

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH AND GUMMOW JJ

UNITED MEXICAN STATES

APPLICANT

AND

MARCO PASINI (BERTRAN) & ORS

RESPONDENTS

United Mexican States v Pasini [2001] HCA 61
24 October 2001
M70/2001

ORDER

1. *Leave to appeal granted, the draft notice of appeal to stand as the notice of appeal.*
2. *Appeal allowed.*
3. *Set aside order 2 of the orders made by Kirby J on 29 June 2001 and in place thereof order that the summons dated 28 May 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))

D Grace QC for the first respondent (instructed by Fernandez Canda Gerken)

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)

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

CATCHWORDS

United Mexican States v Pasini

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 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. This application for leave to appeal against an order made by Kirby J was heard concurrently with Matter No M74/2001 ("M74") which was also an application for leave to appeal against an order made by Kirby J. In M74, the first respondent was Mr Carlos Cabal Peniche. The orders made by Kirby J granted bail to Mr Cabal and Mr Pasini, both of whom had been committed to prison to await surrender to the United Mexican States (Mexico) in respect of offences alleged against the laws of that country¹.

2 At the conclusion of argument in M74, the Court granted leave, allowed the appeal and set aside the order for bail. However, the Court reserved its decision in the case of Mr Pasini. Since reserving its decision, the Court has refused Mr Pasini's application for special leave to appeal with the result that the order granting him bail has expired². He has been returned to prison to await surrender to Mexico. Although the order made by Kirby J no longer has any effect, Mexico should be given leave to appeal against that order, the appeal should be allowed, the order made by his Honour should be set aside and Mr Pasini's application for bail should be dismissed.

The factual background

3 On 27 November 1998, Mr Pasini was arrested pursuant to a provisional arrest warrant issued under the *Extradition Act* 1988 (Cth). He was taken into custody. In January 1999, Mexico made a request for his extradition in respect of three offences³.

4 In December 1999, after a lengthy hearing, a Magistrate, the second respondent, determined that Mr Pasini was eligible for surrender to Mexico in respect of each of the three offences. She committed him to prison to await surrender to Mexico. Subsequently, Mr Pasini made an application to the Federal Court of Australia to review the determination. In August 2000, French J dismissed the application and confirmed the orders made by the Magistrate. Fourteen days later, Mr Pasini filed a Notice of Appeal against the decision of French J. On 20 December 2000, Gray J made an order that Mr Pasini be

1 *Cabal v United Mexican States* (2001) 180 ALR 593; *Cabal v United Mexican States (No 2)* (2001) 181 ALR 169.

2 *Pasini v United Mexican States*, transcript, 7 September 2001 at 58.

3 Affidavit of Daniel Donato Caporale, sworn 29 May 2001, par 8.

released on bail until his appeal was heard⁴. On 18 April 2001, the Full Court of the Federal Court dismissed the appeal with the result that Mr Pasini was again committed to prison⁵. The application for special leave to appeal against the orders of the Full Court was filed in this Court on 1 May 2001.

5 On 29 June 2001, Kirby J ordered that Mr Pasini be granted bail pending the hearing of his special leave application. In our judgment in M74, we referred to the important issues of principle concerning the grant of bail involved in that case. Since the present case, like that of M74, involves important questions of principle, leave to appeal must be granted to Mexico in this case as well as in M74.

6 In M74, we gave our reasons why we thought that his Honour erred in exercising his discretion to grant bail to Mr Cabal. We also gave our reasons for concluding that the proper exercise of the discretion to grant bail required this Court to refuse Mr Cabal's application for bail. The grant of bail to Mr Pasini was vitiated by the same errors as occurred in the granting of bail to Mr Cabal. Because that is so, this Court had to determine whether Mr Pasini should have been given bail.

7 Undoubtedly, Mr Pasini had a stronger claim for bail than Mr Cabal. From December 2000 until his appeal was dismissed in April 2001, Mr Pasini complied with the conditions of bail granted by Gray J. Proof that he had complied with his bail conditions and had not fled Australia was evidence that he was no longer a flight risk, if he ever had been one. On the other hand, his own evidence showed that, with knowledge that Mexico was threatening to extradite him⁶, he had moved from Spain to Argentina and then to the Dominican Republic before coming to Australia⁷. Furthermore, he and his wife entered Australia under false names with passports issued by the Dominican Republic⁸. Mr Pasini and his wife also possessed Dominican Republic birth certificates and Republic of Uruguay identity cards in false names⁹.

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

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

6 Affidavit, sworn 25 May 2001, pars 28, 30.

7 Affidavit, sworn 25 May 2001.

8 Affidavit of Daniel Donato Caporale, sworn 29 May 2001, par 65.

9 Affidavit of Daniel Donato Caporale, sworn 29 May 2001, par 65.

3.

8 It is unnecessary to determine whether there was a real risk that, if granted bail by this Court, Mr Pasini would have fled the jurisdiction. Even if there was no real risk that he would have done so, his application for bail could not succeed. When the case reached this Court, a judge of the Federal Court and the Full Court of that Court had confirmed the decision of the Magistrate that he was eligible for surrender to Mexico. In those circumstances, if he were to be granted bail, Mr Pasini needed to convince the Court that there were very strong grounds for success for both his special leave application and his ultimate appeal. His application for special leave to appeal was based on the same grounds as those upon which Mr Cabal relied. They were not strong grounds – let alone very strong grounds. Because that is so, Mr Pasini was not entitled to bail.

9 Leave to appeal should be granted to Mexico and its appeal should be allowed with costs.