HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

DRAGAN VASILJKOVIC PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Vasiljkovic v Commonwealth of Australia [2006] HCA 40
Date of Order: 15 June 2006
Date of Publication of Reasons: 3 August 2006
C3/2006

ORDER

1. The questions stated by the parties in the Special Case for the opinion of the Full Court are answered as follows:

(a) Q. Is Part II of the Extradition Act *1988 (Cth) invalid to the extent, if any, to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than in the exercise of the judicial power of the Commonwealth?*

A. No.

(b) Q. Is Part II of the Extradition Act *1988 (Cth) read together with the Extradition (Croatia) Regulations 2004 (Cth) invalid to the extent to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than upon a finding that there exists a prima facie case against that person of the commission of the offences alleged by the State requesting extradition?*

A. No.

(c) Q. Is regulation 4 of the Extradition (Croatia) Regulations 2004 (Cth) invalid because it was not made pursuant to the power conferred by s 51(xxix) of the Constitution or any other legislative power of the Commonwealth?

A. No.

2. The costs of the Special Case be costs in the action.

Representation

T E F Hughes QC with K P Smark for the plaintiff (instructed by Albert A Macri Partners)

H C Burmester QC with J G Renwick for the first and second defendants (instructed by Australian Government Solicitor)

Submitting appearance for the third defendant

Submitting appearance for the fourth defendant

CATCHWORDS

Vasiljkovic v Commonwealth of Australia

Extradition – Plaintiff remanded in custody pending determination of eligibility for surrender – Arrest warrant for plaintiff in force in Croatia on charge of certain war crimes – Arrest warrant constitutes relevant "supporting documentation" for purposes of s 19 of the *Extradition Act* 1988 (Cth) – Statement made by Croatian investigating authorities of a well-founded suspicion that plaintiff committed the offences alleged, including recitation of evidence provided by witnesses – Croatia declared to be an "extradition country" by Extradition (Croatia) Regulations 2004 (Cth), regs 3, 4 – Whether Pt II of the *Extradition Act* is a valid law of the Commonwealth.

Constitutional law (Cth) – Judicial power of the Commonwealth – Plaintiff detained pending determination of eligibility for surrender – *Extradition Act*, s 19(1) provided power of an administrative nature to conduct proceedings to determine eligibility for surrender – *Extradition Act*, s 19(5) provided that the person to whom the proceedings relate is not entitled to adduce evidence to contradict allegations that the person has engaged in the conduct constituting an extradition offence – No prima facie evidence requirement applicable – Whether Pt II of the *Extradition Act* is invalid to the extent that it purports to confer a power to deprive an Australian citizen of liberty otherwise than in exercise of the judicial power of the Commonwealth – Whether Pt II of the *Extradition Act* when read together with the Extradition (Croatia) Regulations is invalid to the extent that it purports to confer a power to deprive an Australian citizen of liberty otherwise than upon a finding that there exists a prima facie case against that person of the commission of the offences alleged by the state requesting extradition – Whether law authorising such involuntary detention requires machinery for testing the validity of the charges made – Whether surrender proceedings are an integer of a "matter" for the purposes of Ch III of the Constitution.

Constitutional law (Cth) – External affairs – Extradition (Croatia) Regulations not made pursuant to any treaty between Australia and Croatia – Whether, in the absence of a treaty, the declaration by the Extradition (Croatia) Regulations of Croatia as an extradition country is invalid for want of support by s 51(xxix) of the Constitution or any other legislative power of the Commonwealth – Whether Pt II of the *Extradition Act* and the Extradition (Croatia) Regulations operate by reference to the conduct of the plaintiff external to Australia or by reference to an untested and untestable allegation of such conduct – Whether the mere fact of a request by a foreign state makes the subject-matter of the request amenable to the exercise of the legislative power conferred by s 51(xxix).

Constitution, s 51(xxix), Ch III.
Extradition Act 1988 (Cth), ss 3(a), 5, 11, Pt II.
Extradition (Croatia) Regulations 2004 (Cth).

