HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

MARCO PASINI (BERTRAN) APPLICANT

AND

UNITED MEXICAN STATES & ORS RESPONDENTS

Pasini v United Mexican States [2002] HCA 3
Date of order: 7 September 2001
Date of publication of reasons: 14 February 2002
M39/2001

ORDER

1. *Application for special leave to appeal refused.*

2. *The applicant to pay the costs of the first respondent.*

On appeal from the Federal Court of Australia

Representation:

G Griffith QC with G R Kennett for the applicant (instructed by Fernandez Canda Gerkens)

G A A Nettle QC with M M Gordon for the first respondent (instructed by Director of Public Prosecutions (Commonwealth))

No appearance for the second respondent

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and M K Moshinsky 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

Pasini v United Mexican States

Constitutional law (Cth) – Judicial power – Extradition – Jurisdiction of Federal Court to review order by magistrate that applicant, being eligible for surrender to extradition country, be committed to prison – Provision requiring Federal Court to have regard only to the material before the magistrate – Whether provision denies to the Federal Court power to receive evidence led to show that proceeding before it was an abuse of its process – Whether consistent with the exercise of the judicial power of the Commonwealth – Whether provision enabling curial review of administrative function amounts to purported conferral of non-judicial power.

Extradition – Judicial review by Federal Court of magistrate's order – Provision requiring Federal Court to have regard only to material before the magistrate – Whether provision invalid under the Constitution as inconsistent with the exercise of federal power – Whether provision invalid as conferral of non-judicial power to participate in administrative function.

Constitution, s 71.
Extradition Act 1988 (Cth), ss 19, 21.

1 GLEESON CJ, GAUDRON, McHUGH AND GUMMOW JJ. On 7 September 2001 the Court dismissed this application for special leave to appeal and ordered that the applicant pay the costs of the first respondent. What follows are our reasons for joining in those orders.

2 The first respondent, the United Mexican States ("Mexico"), is an "extradition country" to which Pt II (ss 12-27) of the *Extradition Act* 1988 (Cth) ("the Act") applies[1]. Part II is headed "EXTRADITION FROM AUSTRALIA TO EXTRADITION COUNTRIES". The applicant, Mr Pasini, is the brother-in-law of Mr Cabal. Mexico sought their extradition and lengthy litigation ensued. Mr Cabal has since returned to Mexico but Mr Pasini still contests the matter.

3 The series of steps in the extradition process under Pt II of the Act is detailed in the judgments in *Director of Public Prosecutions (Cth) v Kainhofer*[2] and what follows should be read with those judgments in mind. On 17 December 1999, a magistrate, having determined that Mr Pasini was eligible for surrender to Mexico, by warrant issued under s 19(9) of the Act, ordered that Mr Pasini be committed to prison. Mr Pasini then applied to the Federal Court for a review of that order. Jurisdiction in that respect is conferred on the Federal Court by s 21(1) of the Act. The moving party in such an application is, where the magistrate has made a determination of eligibility for surrender, the person in question, here Mr Pasini; where the magistrate determines that the person is not eligible for surrender, then the applicant under s 21(1) is the extradition country.

4 The application by Mr Pasini for review was heard by French J. On 29 August 2000, his Honour dismissed the application, having rejected all of the many grounds relied upon by the applicant. Section 21(3) provided for an appeal to the Full Court of the Federal Court against the decision of French J. An appeal to the Full Court of the Federal Court (Hill, Weinberg and Dowsett JJ) was unsuccessful and the magistrate's determination as to the eligibility of Mr Pasini for surrender was confirmed.

5 It is against the order of the Full Court that the present application was brought. Of the various grounds agitated in the Federal Court, only one was

---

1 Extradition (United Mexican States) Regulations 1991.

2 (1995) 185 CLR 528 at 533-538 per Brennan CJ, Dawson and McHugh JJ, 547-554 per Gummow J. See also *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 445-447 [3]-[7] per Gleeson CJ and McHugh J, 455-456 [36]-[37] per Gaudron and Hayne JJ, 467-468 [68]-[72] per Kirby J.

pressed again on this application. It concerns the validity of s 21 of the Act. In addition, the applicant relied for the first time in this litigation upon other grounds to attack the validity of s 21, and it is to these that we first turn.

6 Section 21(6) provides that where the person whose surrender is sought or the extradition country applies under s 21(1) for a review of an order made by a magistrate under s 19, then the court to which the application is made "shall have regard only to the material that was before the magistrate". These words appear in par (d) of s 21(6). The same restriction is stated to apply to an appeal such as that brought here to the Full Court of the Federal Court against an order made on the review and to appeals to the High Court against an order made on that appeal (pars (b) and (c) of s 21(6)).

7 The applicant submits the confinement of the Federal Court to the material which was before the magistrate was inconsistent or incompatible with the exercise by French J and the Full Court of the judicial power of the Commonwealth. This conclusion is said to follow, in particular, because the limitation in par (d) of s 21(6) would deny to the Federal Court the power to receive evidence led to show that the proceeding before it was an abuse of its process. The authority to determine the existence of the abuse of its process and to receive evidence upon that issue was said to be an essential element in the exercise of the judicial power of the Commonwealth by a federal court or a State or Territory court exercising invested federal jurisdiction. In the alternative, the applicant submits that s 21(6) should be construed, or read down, so as to give it an operation which does not preclude the reception of such evidence.

8 There are several obstacles in the path of acceptance of the present litigation as the occasion for a consideration of those submissions. First, the process of the Federal Court was set in motion by the application by Mr Pasini to French J and then by his appeal to the Full Court; it is not, for example, a case where the magistrate determined that Mr Pasini was not eligible for surrender, Mexico applied to the Federal Court for a review of that order and Mr Pasini sought to resist that review by putting a case of abuse of process. Secondly, acceptance of the submissions in question in the present case would strike at the Federal Court orders dismissing Mr Pasini's application for review and his appeal, but would leave standing the adverse order made by the magistrate, unless (as seems unlikely) the whole of Pt II fell because the review and appeal provisions in s 21 were inseverable from the remainder of Pt II. Thirdly, the submissions put by Mr Pasini were not advanced at any stage to the Federal Court, so that this Court lacks the advantage of the views of French J and the Full Court upon them. Fourthly, upon one reading of the submissions by Mr Pasini, the process said to be abused is not that of the Federal Court but that involved at earlier stages; but, if so, that would not found any argument under Ch III of the

Constitution because it is accepted that the magistrate was not exercising the judicial power of the Commonwealth.

9 Finally, there is a significant factual matter, the importance of which emerged in the course of oral argument. It was not contended that there was available to Mr Pasini evidence upon which counsel properly could contend that the application for extradition by Mexico was fraudulent; rather, it was said that the Federal Court should have received evidence "which had the potential to allow such a submission to be made". The result is that the Court is being invited to embark upon a consideration of validity of Pt II upon an inadequate factual foundation. For that reason, in addition to the matters identified above, it is not appropriate to grant special leave for the agitation of the new grounds put forward by the applicant.

10 There remains the ground respecting the validity of s 21 which was presented to French J and the Federal Court and, in the determination of which, it is submitted that their Honours fell into error, such that special leave should be granted.

11 Mr Pasini accepts that the powers conferred upon magistrates by s 19 of the Act are administrative in nature but fixes upon the identification in s 21(1) of the matter as one for a curial "review" and submits that, because there is no material distinction upon the exercise of functions under s 19 and s 21, there has been a purported conferral of jurisdiction with respect to the exercise of non-judicial power. From that it would follow that s 21 failed as a law defining the jurisdiction of the Federal Court within the meaning of s 77(i) of the Constitution. Acceptance of that submission would, of course, leave standing the order made by the magistrate committing Mr Pasini to prison unless it could also be established that the invalidity of s 21 brought down the whole of Pt II.

12 French J gave detailed consideration to the submission concerning the validity of s 21 and his Honour's reasoning was accepted by the Full Court. Among the authorities considered by French J was the joint judgment of the whole Court in *Aston v Irvine*[3]. It was there held that legislation providing for curial "review" of an order made by a magistrate was valid; the authority committed to the magistrate did not involve the exercise of the judicial power of the Commonwealth but a review of the order by a court did involve the exercise of the federal judicial power. Similar reasoning was involved in the later

---

3 (1955) 92 CLR 353.

decisions of *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd*[4] and *R v Quinn; Ex parte Consolidated Food Corporation*[5]. The line of authorities establishing that there are some powers which appropriately may be treated as administrative when conferred on an administrative body and as judicial when conferred on a federal court or court exercising federal jurisdiction recently was affirmed in *H A Bachrach Pty Ltd v Queensland*[6] and *Sue v Hill*[7].

