inclined to flee, is unlikely to be diverted from that course by the prospect that his or her sureties may forfeit their securities or by stringent reporting conditions. Even if the defendant has to report twice daily to the police, he or she will have a period of 12-14 hours in which to leave Australia.

62 Even when special circumstances are proved and there is no real risk of flight, it does not follow that bail must be granted. For example, the defendant may pose a risk to the community or a particular individual. In addition, bail must become harder to obtain as the case proceeds through the judicial system. Once the Magistrate has found that the defendant is eligible for surrender, public interest factors similar to those that require a convicted defendant to be imprisoned also require that a defendant in extradition proceedings be kept in custody. Before a Federal Court judge grants bail, the defendant ordinarily will need to show that the application for review has strong prospects of success as well as special circumstances and an absence of risk of flight.

The Federal Court cases

63 In a number of cases, the Federal Court of Australia appears to have taken a more lenient view of the "special circumstances" requirement than that taken by

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99 *Matter of Extradition of Morales* 906 F Supp 1368 at 1373 (SD Cal 1995).

the United States courts. It also appears to have granted bail in a number of cases where United States courts would have refused to do so. In *Schoenmakers v Director of Public Prosecutions*[100], the Federal Court granted bail after the defendant had been held to be eligible for surrender to the United States on a number of charges relating to drugs. The charges included conspiracy to manufacture drugs and conducting a continuing criminal enterprise. The Court granted bail although it accepted that there was a presumption against bail, saying[101]:

> "The reference to 'special circumstances' in the context of this legislation imports a presumption against the grant of bail and puts the onus on the applicant to demonstrate that an order for bail would be justified."

But it is probably more accurate to say, given the terms of the Explanatory Memorandum and the objects of the Act, that bail is ordinarily refused because there is a presumption that the defendant will flee the jurisdiction.

64 After referring to the Explanatory Memorandum, the Federal Court said[102] that the "special circumstances" requirement looked "in particular to the case where a person is in Australia to avoid arrest in the country in which he is alleged to have committed the offence." It held that this rationale for the presumption against bail did not apply to Mr Schoenmakers. The Court said that "[h]aving regard to the policy of the legislation there is … a special circumstance attaching to his presence in this country which puts it in a different class from that of the fugitive offender contemplated by the legislation."

65 With respect, the fact that Mr Schoenmakers had not fled from the United States was not a special circumstance. The object of the "special circumstances" condition is to prevent the defendant being at liberty "because experience has shown that there is a very high risk of persons sought for extraditable offences absconding." Persons who have fled the extraditing country to avoid justice are persons who are likely to flee again. But it is a mistake to think that a person is unlikely to abscond simply because that person did not leave the extraditing country "to avoid justice". In these days of transnational crime, offences are frequently committed against the laws of a country by persons who do not set foot in that country. This is particularly so with respect to drug importation cases

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100 (1991) 30 FCR 70.

101 (1991) 30 FCR 70 at 74.

102 (1991) 30 FCR 70 at 74.

– the type of case involved in *Schoenmakers*. Faced with the choice of being taken to the extraditing country to answer serious charges in that country or fleeing Australia, the defendant may prefer the latter choice. And where the defendant has substantial sums of money available to him, flight may easily prove the more inviting and easier alternative.

66 The Federal Court also found that the 11 months spent in custody by Mr Schoenmakers constituted a special circumstance. The Court said[103] that "it can never be regarded as anything other than a special circumstance that a person should have to spend a year in prison unconvicted of any offence." With respect, this statement cannot be accepted as a general proposition. Whether or not a delay of one year or more constitutes special circumstances depends on the facts of the particular case. If the extraditing country has prosecuted the proceedings without undue delay, it is unlikely that length of delay would itself constitute special circumstances. No doubt it is a hardship for any innocent person to be held in custody for a lengthy period. But detention for a lengthy period – particularly when the charges are numerous and complex and the defendant exercises his or her right to appeal against the order of committal – is not so special that it constitutes special circumstances. In any contested extradition proceedings, delay is inevitable. Delay will constitute special circumstances only when it is outside what could be regarded as the normal range for offences of the type and complexity the subject of the proceedings.