1 GLEESON CJ. The plaintiff is, by naturalisation, a citizen of Australia. At the time of the hearing of this matter he was also a citizen of Serbia and Montenegro. He is accused of having committed, in 1991 and 1993, criminal offences against the Basic Criminal Code of the Republic of Croatia. Those offences are alleged to have been committed in the course of conflict between the armed forces of the Republic of Croatia and "armed Serbian paramilitary troops" of which the plaintiff was said to have been a commander. The alleged offences include torture and the murder of civilians and prisoners of war. On 12 December 2005, a County Court of the Republic of Croatia decided that there was a well-founded suspicion that the plaintiff had committed the alleged offences and that a motion requesting his interrogation should be granted. The decision, after reciting details of the alleged conduct of the plaintiff, recorded that "the suspect" had not been interrogated because he lived abroad and was "not available at the moment". The decision also upheld a "motion concerning custody".

2 On 17 January 2006, the Government of Croatia requested Australia to deliver the plaintiff to the Croatian authorities by way of extradition. The request enclosed a copy of the County Court Decision, and particulars of the alleged offences.

3 The plaintiff, who was born in 1954 in what was then the Federal People's Republic of Yugoslavia, migrated to Australia in 1969 with his family, and took up Australian citizenship in 1975. If the allegations against him are true, he must have returned to his former homeland temporarily in 1991 and 1993, but he resides in Australia.

4 The events that occurred following the extradition request are set out in the reasons of Gummow and Hayne JJ, and it is unnecessary to repeat them.

5 The extradition request was made pursuant to the Extradition (Croatia) Regulations 2004 (Cth) ("the Regulations"), which provided for the Republic of Croatia to be declared an extradition country for the purposes of the *Extradition Act* 1988 (Cth) ("the Act"). The scheme of the relevant provisions of the Act and the Regulations follows what is sometimes called the "no evidence" model of extradition. It will be necessary to examine the scheme in detail. It is convenient, however, at the outset to identify a question of public policy which bears upon the legislative scheme. The central problem in the case is to relate that question to the issues of law by reference to which the matter is to be decided.

Legislative policy

6 Although the extradition of fugitive offenders is an executive act, it requires statutory authority. It cannot be exercised "except in accordance with

the laws which prescribe in detail the precautions to be taken to prevent unwarrantable interference with individual liberty"[1]. As Barwick CJ pointed out in *Barton v The Commonwealth*[2], legislative authority is necessary for the surrender of a person to another country and to provide for custody and conveyance which are the common incidents of such surrender. Although international co-operation in the surrender of fugitives, typically based upon reciprocity, is commonly the subject of treaties, in Australia a treaty does not have the effect of law, and the interference with liberty necessarily involved in the apprehension and surrender of a person for extradition can lawfully occur only if undertaken in accordance with statute. Treaties, or other international arrangements, providing for extradition are made, and acts in fulfilment of obligations undertaken in those treaties or arrangements are implemented, by the Executive Government, but it is for the Parliament, by legislation, to confer the necessary authority required to make executive action lawful. The power to enact legislation upon the subject of extradition is conferred by s 51(xxix) of the Constitution, extradition being a matter of external affairs.

7 Treaties, and other international arrangements, on extradition have reflected certain concerns. Reciprocity is one. Another is the identification of the kinds of offence for which extradition may be sought. Political offences are commonly excluded. Extradition offences are usually limited to serious crimes. According to the principle of double criminality, the conduct constituting such an offence must also constitute a criminal offence according to the law of the surrendering State. Questions of possible penalty (particularly the death penalty) may call for attention. Assurances limiting the offences for which a surrendered person may be prosecuted are common[3]. Whatever is agreed about such matters will be reflected in the necessary legislation. Typically, however, because of the nature of the concerns addressed by extradition arrangements, and the relationship between such concerns and a nation's foreign relations, the legislation will give the executive authority an ultimate discretion to refuse a request for surrender even if all necessary conditions are fulfilled[4].

8 An issue of policy addressed by treaties or other arrangements, and legislation, is whether a State's obligation to surrender a fugitive may extend to a

---

1 *Brown v Lizars* (1905) 2 CLR 837 at 852 per Griffith CJ.

2 (1974) 131 CLR 477 at 483.

3 *Barton v The Commonwealth* (1974) 131 CLR 477 at 483.