13 The authorities were correctly understood and applied in the Federal Court. To succeed in this Court, it will be necessary for the applicant to obtain leave to re-open at least the decisions in *Aston v Irvine*, *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* and *R v Quinn; Ex parte Consolidated Food Corporation*. Those authorities have stood for many years. As was indicated in the submissions on behalf of the Attorney-General of the Commonwealth, in support of Mexico, the Parliament has legislated on various occasions upon the faith of their correctness. Leave to re-open those decisions should not be granted.

14 In any event, the premise upon which the applicant's argument proceeds, that there is no material difference between the function imposed by s 21 of the Act on the Federal Court and that imposed upon magistrates by s 19, is wrong.

15 The function of the magistrate, as set out in s 19(1) of the Act, is "to determine whether [a] person is eligible for surrender in relation to [an] extradition offence or extradition offences for which surrender of [that] person is sought by [an] extradition country" and to make consequential orders as required by sub-ss (9) and (10) of that section. If the magistrate determines that the person is eligible for surrender, he or she is required by s 19(9), amongst other things, to make an order committing that person to prison. If the magistrate determines that the person is not eligible for surrender, by s 19(10), he or she must order that the person be released.

---

4 (1959) 101 CLR 652.

5 (1977) 138 CLR 1.

6 (1998) 195 CLR 547 at 562 [15] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

7 (1999) 199 CLR 462 at 481-482 [32]-[33] per Gleeson CJ, Gummow and Hayne JJ, 515-517 [132]-[135] per Gaudron J.

16 The function of the Federal Court under s 21 is to review an order made under sub-ss (9) or (10) of s 19 of the Act. It is not in issue that a decision of a magistrate under s 19 of the Act is an administrative decision[8]. When a court is required to review an administrative decision, it is required, at the very least, to determine whether or not that decision is erroneous in some respect that renders the rights or liabilities of the person to whom it relates other than as set out in that decision. In so doing, the court declares and enforces the law and, thus, exercises judicial power[9].

17 In the case of review under s 21 of the Act, the Federal Court is required, if the magistrate's decision was erroneous, to determine what order should have been made by the magistrate. So much follows from ss 21(2)(b) and 21(6) of the Act. The latter sub-section relevantly requires that the Federal Court "have regard only to the material that was before the magistrate". And s 21(2)(b) empowers that Court, if it does not confirm the magistrate's order, to quash that order and direct the magistrate either to release the person or to order that he or she be committed to prison to await surrender.

18 Although there may be little difference in practical effect, the function of the Federal Court under s 21 of the Act is different in nature from that of a magistrate under s 19 of the Act. The magistrate is required to determine administratively whether a person is eligible for surrender to an extradition country. The Federal Court is required to determine whether that decision was right or wrong and, if wrong, what decision should have been made by the magistrate, thereby determining the rights and liabilities of the parties to the review proceedings and, thus, exercising judicial power.

---

8 See *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 538 per Brennan CJ, Dawson and McHugh JJ, 540 per Toohey J, 543 per Gummow J.

9 See *Abebe v Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25] per Gleeson CJ and McHugh J, 555 [118] per Gaudron J, 570 [164] per Gummow and Hayne JJ, 585 [215] per Kirby J. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 especially at 211-212 per Starke J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-259 per Mason CJ, Brennan and Toohey JJ, 267-269 per Deane, Dawson, Gaudron and McHugh JJ.

19 For these reasons, we joined in the dismissal of the application for special leave.

20 KIRBY J. Marco Pasini Bertran ("the applicant") applied for special leave to appeal to this Court from a judgment of the Full Court of the Federal Court of Australia[10]. That judgment had dismissed an appeal against orders made in that Court by French J[11]. Those orders had, in turn, confirmed the decision of Magistrate Hannan that the applicant, and an alleged co-offender, Mr Carlos Cabal Peniche ("Mr Cabal"), were eligible, under the *Extradition Act* 1988 (Cth) ("the Act"), to be surrendered to the United Mexican States ("Mexico"). The application for special leave has been dismissed by this Court. It remains for me to state my reasons.

The facts

21 It is unnecessary to recount the detailed facts surrounding the applicant's earlier life in Mexico, his departure from that country, his life in France, Spain and elsewhere as a fugitive from prosecution, his adoption of a false identity and his arrival in Australia in 1997 under an assumed name[12]. The applicant, a Mexican national, is the brother-in-law of Mr Cabal who, before their departure from Mexico, was chairman of Banco Union, a bank in that country.

22 In November 1998 the applicant and Mr Cabal were discovered in Melbourne, Victoria. They were taken into custody. In January 1999 a diplomatic note was received by Australia from Mexico requesting the extradition of the applicant under the treaty between Mexico and Australia. The note relied on two arrest warrants that had been issued against the applicant in Mexico[13]. This request set in train action by the Acting Attorney-General under s 16(1) of the Act. In respect of the applicant, the notice under s 16(1) summarised the offences for which his extradition was requested. They comprised three counts. Two of them involved "wilfully helping" Mr Cabal to commit crimes contrary to the *Law of Credit Institutions* of Mexico and the *Federal Criminal Code* of that country. The third count involved alleged "concealment", contrary to the *Federal Criminal Code* of Mexico[14].

---

10 *Cabal v United Mexican States* (2001) 108 FCR 311.

11 *Cabal v United Mexican States (No 3)* [2000] FCA 1204. The primary judge had also dismissed an application by the applicant and Mr Cabal for judicial review of the magistrate's order under the Act.

12 The facts are set out in the reasons of the primary judge: *Cabal* [2000] FCA 1204 at [1]-[86].

13 See *Cabal* [2000] FCA 1204 at [76]. The two warrants were issued in respect of the applicant on 18 January 1996 and 29 August 1996 respectively.

14 *Cabal* [2000] FCA 1204 at [86].

23 After an unsuccessful application for review of the Attorney-General's decision to issue the foregoing notice[15], an extradition hearing under s 19 of the Act took place between July and December 1999 before Magistrate Hannan[16]. On 17 December 1999, the magistrate determined that both the applicant and Mr Cabal were eligible for surrender to Mexico within the meaning of s 19 of the Act. She issued warrants accordingly. Pursuant to s 21 of the Act, the applicant and Mr Cabal then commenced the application for review in the Federal Court, the dismissal of which led to the proceedings in this Court.

The legislative provisions

24 Having regard to the two constitutional challenges which the applicant argued, it is unnecessary to set out all of the provisions of the Act considered in the Federal Court.

25 Amongst the principal objects of the Act, stated in s 3, are:

> "(a) to codify the law relating to the extradition of persons from Australia to extradition countries … to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence".

By regulation, Mexico is declared to be an "extradition country"[17].

26 Having received a request from an extradition country, the Attorney-General may "in his or her discretion" give notice under the Act to a magistrate that the request has been received[18]. Copy of that notice and of relevant documents must be given to the person named in it[19]. Where the person informs the magistrate that he or she consents to being surrendered to the extradition

---

15 *Bertran v Vanstone* (2000) 173 ALR 63.

16 Magistrate Hannan is the second respondent to these proceedings and she submitted to the orders of this Court.

17 Extradition (United Mexican States) Regulations 1991, reg 5. See *Cabal* [2000] FCA 1204 at [90], [126]. An Extradition Treaty was signed between Australia and Mexico in Canberra on 22 June 1990. See *Cabal* [2000] FCA 1204 at [101].

18 The Act, s 16(1).

19 The Act, s 16(3).

country, steps may be taken to give effect to such surrender[20]. Where, as here, there is no such consent, it is necessary for the magistrate to conduct proceedings "to determine whether the person is eligible for surrender in relation to the … extradition offences for which surrender of the person is sought by the extradition country"[21].

27 The conduct of the proceedings before the magistrate is governed by s 19 of the Act. By s 19(2) it is provided that a person is only eligible for surrender if:

> "(a) the supporting documents in relation to the offence have been produced to the magistrate;
>
> (b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the magistrate of any other documents – those documents have been produced to the magistrate;
>
> (c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and
>
> (d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence".

28 By s 19(3) a detailed definition is provided of the "supporting documents" that must be produced to the magistrate. These include "a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence"; "a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence"; and "a duly authenticated statement in writing setting out the conduct constituting the offence"[22]. By s 19(5) it is provided:

> "In the proceedings, the person to whom the proceedings relate is not entitled to adduce, and the magistrate is not entitled to receive, evidence to

---

20 The Act, s 18 and s 20(1)(a), (2).

21 The Act, s 19(1).

22 The Act, s 19(3)(a) and (c).

contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought."