67 The Federal Court thought that the 11 month delay and the fact that Mr Schoenmakers had not fled from the United States constituted special circumstances which justified the release of Mr Schoenmakers on bail[104]. Its judgment does not indicate that it considered the risk of flight. It seems to have thought that the existence of special circumstances and the bail conditions it would impose were sufficient to warrant the grant of bail. Subsequent events showed how necessary it is for the Court to carefully determine whether there is a real risk of flight before granting bail, irrespective of what conditions of bail it may contemplate imposing. Mr Schoenmakers, having been granted bail on 21 June 1991, "departed from Australia for Thailand on 30 July 1991 … and his whereabouts remain unknown."[105] He was able to leave the country despite the fact that the conditions of his bail required him to surrender his passport to the Australian Federal Police, remain at all times within the metropolitan area of Perth, report twice daily to the Australian Federal Police and enter into a

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103 (1991) 30 FCR 70 at 74-75.

104 (1991) 30 FCR 70 at 75-76.

105 *Schoenmakers v Director of Public Prosecutions (No 2)* (1991) 31 FCR 429 at 431.

recognisance with a surety to be approved by the Australian Federal Police in the amount of $100,000.

68 In *Holt v Hogan (No 1)*[106], the Federal Court accepted[107] "that a paramount consideration is whether the presence of the applicants to be surrendered to extradition can be secured." However, the Court said that that was not the only consideration. Following *Schoenmakers*, the Court said that the liberty of the subject was also a matter to be considered.

69 Later the Court said[108]:

> "Of course, unless the Court was satisfied that it was not probable that the applicant would abscond, it is hard to imagine any situation where special circumstances would be made out. But in assessing that probability regard may be had to the personal circumstances of the applicant and the ability of the Court to impose conditions which maximise the likelihood that an applicant will answer bail. It is not in my view that the circumstances are so exceptional or special that it is not probable that the applicant will abscond which is the sole or appropriate test required by s 21(6)(f)(iv), but rather whether the circumstances are such as to displace the ordinary rule against bail because the personal and other public interests underlying the proven circumstances outweigh the statutory interests and concerns evident in ss 3 and 21(6)(f)(iv) of the Act."

70 This statement places too low a burden on an applicant for bail. The purpose of the extradition proceedings is set at risk if an applicant is entitled to bail upon proof of special circumstances and a probability that the applicant will not abscond. If there is a *real* risk that the applicant will abscond, the objects of the Act and the rationale of ss 15 and 21 require the refusal of bail in all but exceptional cases. Unless the special circumstances are so cogent and the risk so very low that the proper exercise of discretion requires the grant of bail, any real risk of flight should be decisive against the grant of bail.

71 In *Holt*, after referring to the statement in the Explanatory Memorandum, the Federal Court also said[109]:

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106 (1993) 44 FCR 572.

107 (1993) 44 FCR 572 at 578.

108 (1993) 44 FCR 572 at 579.

109 (1993) 44 FCR 572 at 579.

> "Against these matters one then identifies and weighs the particular circumstances of the applicant for bail keeping in mind broad community standards including a predisposition against unnecessary or arbitrary detention in custody. In considering the circumstances of a particular applicant for bail one does not exclude those circumstances which ordinarily would fall for consideration on an application for bail where a person is charged domestically for the commission of a crime in this country. All personal circumstances are taken into consideration, notwithstanding that some or all of them will again fall for consideration if special circumstances are established as a condition precedent to the exercise of a jurisdiction to grant bail."

72 In our opinion, it is an error in a bail application in an extradition matter to take into account that there is "a predisposition against unnecessary or arbitrary detention in custody". The Parliament has made it plain that bail is not to be granted unless special circumstances are proved. However unpalatable such a conclusion may be to the mind of the common lawyer, the Parliament believed that the fulfilment of Australia's treaty obligations makes the principles governing bail in domestic cases inapplicable in extradition cases. In extradition cases, the general rule is that defendants are to be held in custody whether or not their detention is necessary. Only when there is something special about a defendant's circumstances can the question of bail be considered. For that reason, it is erroneous to take into account "those circumstances which ordinarily would fall for consideration on an application for bail where a person is charged domestically for the commission of a crime". Those circumstances may be taken into account in considering the exercise of discretion after special circumstances have been established. But they can play no part in determining whether the applicant has established special circumstances.

73 The Federal Court also erred in *Holt*[110] when it said:

> "It is not in my view that the circumstances are so exceptional or special that it is not probable that the applicant will abscond which is the sole or appropriate test required by s 21(6)(f)(iv), but rather whether the circumstances are such as to displace the ordinary rule against bail because the personal and other public interests underlying the proven circumstances outweigh the statutory interests and concerns evident in ss 3 and 21(6)(f)(iv) of the Act."

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110 (1993) 44 FCR 572 at 579.