4 eg *Extradition (Foreign States) Act* 1966 (Cth), s 18; *Extradition Act* 1988 (Cth), s 22. For an example of judicial review of such a discretion see *Foster v Minister for Customs and Justice* (2000) 200 CLR 442.

fugitive who is one of its nationals[5]. Practice has varied. Professor Shearer has observed that Great Britain never officially favoured exclusion of a State's own nationals from extradition obligations, and that its first extradition treaty, which was with the United States in 1794, applied to all persons irrespective of their nationality[6]. There would be a tension between the adoption of a territorial theory of criminal jurisdiction and a State's refusal in principle to surrender its own nationals. Unless a State that refuses to surrender its own nationals in respect of criminal conduct committed abroad intends to bring them to justice itself, (an obligation that could not be fulfilled if its own criminal jurisdiction were territorially based), then a fugitive can obtain sanctuary by returning from the place of a crime to his or her own country. Great Britain and many Commonwealth countries, including Australia, "do not reject in principle the extradition of their own citizens to foreign countries"[7]. There is nothing in the Act or the Regulations that seeks to attach any legal significance to the fact that the plaintiff was at the relevant time a citizen of Australia as well as of Serbia and Montenegro. This represents a legislative choice in keeping with past Australian practice, and with the practice of many, but not all, other nations.

9 Another issue for international treaties and arrangements on extradition is whether a State requesting extradition should be required to furnish to the State in which the fugitive is located some, and if so what, evidence, not only about the nature of the accusations against the fugitive, but also tending to establish his or her guilt. Writing in 1971, Professor Shearer said[8]:

> "A deep and so far unreconciled conflict exists between the Anglo-American attitude to this question and that of most of the rest of the world. Broadly speaking, British Commonwealth and American courts require that a requesting State make out a *prima facie* case of guilt against an alleged fugitive criminal before they will grant extradition. The weight of the evidence required is the same as would be required by those courts before sending a person accused of the commission of an offence within their own jurisdiction for trial before a judge and jury. Courts in other countries, by contrast, do not in general concern themselves at all with the strength of the case which the accused will be later called upon to answer; it is enough that the warrant has been regularly issued, identity established, and the procedural and substantive stipulations of the treaty fulfilled."

---

5 Generally, see Rafuse, *The Extradition of Nationals*, (1939).

6 Shearer, *Extradition in International Law*, (1971) at 97.

7 Shearer, *Extradition in International Law*, (1971) at 102.

8 Shearer, *Extradition in International Law*, (1971) at 150.

10 As will appear, there has since been a change in British and Australian practice. The foundation of the American practice may be the Fourth Amendment to the United States Constitution (taken up by the Fifth Amendment) which protects the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and provides that "no Warrants shall issue, but upon probable cause"[9]. The practice of the United States has been, and remains, to include in extradition treaties to which it is a party a requirement that before any fugitive in the United States is surrendered it must be shown that there is probable cause to surrender that person to the criminal process of the foreign State and, because of the reciprocity inherent in extradition arrangements, a similar requirement applies when the United States seeks extradition of a fugitive from, say, Australia. Similar requirements applied between Australia and other countries under the *Extradition (Foreign States) Act* 1966 (Cth) and the *Extradition (Commonwealth Countries) Act* 1966 (Cth).

11 On the other hand, the United Nations Model Treaty on Extradition, adopted in 1990, contains no such requirement. A request for extradition is to be accompanied by a description of the person sought together with any other information to help establish identity, the text of the law creating the offence, a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission. A footnote to the Model Treaty states: "Countries requiring evidence in support of a request for extradition may wish to define the evidentiary requirements necessary to satisfy the test for extradition and in doing so should take into account the need to facilitate effective international cooperation." The European Convention on Extradition of 1957, in Art 12 dealing with the request and supporting documents, says that the request shall be supported by the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting State and a statement of, and particulars of, the offences for which extradition is requested. In 1991, the United Kingdom ratified the 1957 European Convention. Its extradition arrangements with other parties to the European Convention contain no prima facie evidence requirement.

12 Australia's current extradition arrangements vary. Some include the (reciprocal) requirement of showing probable cause, or a prima facie case. Others do not. This topic was the subject of a 2001 Report by the Parliament's

---

9 Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 830; *Caltagirone v Grant* 629 F 2d 739 (2nd Cir 1980); *Parretti v United States* 122 F 3d 758 (9th Cir 1997).