29 By s 19(6) it is stated:

"Subject to subsection (5), any document that is duly authenticated is admissible in the proceedings."

The Act contains provisions governing the authentication of documents produced by the extradition country[23]. Where in the proceedings the magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence, the magistrate is subject to a number of duties[24].

30 The provisions of the Act affording judicial review of a magistrate's orders are critical for the arguments of the applicant in these proceedings. They are contained in s 21 of the Act. Relevantly, that section provides:

"(1) Where a magistrate … makes an order under subsection 19(9) … 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 …

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

(2) The Court may, by order:

(a) confirm the order of the magistrate; or

(b) quash the order and direct a magistrate to:

(i) in the case of an order under subsection 19(9) – order the release of the person …

---

23 The Act, s 19(7) and (8).

24 The Act, s 19(9). The duties include to commit the person to prison to await surrender; to inform the person of the right to seek review; and to record in writing the extradition offence or offences determined as rendering the person eligible for surrender. This writing must be made available both to the person and the Attorney-General.

> (3) The person or the extradition country … may appeal to the Full Court of the Federal Court from the order of the Federal Court …
>
> (4) The person or the extradition country is not entitled to appeal to the Full Court more than 15 days after the day on which the order of the Federal Court … is made.
>
> (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 …
>
> (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."

31 If the decision of the magistrate to surrender a person to an extradition country is the subject of application to the Federal Court, or appeal to the Full Court of that Court or to this Court, the conclusion in those judicial proceedings that the person is "eligible for surrender"[25] is not, even then, an end of the matter. There remains a "surrender determination" to be made by the Attorney-General of the Commonwealth[26].

---

25 The Act, s 21(6)(g).

26 The Act, s 22.

32 By s 22(2) of the Act, "as soon as is reasonably practicable … after a person becomes an eligible person" the Attorney-General must "determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences". By s 22(3) the Attorney-General is only to surrender an "eligible person" in relation to "a qualifying extradition offence" if various conditions are complied with. These include that the Attorney-General is satisfied that there is no extradition objection in relation to the offence[27]; that the person surrendered will not be subject to torture[28]; that the person will not be tried for an offence carrying, or subject to the imposition, or carrying out of, the death penalty[29]; that the extradition country has given a speciality assurance in relation to the person[30]; that the extradition is not one in relation to an extradition country subject to a limitation, condition, qualification or exception that has effect[31] and that the Attorney-General "in his or her discretion, considers that the person should be surrendered in relation to the offence"[32].

33 Once the person, the subject of the application for extradition, has passed through the magistrate's determination[33], judicial review of that determination in which the applicable court also "determines that the person is eligible for surrender"[34] and scrutiny by the Attorney-General who finally "considers that the person should be surrendered in relation to the offence"[35], provision is made by the Act for the issue by the Attorney-General of a warrant for the surrender of the

---

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

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

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

30 The Act, ss 22(3)(d), 22(4) and 42; cf *Barton v The Commonwealth* (1974) 131 CLR 477 at 483; *AB v The Queen* (1999) 198 CLR 111 at 128-129 [41]-[43], 138 [73]-[74], 141-145 [80]-[91].

31 The Act, s 22(3)(e).

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

33 The Act, s 19.

34 The Act, s 21(6)(g).

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

person to the extradition country[36]. The form and mode of surrender is clearly regulated[37].

34 The foregoing provisions of the Act represent a recognition by the Parliament (as by international law) that surrender is a derogation from a nation's sovereignty in relation to the person concerned that is only sanctioned where the subject consents or, if not consenting, where, under the Act, the magistrate, any court on judicial review and the Attorney-General make their respective successive determinations[38].

The issues

35 The applicant did not directly seek any relief under the Constitution[39]. Instead, the relief he sought was relief against the magistrate's determination that he was eligible for surrender. Such relief was principally claimed pursuant to the provisions of s 21 of the Act providing for review of the magistrate's orders in the Federal Court. The constitutional grounds upon which the applicant was permitted to seek special leave from this Court were, in turn, confined to an attack on the constitutional validity of s 21 of the Act.

36 The applicant argued two points:

1. That so far as s 21 of the Act provided for "review" of the determination of the magistrate under the Act, it purported to confer non-judicial power on the Federal Court with the result that the entire Act (or at least Pt II of the Act governing extradition from Australia to extradition countries) was constitutionally invalid with the consequence that there was no valid determination that he was eligible for surrender to Mexico; and

2. That so far as s 21(6)(d) of the Act purported, before the Federal Court on review, to limit the available evidence to that which was before the magistrate (and thereby to preclude the receipt of evidence tendered to invoke the implied or inherent powers of the Federal Court to prevent an abuse of process) such provision was inconsistent with the exercise of the judicial power of the Commonwealth. It was therefore invalid under the Constitution.

---

36 The Act, s 25(1).

37 The Act, s 26.

38 *Riley v The Commonwealth* (1985) 159 CLR 1 at 15; *AB v The Queen* (1999) 198 CLR 111 at 141 [80]; cf *Cabal* [2000] FCA 1204 at [129].

39 Constitution, s 75(iii) and (iv) and s 76(i) with *Judiciary Act* 1903 (Cth), s 30(a).

37 The first issue concerns whether the provisions of the Act affording judicial review contravene the principle of the separation of powers established by the Constitution. That principle forbids legislative attempts to impose upon this Court, or other federal courts, functions that are administrative or otherwise non-judicial in character[40].

38 The second issue would only arise if the first were decided adversely to the applicant. It is presented in circumstances that will be described. Before the primary judge and in the Full Court, an attempt was made to tender evidence which was said to establish that, in relation to Mexico's request for the applicant to be surrendered, Mexico was acting unconscionably, unfairly, abusively and dishonestly. If otherwise the provisions of the Act for judicial review were held to be valid, the applicant argued that the provision of the Act purporting to forbid the Federal Court receiving evidence, and limiting its review "to the material that was before the magistrate"[41], was constitutionally invalid.

The decisions of the Federal Court

39 In the Federal Court, the applicant (and Mr Cabal) argued many objections to their eligibility for surrender[42]. Relevant to the two issues reserved for consideration in these proceedings, the argument sought declaratory relief to the effect that the Act was constitutionally invalid and orders requesting the Federal Court to take the propounded material into account.

40 The primary judge rejected the submission that s 21 of the Act constituted an invalid attempt to confer non-judicial powers on the Federal Court. He concluded that "one of the criteria for characterising a power as administrative or judicial is the body to which it is entrusted"[43]. As the limited question for review committed to the Federal Court was, in turn, confined to having regard only to the material that was before the magistrate, this justified its characterisation as judicial not administrative. The primary judge considered that, although the attack identified in the first issue now before this Court had not been mounted in *Director of Public Prosecutions (Cth) v Kainhofer*[44], it was inherent in the

---

40 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

41 The Act, s 21(6)(d).

42 Set out in the reasons of the primary judge: *Cabal* [2000] FCA 1204 at [105].

43 *Cabal* [2000] FCA 1204 at [118] citing *Cominos v Cominos* (1972) 127 CLR 588 at 606.

44 (1995) 185 CLR 528.

decision in that case that the validity of the conferral of judicial power on the Federal Court had been accepted[45].

41 So far as concerned the additional evidence, which gives rise to the second issue, the primary judge recorded the invitation of counsel "to consider additional material relating to the entry of the equivalent of a '*nolle prosequi*' in relation to certain of the offences alleged against Cabal"[46]. Of this his Honour stated:

> "I expressed my provisional opinion then that the material proffered would take the Court into an area of inquiry prohibited by s 19(5) and in any event an issue which was not put before the Court in the original extradition hearing before the magistrate. On that basis I confirm my provisional view that the material cannot be considered."

42 The Full Court affirmed the primary judge's decision on the constitutional question relating to the suggested invalidity of the attempt to impose administrative functions on the Federal Court[47]. That Court concluded that, on review, the Federal Court was exercising the judicial power of the Commonwealth and not an impermissible administrative function. It pointed out that the first general extradition statute in the United Kingdom, enacted in 1870[48], gave a limited right to approach a court "where the fugitive criminal was not surrendered and extradited within two months of committal"[49]. The fact that the scope of the Federal Court's review was limited, and that the materials it could take into account were confined, did not alter the judicial nature of the proceedings themselves[50]. Nor did it alter the final and binding character of the determination so far as the parties were concerned and in respect of "the issue before the Court, namely whether the person whose extradition is sought is eligible for surrender"[51].