74 It is no doubt true that the test is not whether the proven special circumstances are such that it is not probable that the applicant will abscond. But it is not a question of whether the personal and other public interests outweigh the objects and rationale of the Act. Once special circumstances are proved, the Court must consider all the circumstances of the case, the chief of which is the risk of flight. If a real risk of flight exists, the proper exercise of the discretion will ordinarily require the refusal of bail. Conversely, if special circumstances are proved and there is no real risk of flight, bail may be granted unless the defendant may be a danger to the community or some specific individual. In determining whether bail will be granted, one of the most important factors will be the stage which the proceedings have reached. As the case proceeds through the legal system, the chance of obtaining bail reduces, despite the existence of special circumstances. As the case against the defendant is confirmed at each step in the judicial hierarchy, the public interest in extraditing the defendant weighs more heavily against him or her.

75 *Schoenmakers* and *Holt* have proved influential in the determination of a number of subsequent cases in the Federal Court[111]. But, for the reasons we have given, the two cases contain statements which are wrong and which should not be followed. It is unnecessary to examine the reasoning or decisions in subsequent cases in the Federal Court. In some cases bail has been refused; in others, it has been granted. Earlier in this judgment, we stated the principles that should be applied in determining whether to grant bail under the Act. Together with the assistance to be gained from the United States decisions on "special circumstances", those principles will enable the Federal Court to produce a consistent body of case law on the bail requirements of the Act.

Bail in extradition cases in the High Court

76 Section 21(6) of the Act also governs applications for bail in the High Court after the grant of special leave and the lodging of an appeal. The principles to which we have referred apply to such applications. When a case reaches this Court, however, a judge and the Full Bench of the Federal Court have already examined the case and found no error in the Magistrate's order of committal. Although the grant of special leave usually indicates that the appeal has reasonable prospects of success, public interest factors similar to those that require the refusal of bail after a criminal conviction[112] also strongly point to this Court refusing bail in an extradition case.

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111 See for example: *Wu v Attorney-General (Cth)* (1997) 79 FCR 303; *Timar v The Republic of Hungary* [1999] FCA 1559.

112 *Ex parte Maher* [1986] 1 Qd R 303 at 310.

77 As we have indicated, this Court also has jurisdiction to grant bail in extradition proceedings before it has granted special leave to appeal. In the exercise of that jurisdiction, the Court will be guided by the same principles as apply to an application made under s 21(6) of the Act. But even if special circumstances and the absence of risk of flight are proved, more than that is required to obtain a grant of bail before the grant of special leave[113]. At the leave stage, as Mason CJ pointed out in *Zoeller*[114], "the ordinary processes of appeal have been exhausted; they have resulted in a final order committing the applicant to prison." That being so, "something exceptional needs to be shown"[115] before bail will be granted. Mason CJ gave as an example a case where leave is certain to be granted and the appeal allowed "as a result of a recent decision of this Court."[116] Absent such factors, it is difficult to envisage circumstances when this Court would grant bail in an extradition case before the grant of special leave.

The exercise of discretion by Kirby J miscarried

78 The extreme conditions under which Mr Cabal had been held for 31 months together with his deteriorating psychological condition constituted special circumstances. Few, if any, persons detained for extradition in this country can have been held for so long under such conditions. The conditions were so extraordinarily harsh that they alone constituted special circumstances. Even if all defendants in extradition proceedings, held in custody in Victoria, have to endure such conditions, they are not endured by defendants in such proceedings in other parts of Australia. Other matters to which Kirby J referred as allegedly lifting Mr Cabal's case "into the exceptional class"[117], however, were not special circumstances. Nor did his Honour suggest that they were. These matters included the bare fact of Mr Cabal's lengthy imprisonment and the willingness of Australian citizens of good character to act as sureties.

79 However, in our opinion, his Honour's discretion miscarried in two respects. First, his Honour made no finding as to whether there was a real risk, independently of the effect of bail conditions, that Mr Cabal would flee if

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113 cf *Peters v The Queen* (1996) 71 ALJR 309 at 310.

114 (1989) 64 ALJR 137 at 139; 90 ALR 161 at 164.

115 (1989) 64 ALJR 137 at 139; 90 ALR 161 at 164.

116 (1989) 64 ALJR 137 at 138; 90 ALR 161 at 164.