Joint Standing Committee on Treaties ("the Report")[10], which reviewed and criticised aspects of policy changes made by the 1988 legislation. According to the Report[11]:

> "In the 1980s, following the recommendations of the Stewart Royal Commission into drug trafficking and the failed attempt to extradite Robert Trimbole from Ireland, a government task force examined extradition law. Major changes to Australia's laws resulted in 1985, including the introduction of a 'no evidence' alternative to the prima facie case requirement. Under this option, the requesting country must provide a statement of the conduct constituting the offence, but need not provide evidence in support. When the various Acts were consolidated into the *Extradition Act 1988*, the 'no evidence' option became the default scheme. That option has been the preferred policy ever since, having been included in Australia's model treaty ... and is now embodied in 31 signed treaties."

13 When the *Extradition (Foreign States) Act* 1966 (Cth) was amended in 1985 the Attorney-General, Mr Bowen, told Parliament that the new approach would enable Australia more easily to conclude extradition arrangements with civil law countries "whose systems have difficulty in adapting to the provision of pre-trial evidence"[12].

14 The "no evidence" scheme is reflected in the 2004 Regulations relating to Croatia. It is the scheme that is now commonly adopted in relation to countries which have civil law systems of justice. To speak of a prima facie case requirement is perhaps an over-simplification, as there are differing approaches to the standard of evidence that may be required, but those differences are not of present relevance. The Report noted that, with the exception of the criminal justice agencies, most of the witnesses who gave evidence or made submissions to the Joint Standing Committee, who included legal experts, "supported the prima facie case requirement as a necessary and not particularly onerous

---

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

11 The Commonwealth Parliament Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (August 2001), par 2.21.

12 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 March 1985 at 596.

safeguard of the rights of those whose extradition from Australia is sought"[13]. The Committee found it "incongruous that quite different standards of proof apply to extradition requests from Commonwealth countries and civil law countries, and that far more supporting evidence is required from countries whose systems of justice closely resemble Australia's"[14]. It did not favour the continuation of the "no evidence" model and recommended reconsideration of the current legislative policy. Those recommendations have not, or have not yet, been accepted.

15 Many lawyers would find it surprising that, in responding to a request from Croatia for the surrender to its criminal justice system of an Australian citizen, Australia's requirements for supporting information are less than its requirements in responding to a similar request from the United States of America. The question of supporting information is a matter that affects human rights, and involves an important issue of public policy. This Court's concern, however, is with legislative power, and that has been the focus of the argument.

The Act and the Regulations

16 The Act deals, in Pt II, with extradition from Australia to extradition countries which includes a country that is declared by the regulations to be an extradition country, such as Croatia (s 5). A principal object of the Act is to codify the law relating to the extradition of persons from Australia to extradition countries and, in particular, 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 (s 3). Relevant to Pt II are the definitions of extradition offence (offences for which the penalty reflects a certain level of seriousness, or conduct which under a relevant extradition treaty is required to be treated as an offence: s 5) and extraditable person (a person who is accused or who has been convicted in a country of an extradition offence, for whose arrest a warrant is in force, and who is believed to be outside the country: s 6). Such a person is an extraditable person in relation to the country. Although we are presently concerned with a case of an accused, rather than a convicted, person, the provisions of the Act relating to convicted persons should not be overlooked.

---

13 The Commonwealth Parliament Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (August 2001), par 3.39.

14 The Commonwealth Parliament Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (August 2001), par 3.1.

17 Section 11 of the Act, which is in Pt I, provides that regulations may state that the Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a treaty. Sub-sections (4) and (5) of s 11 deal with a case where the Act applies subject to a limitation, condition, qualification or exception which stipulates that a person is not eligible for surrender to an extradition country in relation to an extradition offence for the purposes of s 19(2) unless the sufficient evidence test is satisfied. Broadly stated, the standard of evidence required to satisfy such a test corresponds with the provision of such evidence as would be required, in relation to an offence committed in Australia, to satisfy a committing magistrate that a person should be committed for trial. For present purposes, it is unnecessary to go into the detail. It covers extradition under those treaties and arrangements which have the prima facie evidence requirement.

18 Part II establishes the procedures to be followed where a request for extradition of a person is made to Australia by an extradition country.