43 The Full Court, like the primary judge, relied on several observations in this Court which have suggested that some functions are neither universally

---

45 *Cabal* [2000] FCA 1204 at [124].

46 *Cabal* [2000] FCA 1204 at [245].

47 *Cabal* (2001) 108 FCR 311 at 338-339 [104].

48 *Extradition Act* 1870 (UK).

49 *Cabal* (2001) 108 FCR 311 at 337 [95].

50 *Cabal* (2001) 108 FCR 311 at 338 [102].

51 *Cabal* (2001) 108 FCR 311 at 338 [102].

administrative nor invariably judicial in character. They may take their character "depending upon whether or not [they are] conferred upon a Court"[52]. On that footing the applicant's arguments on what is now the first issue in this Court were rejected by the Full Court.

44 As to the second issue, the Full Court referred to the motion for the reception of new evidence which had been placed before the primary judge in August 2000. Their Honours explained the argument advanced by Mr Cabal and the applicant, now pursued in these proceedings by the latter[53]:

> "It emerged further that the specific basis upon which that advice was given [that a *nolle prosequi* should be filed] was that Mr Cabal was not, at the time of the alleged offences, a member of the High Committee of Credit of Banco Union. It was considered that the position which he occupied within the Bank did not give him the power, authority or responsibility to determine which borrowers should be approved, or the way in which loans should be applied, and that the banking offences could not therefore be proved. It appears that this view prevailed, and on 17 December 1999 it was determined that no additional charges should be laid …
>
> The relevant provisions of the banking law which created these offences required that they be committed by an *empleado* or *functionario* of the Bank. It was Mr Cabal's alleged membership of the High Committee of Credit which was said to satisfy that requirement [but was now] controverted by the abandonment in Mexico of the further charges. It was submitted that the timing of the filing of the formal decision to abandon those charges (the day after the magistrate had ruled that [Mr Cabal and the applicant] were eligible for surrender) bore a particularly sinister connotation."

45 The Full Court confirmed the decision of the primary judge to reject the tender of the additional evidence. Their Honours held that the primary judge had been prevented from receiving that evidence by the operation of ss 19(5) and 21(6)(d) of the Act[54].

---

52 *Cabal* (2001) 108 FCR 311 at 332-333 [74]-[79] citing *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360-361.

53 *Cabal* (2001) 108 FCR 311 at 375 [292]-[294].

54 *Cabal* (2001) 108 FCR 311 at 376 [301].

46 The Full Court expressed doubts as to whether it could intervene in the extradition process, even if it were demonstrated that there had been an abuse of process or that those seeking extradition had acted fraudulently or in bad faith. In respect of extradition from Australia, a series of decisions of the Federal Court had held that neither that Court, nor a magistrate, had power under the Act to stay extradition proceedings on the grounds of an abuse of process[55]. The Full Court also doubted that the provisions of the *Judiciary Act* 1903 (Cth), s 39B, which the applicant and Mr Cabal had invoked, would permit the Federal Court, indirectly, to circumvent the prohibition in the Act upon enlargement of the materials available to, or the restriction on the jurisdiction conferred on, the Court[56]. According to the Full Court, the proper place to raise such objections was with the Attorney-General, who retained the final discretion under s 22 of the Act[57].

47 The Full Court did not expressly deal with what is now the applicant's second constitutional argument to the effect that s 21(6)(d) was a constitutionally invalid inhibition on the exercise by the Federal Court of the judicial power of the Commonwealth. However, in this Court no party raised any procedural objection to the consideration of that issue. It involves a question of constitutional law. The primary judge and the Full Court proceeded on the assumption that the restriction in s 21(6)(d) was constitutionally valid. The question is whether that assumption was correct.

The conferral of judicial and administrative powers

48 The point presented for decision by the first issue has not previously been decided by this Court. However, as the judges of the Federal Court observed, the decision in *Kainhofer*[58] is consistent only with an acceptance by this Court that s 21 of the Act validly conferred on the Federal Court judicial and not administrative functions[59]. Moreover, in that case, Brennan CJ, Dawson and McHugh JJ said[60] that "[t]he powers conferred by the Act, other than those

---

55 *Cabal* (2001) 108 FCR 311 at 376 [303] citing *Papzoglou v Republic of the Philippines* (1997) 74 FCR 108 at 129; *Bennett v Government of the United Kingdom* (2000) 115 A Crim R 346 at 370 [107]-[108]; cf *Bou-Simon v Attorney-General (Cth)* (2000) 96 FCR 325.

56 *Cabal* (2001) 108 FCR 311 at 376-377 [304].

57 *Cabal* (2001) 108 FCR 311 at 377 [305].

58 (1995) 185 CLR 528.

59 *Cabal* (2001) 108 FCR 311 at 333-334 [80].

60 (1995) 185 CLR 528 at 538.

conferred on a court by s 21, are administrative in nature". This remark suggests explicit acceptance that the powers conferred by s 21 of the Act were non-administrative in nature. In the context, that could only mean that they were judicial.

49 As no issue was before the Federal Court in *Kainhofer*, similar to that now raised by the applicant's first issue, it is appropriate to accept, as all parties to these proceedings did, that the question is not foreclosed by authority.

50 It was common ground that the power conferred on the magistrate under s 19 of the Act was administrative in character. This point is also established by authority[61]. Indeed, the applicant relied upon this characterisation of the magistrate's function. He also relied on the fact that, traditionally, extradition is a procedure carried out by the Executive Government. Originally, it was effected pursuant to treaties with foreign countries. Now it is ordinarily carried out pursuant to legislation[62]. In both instances, it is ultimately effected by the Executive.

51 Consideration of the differentiation between functions apt for assignment to a court and those that were not, arose in the early days of the operation of the Constitution. Depending on the circumstances, they could belong to judicial or non-judicial functions. In *Federal Commissioner of Taxation v Munro*[63], Isaacs J said:

> "[S]ome matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another … Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government."

52 This reasoning led to a series of decisions in which this Court sought to identify the *discrimen* by which functions (sometimes called "innominate") that might on one occasion be characterised as *judicial* and on another as *administrative*, could be differentiated. However, the Court has repeatedly accepted the difficulty that exists in framing an exhaustive definition of judicial

---

61 *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 538; *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 290; *Todhunter v United States of America* (1995) 57 FCR 70 at 80; *Cabal* (2001) 108 FCR 311 at 333-334 [80].

62 *Brown v Lizars* (1905) 2 CLR 837 at 852; *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 459 [45]-[46].

63 (1926) 38 CLR 153 at 178.

power[64]. It has attributed this difficulty, in part, to the fact that there is a "borderland in which judicial and administrative functions overlap"[65]. This makes an exhaustive classification of functions impossible.

53 In those cases which are not invariably instances of the exercise of judicial power[66], it has been said repeatedly that, in classifying the nature of a power impugned, regard may properly be had to the repository entrusted by the Parliament to exercise the power[67]. In a sense, this was to say no more than that a court, vested with a power, would be expected to exercise it in a court-like fashion, whereas an official, entrusted with a similar power, might be expected to exercise it in an administrative manner.

54 The foregoing point has been brought out vividly in several cases that came to this Court relating to decisions made successively by an administrator and by a court. Thus in *Aston v Irvine*[68], the question concerned the provisions of the *Service and Execution of Process Act* 1901 (Cth). That Act dealt with the "return" of an apprehended person from one part of the Commonwealth to another. In many respects, such "return" represented a form of internal "extradition". It is thus of particular interest in the context of the present application.

55 The Court held in *Aston* that the authority vested in a magistrate or justice of the peace under s 18 of that Act to order the return of a person to another State did not involve a conferral of the judicial power of the Commonwealth on those functionaries[69]. However, the provision by s 19 of that Act, providing for the review of the primary decision by a judge, was held to involve the exercise of federal judicial power[70]. The scheme of the Act was accordingly upheld as valid.

---

64 See eg *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373.

65 *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 148.

66 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; *Nicholas v The Queen* (1998) 193 CLR 173 at 206-207 [68].

67 eg *Cominos v Cominos* (1972) 127 CLR 588 at 599, 605-606.

68 (1955) 92 CLR 353 applied *Ammann v Wegener* (1972) 129 CLR 415 at 422-423, 428, 436-437, 438, 441; *Hilton v Wells* (1985) 157 CLR 57 at 67; *Grollo v Palmer* (1995) 184 CLR 348 at 359-360.

69 *Aston* (1955) 92 CLR 353 at 365.

70 *Aston* (1955) 92 CLR 353 at 366.