117 (2001) 180 ALR 593 at 602 [37].

released on bail. His Honour said[118] that "[a]lthough 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." But his Honour made no finding as to whether Mr Cabal was likely to flee the jurisdiction, apart from the imposition of those conditions. For the reasons given earlier, that was an error. And with great respect, the conditions that his Honour imposed were no more likely to prevent Mr Cabal fleeing, if he was so inclined, than the conditions imposed by the Federal Court in *Schoenmakers*[119] prevented Mr Schoenmakers from fleeing the jurisdiction. Second, special leave not having been granted, his Honour made no finding that Mr Cabal had made out a very strong case for the grant of special leave and for the allowing of the consequential appeal. On the contrary, his Honour took into account as a relevant factor that "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."[120] In his first judgment, his Honour said that this factor was "critical" to the conclusion that Mr Cabal and Mr Pasini had proved "exceptional circumstances"[121].

80 Because the exercise of his Honour's discretion miscarried, it became necessary for this Court to re-examine the application for bail. In our opinion, Mr Cabal failed to establish that, if he was released on bail, there was no real risk that he would flee from Australia. The evidence established that Mr Cabal left Mexico on 2 September 1994 and that he had not returned to Mexico since that time. In October 1996, Mr Cabal, using the name Rafael Certi Merrit, applied to the Department of Immigration and Multicultural Affairs for "a long stay temporary business visa" for himself, his wife and four children. That application was approved by the Department in March 1997[122] and Mr Cabal settled in Australia with his family. Mexico alleges that on the day of Mr Cabal's arrest on 11 November 1998, Australian Federal Police found a number of documents at his home that showed that he was in possession of a number of passports in false names. Three of the passports had been issued by the Dominican Republic and were in the name of Rafael Certi Merrit but bore a

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118 (2001) 181 ALR 169 at 178 [31].

119 (1991) 30 FCR 70 at 76.

120 (2001) 180 ALR 593 at 602 [36].

121 (2001) 180 ALR 593 at 604 [40].

122 Affidavit of Daniel Donato Caporale, sworn 29 May 2001, par 64.

photograph of Mr Cabal as being the holder of the passports. There were also Dominican Republic passports bearing photographs of Mr Cabal's wife and children but issued under false names[123].

81 In addition, Mexico alleges that the Australian Federal Police found at the home of Mr Cabal a Republic of Uruguay driver's licence and an international driver's licence in the name of Rafael Certi Merrit. Those documents bore a photograph of Mr Cabal as the holder of the licence. Mexico also alleges that the police search found a number of credit cards in the name of Rafael Certi Merrit.

82 In addition, the Australian Federal Police are alleged to have found at Mr Cabal's home Republic of Uruguay identity cards in false names for his wife, each of his four children and their "nanny". A Republic of Uruguay identity card bearing a photograph of Mr Cabal's brother-in-law in a false name was also allegedly found in the search. In addition, Mexico alleges that the Australian Federal Police found a Dominican Republic electoral identity card and driver's licence in the name of Natalia Righi Cusine, each of which bore a photograph of Mr Cabal's wife as the holder of the card. Furthermore, Mexico alleges that Italian passports were issued under false names to Mr Cabal and members of his family by the Italian Embassy in Santo Domingo, Dominican Republic.

83 Upon these facts, we were far from satisfied that Mr Cabal would not flee from Australia, if given bail. His history indicated that he would not hesitate to move from country to country to avoid extradition. The documents found in his possession indicated his capacity to obtain passports, drivers' licences and credit cards under false names in foreign countries. If the allegations of the Mexican Government are true, it is probable that he has very large sums of money available to him. On the first occasion on which Kirby J considered the bail application, he said[124]:

> "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."

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123 Affidavit of Daniel Donato Caporale, sworn 29 May 2001, par 60. There was also a Dominican Republic passport in the name of Estherbel Jiminez Fernandez and bearing a photograph of the "nanny" of Mr Cabal's family as being the holder of the passport.

124 (2001) 180 ALR 593 at 606-607 [53].

84 In addition, we were far from confident that Mr Cabal would be granted special leave to appeal – let alone succeed in a consequential appeal. Even if he could make out a case that s 21 of the Act was invalid – and we were not convinced that the arguments in his special leave application even on that point made a strongly arguable case – his prospects of bringing down the whole Act seemed remote. Similarly, we were not persuaded that his alternative arguments based on ss 19(5) and 21(6)(d) would succeed[125].

85 For these reasons, we were of the opinion that the Court should grant leave to appeal against the orders of Kirby J, allow the appeal and dismiss Mr Cabal's application for bail.

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125 Mr Cabal has since abandoned that application for special leave to appeal. Mr Pasini's application for special leave to appeal, based on the same arguments as those advanced by Mr Cabal, was refused by the Full Court on 7 September 2001.