19 An application may be made, on behalf of the extradition country, to a magistrate for the issue of a warrant for the person's arrest (s 12). If the magistrate is satisfied, on the basis of information given by affidavit, that the person is an extraditable person in relation to an extradition country the magistrate shall issue a warrant for the person's arrest, and send a report to the Attorney-General. By reason of the definition of extraditable person, the facts of which the magistrate must be satisfied are (relevantly), first, that a warrant is in force for the arrest of the person in relation to an offence against the law of an extradition country, secondly, that the offence is an extradition offence in relation to the country, and thirdly, that the person is believed to be outside the extradition country.

20 A person who is arrested under a provisional arrest warrant shall be brought as soon as possible before a magistrate and shall be remanded either in custody or on bail for the time necessary to allow proceedings under s 19 to be conducted (s 15).

21 Section 16 provides for the Attorney-General, after receiving an extradition request from an extradition country in relation to a person, to notify a magistrate. The notice shall not be given unless the Attorney-General is of the opinion that the person is an extraditable person in relation to the extradition country and that if the alleged conduct had taken place in Australia it would have constituted an extradition offence in relation to Australia. Further, the notice shall not be given if the Attorney-General is of the opinion that there is an extradition objection in relation to the alleged offence. (An extradition objection is defined in s 7. It covers, for example, political offences, or cases of persecution.) If the Attorney-General decides not to issue a notice under s 16, then the Attorney-General must direct the magistrate to release the person if the

person is in custody or, if the person is on bail, to discharge the recognizances on which bail was granted (s 12).

22 Section 19 deals with a case such as the present. Where a person is on remand under s 15, and a notice has been given under s 16, and an application is made for proceedings to be conducted under s 19, and the magistrate considers that the person and the extradition country have had reasonable time to prepare, the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence. The section continues:

> "(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country 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.
>
> (3) In paragraph (2)(a), ***supporting documents***, in relation to an extradition offence, means:
>
> (a) if the offence is an offence of which the person is accused—a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;

(b) if the offence is an offence of which the person has been convicted—such duly authenticated documents as provide evidence of:

(i) the conviction;

(ii) the sentence imposed or the intention to impose a sentence; and

(iii) the extent to which a sentence imposed has not been carried out; and

(c) in any case:

(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and

(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

(4) Where, in the proceedings:

(a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings is or are produced; and

(b) the magistrate considers the deficiency or deficiencies to be of a minor nature;

the magistrate shall adjourn the proceedings for such period as the magistrate considers reasonable to allow the deficiency or deficiencies to be remedied.

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

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

(7) A document that is sought by or on behalf of an extradition country to be admitted in the proceedings is duly authenticated for the purposes of this section if:

(a) it purports to be signed or certified by a judge, magistrate or officer in or of the extradition country; and

(b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:

(i) in any case—of the extradition country or of a Minister, Department of State or Department or officer of the Government, of the extradition country; or

(ii) where the extradition country is a colony, territory or protectorate—of the person administering the Government of that country or of any person administering a Department of the Government of that country.

(7A) Subsection (7) has effect in spite of any limitation, condition, exception or qualification under subsection 11(1), (1A) or (3).

(8) Nothing in subsection (6) prevents the proof of any matter or the admission of any document in the proceedings in accordance with any other law of the Commonwealth or any law of a State or Territory.

(9) Where, in the proceedings, the magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence or one or more of the extradition offences, the magistrate shall:

(a) by warrant in the statutory form, order that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5);

(b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under subsection 21(1); and

(c) record in writing the extradition offence or extradition offences in relation to which the magistrate has determined that the person is eligible for surrender and make a copy of the record available to the person and the Attorney-General.

(10) Where, in the proceedings, the magistrate determines that the person is not, in relation to any extradition offence, eligible for

surrender to the extradition country seeking surrender, the magistrate shall:

(a) order that the person be released; and

(b) advise the Attorney-General in writing of the order and of the magistrate's reasons for determining that the person is not eligible for surrender."

23 As was noted above, in some cases Australia's arrangements with an extradition country include a prima facie evidence (or similar) requirement. Where there is such a requirement it will be taken up by s 19(2)(b). Where, as in the case of Croatia, there is no such requirement, then s 19(3) identifies the supporting material that is required. If a question arises as to whether there is an extradition objection, that is dealt with under s 19(2)(d). Sub-section (5) applies whether or not there is a prima facie evidence requirement. It reflects the fact that, even where there is such a requirement, an extradition hearing does not involve a trial on the merits, and the enquiry is as to whether there is, in effect, a case to be answered. The alleged offender is not given an opportunity to adduce evidence which contradicts the allegations made on behalf of the country seeking surrender[15].