Mexico, and the Commonwealth (which had intervened before the Federal Court and was a respondent to this application), relied heavily on the decision in *Aston*. The applicant recognised the difficulties which the decision presented. He sought to distinguish it or leave, if that was necessary, to argue that *Aston* had been wrongly decided.

56 A further authority in which successive decisions of officials and courts were classified as respectively administrative and judicial is *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd*[71]. By s 42 of the *Trade Marks Act* 1905 (Cth), the Registrar of Trade Marks could hear the applicant for, and opponent to, the grant of a trademark and decide whether the application should be refused or granted. By s 43 of that Act, a party aggrieved was given a right of appeal from the Registrar's decision to the Law Officer. By s 44, a party aggrieved by the Law Officer's decision could "appeal" to "the Court"[72].

57 In this Court Dixon CJ acknowledged that it was "not surprising that similarity of expression has given rise to the argument"[73]. However, the Court upheld the validity of the legislative scheme, isolating from its consideration the first level of "appeal" to the Law Officer. Concentrating on the appeal to "the Court", Dixon CJ regarded the matter as settled by the reasoning of Isaacs J in *Munro* and the Privy Council decision which followed it[74]. Those decisions were, he said[75]:

> "enough to show that words which might otherwise be sufficient to confer judicial power may be governed by the context as well as by the character of the body or person upon whom the power is conferred and may be construed as going no further than granting administrative power".

58 The foregoing reasoning was continued in *R v Quinn; Ex parte Consolidated Food Corporation*[76]. That was a case considering federal

---

71 (1959) 101 CLR 652.

72 "Court" was defined in s 4 of the *Trade Marks Act* 1905 (Cth) as meaning the High Court or the Supreme Court of the State in which the Trade Marks Office is situate or a Justice thereof.

73 *Bayer* (1959) 101 CLR 652 at 658.

74 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; [1931] AC 275.

75 *Bayer* (1959) 101 CLR 652 at 659-660.

76 (1977) 138 CLR 1.

trademarks legislation that had replaced that considered in *Bayer*[77]. In compendious terms, that new Act empowered the Registrar of Trade Marks and this Court, on application by a person aggrieved, to order a trademark to be removed from the Register of Trade Marks in prescribed circumstances. The Court unanimously held that the section did not confer judicial power on the Registrar.

59 Although it was strictly unnecessary for this Court to determine whether non-judicial functions had been imposed on it, it is unlikely that the impugned section would have been upheld as valid if the Court had regarded it as impermissibly conferring non-judicial functions. The statute had pressed to the limit the principle expressed by Isaacs J in *Munro*. Nevertheless, once again, this Court upheld the power of the Parliament to confer functions on administrators and courts that, "chameleon like"[78], took their character from the repository in question[79].

60 In the face of such a long line of authority, the submissions of the applicant, attacking the scheme of the present Act, faced obvious difficulties. These were acknowledged by the applicant.

The Federal Court's functions under the Act are judicial

61 To make good his contention that the powers conferred on the Federal Court by s 21 of the Act were administrative in character, the applicant relied principally upon the following arguments:

1. The magistrate's determination was accepted as administrative (s 19). The surrender determination by the Attorney-General was of the same character (s 22). Extradition was traditionally a function of the Executive Government. The intermediate "review" by the Federal Court (s 21) was therefore incidental to the functions of the Executive and thus administrative in character. It involved no more than a court giving a "judicial tick" to what was essentially an administrative decision throughout.

2. The very limitation of the Federal Court to the material that was before the magistrate and nothing else (s 21(6)(d)) and to deciding the same question, namely determination whether the person is "eligible for surrender",

---

77 *Trade Marks Act* 1955 (Cth), s 23.

78 (1977) 138 CLR 1 at 18 per Aickin J.

79 (1977) 138 CLR 1 at 6.

indicated that the function reposed in that Court was the same as that reposed in the magistrate. It was therefore administrative in character.

3. Confirmation of this character could be seen not only in the limited powers conferred on the Federal Court and the purported exclusion of a power to receive evidence although conducting a rehearing but also in the statutory exclusion of judicial review in the full sense under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[80].

4. Further confirmation was signified by the fact that, in effect, the decision on a "review" under s 21 was not final even if the Federal Court decided that the person was eligible for surrender. That Court's decision was subject to an administrative determination by the Attorney-General in his or her discretion. The Attorney-General still had to decide whether the eligible person was to be surrendered in relation to a qualifying extradition offence[81]. The final determination of legal rights and duties and their immediate susceptibility to enforcement is accepted as an important characteristic that helps to differentiate the exercise of judicial power from the performance of administrative functions[82]. The provisional features of its functions therefore confirmed that the Federal Court was being asked to perform non-judicial duties.

5. The earlier decisions of the Court in *Munro*, *Aston*, *Bayer* and *Quinn* needed to be differentiated from the present case, so it was argued, because of the different functions conferred (and especially the statutory prohibition under the Act on the receipt of further evidence). Those decisions also needed to be reconsidered, according to the applicant, in the light of further elucidation by the Court of the character of judicial functions, particularly following the *Boilermakers' Case* in 1956[83].

62 The applicant was correct to say that the assignment of a function to a court cannot, without more, finally determine, for constitutional purposes, the character of the function so assigned. Were it so, the identification by the Parliament of the repository of the function would conclusively determine its

---

80 s 3 and Sched 1, cl (r).

81 The Act, s 22.

82 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261, 270; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-112 [42]-[47], 126-134 [82]-[101].

83 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

constitutional nature. That could not be. By the Constitution, the function of characterisation belongs, finally, to this Court[84].

63 The applicant's attack on the consistent line of authority that holds that the repository of a power can help to "impart a judicial character to the power" should be rejected. That authority has been repeatedly applied. This was done most recently in *Sue v Hill*[85] by Gaudron J (with whom Gleeson CJ, Gummow and Hayne JJ agreed on this point[86]). Her Honour expressly accepted the "double aspect"[87] that particular powers can enjoy. In such cases, she said, it is settled law that the character of the power in the particular case may be influenced by the body in which the power is reposed[88]. Acceptance of that principle was necessary because of the inherent difficulty of classifying functions for all purposes. There is a consequent need to classify functions for particular purposes, given the context in which the impugned functions fall to be exercised. That context will not be conclusive. But it will be highly influential.

64 There is nothing in s 21 of the Act that renders the "review" decision of the Federal Court a mere incident to the administrative functions performed respectively by the magistrate and the Attorney-General. It is true, as the Federal Court recognised, that under the Act its functions are strictly limited. They fall short of submitting the administrative decision of the magistrate for scrutiny against a standard such as whether a prima facie case had been established, either on the same or with additional evidence. However, this Court has made it clear in *Abebe v The Commonwealth*[89] that it is competent for the Parliament, under its constitutional powers of "defining the jurisdiction of any federal court"[90], to limit the matters with which such a court may deal. The definition of jurisdiction of the court concerned may be broad or narrow. In the present case it is narrow. The applicant did not contest the general principle stated in *Abebe*. That principle sustains the limited jurisdiction conferred on the Federal Court by s 21 of the Act. However, the limited scope of the jurisdiction says nothing about the character of the powers thereby conferred.

---

84 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305.

85 (1999) 199 CLR 462 at 516-517 [134]-[135], 518 [140].

86 (1999) 199 CLR 462 at 484 [39].

87 Referring to *R v Davison* (1954) 90 CLR 353 at 368-369.

88 (1999) 199 CLR 462 at 515-517 [131]-[135].

89 (1999) 197 CLR 510.

90 Constitution, s 77(i).

65 The fact that the successive determinations of the magistrate and the Federal Court involve the same question does not mean that they necessarily partake of the same character for constitutional purposes. *Munro*, *Aston*, *Bayer* and *Quinn* establish the contrary proposition. All that the Act envisages is that, under s 19, the magistrate will perform his or her administrative functions in a way appropriate to such functions. The Federal Court, conducting the review under s 21, will do so in a manner appropriate to the exercise of judicial powers. Those powers, under the Act, are confined. Yet they are normative. They involve the application of a stated legal rule (viz determination of whether the person is "eligible for surrender" within the meaning of s 19(2)) to the facts found by the Court having regard only to the material that was before the magistrate (s 21(6)(d)). This is a determination susceptible to judicial decision-making. There is nothing incompatible with the judicial function of conferring such power on the Federal Court.

66 Nor does the exclusion of a power to admit fresh evidence deny a judicial character to the proceedings in the Federal Court. In appeals, strictly so called, fresh evidence is not conventionally received. This Court has repeatedly held that it may not receive fresh evidence in the exercise of its own appellate jurisdiction[91]. However, that jurisdiction incontestably involves the exercise of judicial power and the performance of judicial functions.

67 The exclusion of judicial review under the *Administrative Decisions (Judicial Review) Act* is immaterial to the character of the power conferred on the Federal Court by s 21 of the Act. Clearly, in several places, the Act indicates a legislative purpose of ensuring as speedy a determination of the respective decisions that must be made as is compatible with compliance with the Act's provisions[92]. Such provisions reflect an understandable urgency given the objects of the Act and the likelihood that a person, awaiting decisions under the Act, may be held in custody, as the applicant was for a very long time. Once it is accepted that, in defining the jurisdiction of a federal court, the Parliament may limit the powers conferred on such a court, the exclusion of alternative avenues of judicial review, so as to achieve the objective of expeditious determinations in the Act, is readily appreciated. In any case, it remained open to the applicant to seek judicial remedies under s 39B of the *Judiciary Act*. He availed himself of this facility. Access to this Court under its constitutional jurisdiction was unimpaired by the Act, although not availed of by the applicant.

---

91 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271; *Eastman v The Queen* (2000) 203 CLR 1 at 11 [13], 34 [108], 52-53 [160], 96-97 [290]; cf at 91 [273].

92 See eg the Act, s 21(1), (4) and (5).

68 It is not correct to say that the decision of the Federal Court was lacking in finality or enforceability or subject to review by the Attorney-General. That is not the scheme of the Act. If the Federal Court, having conducted its review under s 21 of the Act, determines that the person concerned was not eligible for surrender to an extradition country seeking surrender, that would be an end of the matter. In such a case, the Court would be entitled to quash the magistrate's order and direct the magistrate to order the release of the person[93]. The Attorney-General would have no residual function.

69 The fact that the Attorney-General sometimes has a residual determination of his or her own to make under s 22(2) does not detract from the finality of the determination by the Federal Court that the person in question is "eligible for surrender"[94]. Each of the successive actors – the magistrate, the Federal Court and the Attorney-General – in turn plays his, her or its respective functions.

70 It is by no means unknown for the Executive Government, after a judicial determination, to exercise, either under statute or under the common law, the modern equivalent to the Royal prerogative of mercy, either conditionally or unconditionally[95]. The existence of this right for centuries, indicates that there is nothing incompatible with the judicial function in reserving to the Executive, following the completion of a judicial determination, of a different and separate decision that may be more favourable to the liberty (and at one time the life) of the citizen. The power of the Attorney-General under s 22 of the Act must be understood in that light.

71 Nor can it be suggested that the principle stated in *Munro*, *Aston* and *Bayer* needs to be reconsidered in the light of a "stricter" doctrine adopted by this Court in the *Boilermakers' Case*[96]. It is true that decisions of this Court since that case have adopted a strict principle in respect of attempts by the Parliament to confer on federal courts powers classified as non-judicial in character. That principle has also been extended to the activities of federal judges as *persona designata* under federal legislation[97]. However, in applying this strict rule, it

---

93 The Act, s 21(2)(b)(i).

94 The Act, s 21(6)(g).

95 *R v Frost* (1839) 4 St Tr (NS) 85 at 479-480.

96 (1956) 94 CLR 254.

97 *Grollo v Palmer* (1995) 184 CLR 348 at 364-365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 18-19; cf *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [No 2]* (1982) 152 CLR 179 at 183.

remains necessary, in the particular case, to determine whether the power or function in question is judicial or not. The principle stated in the foregoing decisions has been applied by this Court many times since the *Boilermakers' Case*. Thus *Quinn*, to which reference has been made, was decided in 1977[98], more than two decades after the *Boilermakers' Case*. Since then several decisions have referred to the "double aspect" by which the character of particular powers may be influenced by the body in which they are reposed[99]. And in any case, in the *Boilermakers' Case* itself[100], Dixon CJ, McTiernan, Fullagar and Kitto JJ expressed their reasons in language that is entirely compatible with the long line of decisions starting with *Munro* and extending to *Sue v Hill*.

72 If these well-established principles are applied to the present case, they afford a full answer to the objection taken by the applicant in his first issue. There is no offence to the judicial power of the Commonwealth in the conferral on the Federal Court of the limited functions contained in s 21 of the Act. True, the functions of themselves had a "double aspect", as may be seen by the conferral of similar functions upon a magistrate to be performed administratively as *persona designata*. But in the context of the Act, the interposition of the Federal Court, with the functions provided by s 21 of the Act, does no offence to the segregation of the judicial power and of federal courts as established by the decisions of this Court. Within the context of the legislation, and for its limited purposes, the Federal Court acts as a court. Its functions are judicial. The applicant's arguments on his first issue therefore fail.

73 It follows that it is unnecessary to consider whether, had the applicant's arguments on his first issue succeeded, the impugned provisions would be excised from the Act or treated as integral to the powers of the magistrate under s 19. No issue of severance has to be decided. These are the reasons why I dismissed the applicant's first ground of challenge.

---

98 *Quinn* (1977) 138 CLR 1.

99 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, 631; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665; *Harris v Caladine* (1991) 172 CLR 84 at 122, 147-148; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189.

100 (1956) 94 CLR 254 at 278.

The limitation of evidence and stays

74 *The applicant's complaint:* Because the applicant made it clear that he did not contest the correctness of this Court's decision in *Abebe*[101], the problem presented for him by the second issue is immediately apparent. If the Parliament, in the course of "defining" the jurisdiction of a federal court in a particular matter, does so in terms that confine it to the exercise of that jurisdiction on the basis of the material that was before the administrator and nothing else, how can such definition be incompatible with the judicial function[102]? As the Constitution envisages limitations of the jurisdiction of federal courts and as many courts in the past have been limited to the record of courts and tribunals from which they have received appeals (or which they review) how can it be said that the review afforded by s 21 of the Act is in some way undermined as a proper function of such a court by the limitation stated in s 21(6)(d)?

75 The applicant submitted that the circumstances of his case demonstrated how offensive to principle it was to subject the Federal Court, under the guise of performing judicial functions, to "going through the motions" of considering whether, only on the material before the magistrate, he was a person "eligible for surrender" when evidence was available which could show the want of good faith of Mexico in pressing on with its application for his extradition. If such evidence could have been admitted in the Federal Court, it was submitted, it might undermine the charges in the arrest warrant upon the basis of which the magistrate had determined that the applicant was a person "eligible for surrender" to Mexico.

76 The charges in question involved the offences previously described by reference to "wilfully helping" Mr Cabal to commit crimes in his capacity as an employee and officer of the Mexican bank of which he was at the relevant time chairman and "concealment" of Mr Cabal. The evidence, proffered but rejected in the Federal Court, struck mortally, so it was submitted, at all of the offences alleged against the applicant because an essential element of each was that Mr Cabal, in the nominated capacities, had committed the offences specified. Not only was it argued that an affidavit was available from the lawyer acting in Mexico for the applicant and Mr Cabal to demonstrate that the latter had not been a member of the relevant committee of the bank whose authority was required for the transactions impugned in the charges against Mr Cabal. As well, it was

---

101 (1999) 197 CLR 510.

102 In *Williamson v Ah On* (1926) 39 CLR 95 at 122 it was accepted that the Parliament may prescribe rules of evidence and procedure for the exercise of the federal judicial power. Necessarily, these will sometimes involve provisions permitting or requiring the exclusion of some evidence from judicial consideration.

submitted that a letter from the same lawyer reported on documents that had been shown to him in July 2000 by officers of the Mexican Law Department comprising "four resolutions". These were said to decide that criminal action would not be exercised "against Mr Carlos Cabal in preliminary investigations that involved him". This, it was submitted, could be shown by evidence to be the equivalent of a decision of *nolle prosequi* under Australian criminal procedure. Accordingly, the evidence should have been received by the Federal Court.

77 The applicant argued that the primary judge's refusal to receive the proffered evidence, confirmed by the Full Court, on the basis of s 21(6)(d) of the Act, demonstrated that the Act was subjecting the Federal Court to an obligation to perform judicial functions in a way that was incompatible with its status as a federal court and as a superior court of record[103]. According to the applicant, it was essential that the Federal Court should retain powers (whether described as implied or inherent[104]) to stay the proceedings before it in relation to the matters that formed the foundation of the decision that the applicant was a person "eligible for surrender" under the Act. The applicant submitted that the power to stay the proceedings, to prevent the Federal Court being subjected to an abuse of its process, was an essential power of judicial self-protection. It was necessary that it should be available to any federal court that exercised the judicial power of the Commonwealth or indeed to any Australian court in the integrated hierarchy of courts envisaged by the Constitution[105]. Whilst not resiling from his general acceptance of the principle established by the Court in *Abebe*, the applicant acknowledged that this principle might need "some refinement" to accommodate his submissions.

78 *Relevance of Canadian authority:* The applicant relied particularly on a recent decision of the Supreme Court of Canada: *United States of America v Shulman*[106]. Superficially, that decision had certain similarities to the case that the applicant wished to establish. A closer inspection, however, reveals important differences.

79 In *Shulman*, the appellant was a Canadian citizen resisting extradition to the United States on a charge of conspiracy to commit fraud. He raised objections to his extradition from Canada, in part based on the *Canadian Charter*

---

103 *Federal Court of Australia Act* 1976 (Cth), s 5(2).

104 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618, 623-624, 630-631, 639-640.

105 Reference was made to *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362.

106 [2001] 1 SCR 616.

of Rights and Freedoms[107]. That aspect of the case could have no immediate application to the present proceedings. However, the appellant also relied on the power of the Canadian courts, under the common law, to prevent an abuse of the process of such courts[108]. It was this aspect of the decision that the applicant latched onto.

80 Before the Canadian courts, Mr Shulman had relied on two classes of evidence to suggest that the United States' application to extradite him amounted to an abuse of the Canadian courts' process. The first was a statement made by a United States trial judge, when sentencing one of the co-accused in the fraudulent scheme in which Mr Shulman was said to be involved. According to the evidence proffered by Mr Shulman, that judge had said[109]: "[A]s to those people who don't come in and cooperate … if we get them extradited and they're found guilty, as far as I'm concerned they're going to get the absolute maximum jail sentence that the law permits me to give."

81 The second category of evidence relied on was a record of a television interview broadcast in Canada including comments made by the Assistant United States Attorney responsible for the prosecution of the Canadian accused resisting extradition, including Mr Shulman. According to the transcript of the interview, that prosecutor warned that those resisting extradition could "wind up serving a great deal longer sentence under much more stringent conditions". He also suggested that those resisting might be sexually assaulted in prison[110]. He said that, as a consequence of that risk, 55 of 89 accused had "given up" and consented to extradition to the United States.

82 Mr Shulman's process was delayed whilst an application concerning certain co-accused went ahead. The primary judge in one case had received the foregoing evidence and had stayed those proceedings on the basis of the statements by the United States officials[111]. However, the Court of Appeal of Ontario set the stay aside. It dismissed the application to adduce the fresh evidence[112].

---

107 ss 6 and 7.

108 *Shulman* [2001] 1 SCR 616 at 642-643 [60]-[61].

109 *Shulman* [2001] 1 SCR 616 at 623 [6].

110 *Shulman* [2001] 1 SCR 616 at 623-624 [7].

111 *United States v Cobb* (1997) 11 CR (5th) 310.

112 *United States of America v Cobb* (1999) 139 CCC (3rd) 283.

83 The Supreme Court of Canada then admitted the appeals to it, including one against the original order of committal of Mr Shulman. These appeals were heard concurrently and decisions were delivered consecutively[113]. It is the decision in *Shulman* that is of immediate interest. It contains observations on Canadian law relevant to the reception of fresh evidence in an appeal, or in judicial review of the Minister's decision to surrender, which may be heard concurrently[114].

84 The Supreme Court decided that the Court of Appeal of Ontario had erred. It concluded that the primary judge in the co-accused's case had been entitled to act as he did, that is to receive the proffered evidence and to enter a stay[115]. Because the same statements that had been in issue in his case were also relevant to the appeal involving Mr Shulman, they were reviewed by the Supreme Court for their application to his circumstances. The Supreme Court unanimously decided that Mr Shulman's appeal should be allowed. It ordered a stay of the extradition proceedings against him.

85 The unanimous reasons of the Supreme Court of Canada were given by Arbour J. She was inclined to give a beneficial interpretation to the comments of the United States judge[116]. However, the comments of the United States prosecutor were found to be "of a different nature"[117]. His answers on television were said to represent "an unambiguous statement to the effect that those who resist their extradition to face charges in the US will, if convicted, be subjected to harsher incarceration conditions, including being exposed to sexual violence while in jail". This finding led Arbour J to say[118]:

> "In my view, that statement was properly characterized by the extradition judge in *Cobb* as a shocking use of threats by a US official attempting to induce Canadian citizens to renounce the exercise of their lawful access to courts in Canada in order to resist a US extradition request. … Therefore, the statement is properly attributed to the

---

113 *United States of America v Kwok* [2001] 1 SCR 532; *United States of America v Cobb* [2001] 1 SCR 587.

114 *Shulman* [2001] 1 SCR 616 at 631 [27].

115 *Shulman* [2001] 1 SCR 616 at 634 [36] referring to the decision of Hawkins J in *United States v Cobb* (1997) 11 CR (5th) 310.

116 *Shulman* [2001] 1 SCR 616 at 634-635 [38].

117 *Shulman* [2001] 1 SCR 616 at 635 [40].

118 *Shulman* [2001] 1 SCR 616 at 635-636 [41]-[42].

> Requesting State, also the respondent in the Court of Appeal. The threat uttered by the prosecutor was never explained or withdrawn, and we must presume that it continues to be operative to this day."

86 Arbour J held that the tendered evidence was receivable in resistance to the extradition of Mr Shulman and his co-accused. She pointed out that the evidence was not tendered to challenge the decision under appeal, as such, but "as a basis for requesting an original remedy in the Court of Appeal"[119]. Arbour J then went on[120]:

> "Properly construed, the evidence here was tendered in the Court of Appeal for the purpose of invoking the jurisdiction of *that* court to control *its own* process, rather than for the purpose of asking the court to review the proceedings in the court below."

87 The impugned evidence was held not to be inadmissible under Canadian law[121]. Arbour J then reached the disposition of the case upon which great reliance was placed by the applicant[122]:

> "[T]he Requesting State has disentitled itself from pursuing its extradition request before the courts. The intimidation bore upon the judicial phase of the extradition process in its entirety, thus engaging the appellant's right to fundamental justice under s 7 of the *Charter* as well as by virtue of the doctrine of abuse of process.
>
> This Court, just as the Court of Appeal did, has the requisite jurisdiction to control the integrity of the proceedings before it, and to grant a remedy, both at common law and under the *Charter*, for abuse of process. Since the Requesting State in these proceedings … has not repudiated the statements of one of its officials that an unconscionable price would be paid by the appellant for having insisted on exercising his rights under Canadian law, this is a clear case where to proceed further with the extradition hearing would violate 'those fundamental principles of justice which underlie the community's sense of fair play and decency'"[123].

---

119 *Shulman* [2001] 1 SCR 616 at 637 [45].

120 *Shulman* [2001] 1 SCR 616 at 637 [44] (original emphasis).

121 *Shulman* [2001] 1 SCR 616 at 641 [57].

122 *Shulman* [2001] 1 SCR 616 at 642-643 [60]-[61].

123 Citing *R v Keyowski* [1988] 1 SCR 657 at 658-659.

88 The applicant submitted that the powers of the Federal Court of Australia were no less protective than those enjoyed by the Canadian courts. Upon the making of an arguable suggestion that the application of Mexico for his surrender could be shown, by evidence, to have been overtaken by supervening events and to be advanced without good faith, the applicant submitted that he should have had the opportunity to tender evidence relevant to that suggestion before the Federal Court. He asserted that if he could do so it would demonstrate his propositions. To the extent that s 21(6)(d) of the Act purported to prevent that occurring, he argued, that paragraph was invalid under the Constitution. It was so because it improperly impeded the performance by the Federal Court of the functions inherent in it as a "federal court" operating under the Constitution[124].

89 *Distinguishing the Canadian decisions:* There are a number of answers to these propositions. They range from answers founded in the different constitutional and statutory arrangements applicable in Canada, as illustrated in *Shulman*, and in Australia, as applicable to the present case. They also involve a number of factual considerations that were emphasised by Mexico.

90 The Canadian extradition legislation affords to the court considering the request what is described as the "habeas corpus jurisdiction"[125]. This means that the Canadian judge, considering a surrender application, is armed by statute with powers akin to those which a judge of a common law court would exercise on the return of an application for a writ of habeas corpus. Thus the Canadian judge may stand outside the statutory regime that is the Canadian equivalent to that provided purely for extradition. The powers of the judge deciding "committal", as the first step towards surrender, were expanded under Canadian law to include all the powers that could previously be exercised only by a superior court judge sitting in habeas corpus review. Such powers stand in marked contrast to those which the Parliament in Australia has conferred on the Federal Court by s 21 of the Act. It is unsurprising that such powers should yield different results in Canada, both at first instance and on appeal reviewing first instance decisions made within such powers.

91 It is futile for the applicant to complain about the narrow jurisdiction conferred on the Federal Court and to aspire to the enjoyment by that Court of powers similar to those enjoyed by the committal judge in Canada. Here the Parliament has enacted legislation conferring only a limited power. This Court has upheld its entitlement to do so in terms that the applicant did not challenge[126].

---

124 Constitution, s 71.

125 See *United States of America v Kwok* [2001] 1 SCR 532 at 556-559 [39]-[43].

126 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 534 [48]-[50], 586-590 [220]-[229].

To suggest, even *sotto voce*, the "refinement" of this Court's decision concerning the Parliament's power to "define" the jurisdiction of any federal court[127] runs into clear and recent authority founded on the express language of the Constitution.

92 The question of whether there should be a different legislative regime in Australia to permit a wider opportunity for challenge of surrender to the courts of other countries has been the subject of consideration by a Joint Standing Committee of the Parliament[128]. That committee's report records criticism of the Act, specifically as it affects the surrender of Australian citizens. Indeed, it contrasts the legislation of other countries, including the United Kingdom, Canada and the United States. The report recommends that the Australian Law Reform Commission be asked to examine the role of the courts in considering extradition requests and specifically "in considering evidence that may be led by persons whose extradition is sought"[129]. This parliamentary report is a recent one. It has not yet been acted on. Meanwhile, it is the duty of courts, including this Court, to uphold the provisions of the Act as it stands.

93 Nothing in the foregoing need be taken as a denial of a residual entitlement of a federal court, or any other court in Australia, in proper circumstances, to refuse the exercise of its jurisdiction where that court concludes that such exercise would be contrary to law or would involve the court in sanctioning fraud or oppression or participating, or permitting parties to participate, in an abuse of the court's process[130]. Subject to any legislative requirements, a court may, in limited circumstances, enjoy an entitlement to refuse to exercise its jurisdiction because such exercise would be an affront to the court's function as a court within the Australian Judicature.

94 The power to stay further proceedings in such circumstances is most obvious in the case of a court of general jurisdiction, such as the Supreme Courts of the States. Such courts are able "'to draw upon the well of undefined powers' which were available to [the common law courts at Westminster] as part of their

---

127 Constitution, s 77(i).

128 Australian Parliament, Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (2001).

129 Australian Parliament, Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (2001) at 71 [4.69].

130 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201; *Barton v The Queen* (1980) 147 CLR 75 at 96, 116; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25, 45, 59, 75.

'inherent jurisdiction'"[131]. The Federal Court, however, is a court created by statute[132]. It is inaccurate to refer to such a court as having an "inherent jurisdiction"[133]. However, that is not to say that it lacks powers of a general character that arise by necessary implication out of powers expressly granted to it, or out of its character as a court of the Australian Judicature[134]. These fundamental principles are not altered by the statutory designation of a federal court as a "superior court of record"[135]. Within its limited and defined jurisdiction, such a court will enjoy certain implied functions that include protecting its character as a court[136]. In an extreme case, such powers might extend to terminating proceedings which the court concludes, upon proper material, amount to an abuse of its process.

95 In the present case it is unnecessary to consider whether such an implied power is retained by the Federal Court in proceedings before it under the Act. This is because the exercise of any such power would not avail the applicant. Were the Federal Court to be persuaded to stay its proceedings under the Act, any such order would leave standing the determination of the magistrate. Only by the exercise of its jurisdiction expressly conferred by the Act does the Federal Court enjoy a power to quash the magistrate's order[137]. However, self-evidently, the exercise of the power under the Act must conform to the valid limitations imposed upon the Federal Court by the Parliament. That power could not, by a stay order, be expanded into power of a different, affirmative and larger character, such as a power to stay any proceedings on the magistrate's determination. In this respect, the powers enjoyed in Australia by the Federal Court are much more limited than those conferred on the judges performing equivalent functions in Canada under Canadian legislation.

---

131 *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25]; see also *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 464-465 [92]-[93].

132 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 603 [273]: see *Federal Court of Australia Act* 1976 (Cth), s 5.

133 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25].

134 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 464-465.

135 *DJL v Central Authority* (2000) 201 CLR 226 at 248 [45], 268-269 [104]-[107], 288 [183].

136 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 8.

137 The Act, s 21(2)(b)(i).

96 *The availability of remedies:* To the complaint that this conclusion is an affront to justice that the Constitution would not permit, there are several answers. In the first place, the *Judiciary Act* allows an alternative mode of challenge in the Federal Court, which the applicant unsuccessfully invoked, and which is not excluded by the applicable federal law[138]. More fundamentally, the Constitution makes available relief to a person who can enlist the original jurisdiction of this Court to seek relief against the Commonwealth or an officer of the Commonwealth[139].

97 When these proceedings were in the Federal Court, and the applicant sought to tender the evidence of the alleged developments in Mexico, that Court repeatedly drew to the attention of the applicant's then counsel, the facility of application to this Court, exercising its constitutional jurisdiction. Despite repeated questions, including during the proceedings in this Court, no application was made to this Court. The inference is inescapable that this was because no proper foundation in admissible evidence could be proved for the provision of such relief.

98 This conclusion is further reinforced by consideration of the factual material which the applicant suggested to the Federal Court, and to this Court, that the Federal Court should have received.

99 In his written submissions to this Court, there appeared a footnote to the statements by the applicant's legal representatives about the content of the affidavits upon which the applicant relied to show that Mexico's request for his surrender was not bona fide. In respect of a claim that the determination of the magistrate might have been procured by withholding information from her, the applicant's written submissions stated[140]: "It is not presently submitted that that has occurred; merely that the Court should have received evidence *which had the potential to allow such a submission to be made*."

100 This qualified assertion was explained by reference to the rules that limit suggestions by legal practitioners before Australian courts of fraud, misconduct or *mala fides* of a party or witness. Counsel for Mexico pointed out that, at best, the material proffered to the Federal Court was unpersuasive hearsay. It involved evidence of what Mr Cabal's lawyers in Mexico said they had seen in a document

---

138 Under the *Judiciary Act* 1903 (Cth), s 39B.

139 Under the Constitution, ss 75(iii), (iv) or 76(i) and *Judiciary Act* 1903 (Cth), s 30(a).

140 Emphasis added.

that comprised an internal memorandum written by an officer within the prosecution department of the Justice Department in Mexico relating to his consideration of some of the offences involving Mr Cabal. It was not suggested, still less proved, that anyone in Mexico had said in respect of the transactions which formed the subject of the charges against Mr Cabal, on the actual days on which those offences were alleged to have occurred, that Mr Cabal was not *then* a member of the High Credit Committee of the bank. Nor was it said against anybody that evidence had been found, or a decision finally taken in Mexico, that the equivalent of a *nolle prosequi* ought to be entered in respect of Mr Cabal concerning the charges the subject of Mexico's application for his surrender. So far as the applicant was concerned, he was one step further removed, being accused of separate offences which assumed the criminality of Mr Cabal's conduct.

101 It is unnecessary to go further into the state of the evidence. The decision of the Federal Court rested on a more fundamental proposition. Section 21(6)(d) of the Act forbade regard being had to any evidence in the "review" proceedings in the Federal Court, other than the material that had been before the magistrate. To resort to other evidence, it was obligatory to go outside the regime established for that Court by the Act. The facility to do so existed under the Constitution. Amidst all the other proceedings that were brought for the applicant and Mr Cabal in their extended attempts to resist extradition to Mexico, it is surely significant that no such proceedings were ever initiated. Even a brief glance at the evidence tendered before the Federal Court suggests reasons why that may have been so.

102 The proposition that s 21(6)(d) of the Act is invalid for constitutional reasons, as attempting invalidly to limit jurisdiction and powers of the Federal Court, cannot stand with the decision of this Court in *Abebe*[141]. It follows that the second issue presented by the applicant was also without legal merit.

103 With the rejection of the applicant's application for special leave to appeal to this Court, the decision of the Full Court of the Federal Court concluding that the applicant was eligible for surrender, was confirmed. On that footing, the matter passed from the judiciary to the consideration by the Attorney-General of the surrender determination reserved by the Act to him[142].

---

141 (1999) 197 CLR 510.

142 Under the Act, s 22.

Orders

104 It was for these reasons that I joined in the decision of the Court refusing the applicant's application for special leave to appeal and ordering the applicant to pay the costs of the first respondent.