24 Section 21 provides that an order of a magistrate under s 19(9) or s 19(10) may be the subject of a review by the Federal Court or the Supreme Court of a State or Territory. The reviewing court may either confirm or quash the magistrate's order. If an order under s 19(9) is quashed, the reviewing court may direct the magistrate to order the release of the person. There is a right of appeal to the Full Court of the Federal Court. A time limit is imposed on a subsequent application for special leave to appeal to this Court.

25 In *Pasini v United Mexican States*[16] this Court rejected an argument that s 21 of the Act was invalid on the ground that it conferred on the Federal Court an administrative rather than a judicial function. After referring to *Director of Public Prosecutions (Cth) v Kainhofer*[17], the joint judgment said[18]:

---

15 Shearer, *Extradition in International Law*, (1971) at 154-156; Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 832-835.

16 (2002) 209 CLR 246.

17 (1995) 185 CLR 528.

18 (2002) 209 CLR 246 at 255 [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."

26 As soon as reasonably practicable after a person has been determined to be an eligible person, the Attorney-General shall determine whether the person is to be surrendered (s 22(2)). The person is only to be surrendered if the Attorney-General is satisfied that there is no extradition objection, and if the Attorney-General is satisfied that the person will not be subjected to torture, and that the death penalty will not apply, and if there is a speciality assurance (against trial for other offences) and if any limitation, condition, qualification or exception is satisfied. In addition, the person is only to be surrendered if the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence (s 22(3)). Where the Attorney-General determines that a person is to be surrendered then a warrant issues for the surrender of the person to the extradition country (s 23).

27 The ultimate discretion reposed in the Attorney-General by s 22 of the Act is consistent with the earlier Australian legislation[19]. One aspect of its significance relates to a matter referred to in s 22, that is, political offences. Professor Shearer wrote[20]:

> "The exercise of executive discretion in this matter can be supported by several arguments. In the first place, the executive may have confidential avenues of information closed to the courts which may significantly alter the appreciation of the nature or circumstances of an offence to the fugitive's advantage. Second, even where the executive has no further information of its own, it may be persuaded to act upon information supplied by the fugitive which could not be received as admissible evidence by the courts because of evidentiary rules or procedures. Third, where the executive is not persuaded by representations made to it by the fugitive to refuse extradition, it may nevertheless attach certain conditions to his surrender in order to satisfy any qualms it may have as to the consequences of his return."

---

19 *Extradition (Foreign States) Act* 1966 (Cth), s 18.

20 Shearer, *Extradition in International Law*, (1971) at 192.

28 Part II of the Act thus provides for the exercise of judicial power by a court, administrative functions by a judicial officer acting as persona designata, and executive power by the Attorney-General. Eligibility for surrender is determined by the first two of those three methods. If a person is found to be eligible, then the decision whether the person should be surrendered is committed to the executive authority. That decision-making power is subject to the provisions of s 22, which include requirements concerning the Attorney-General's satisfaction about certain matters, and a general discretion.

29 The legislation provides for what have been described as "four stages in extradition proceedings", that is, commencement, remand, determination by a magistrate of eligibility for surrender and executive determination (subject to legislative constraints) that a person is to be surrendered[21].

30 There is no extradition treaty with Croatia. The Regulations declare Croatia to be an extradition country, and, as authorised by s 11 of the Act, amend the terms of the Act to substitute "60 days" for "45 days". Extradition does not depend upon the existence of a treaty[22]. The Regulations do not stipulate any presently relevant limitations or conditions. In that respect they may be contrasted with the Extradition (United States of America) Regulations (Cth) which provide (in reg 4) that the Act applies subject to the Treaty on Extradition between Australia and the United States of America. That treaty is annexed to those regulations. Article V of the treaty provides that neither of the Contracting Parties shall be bound to deliver up its own nationals but the executive authority of each Contracting Party shall have the power to deliver them up if, in its discretion, it considers that it is proper to do so. That, incidentally, is an example of the role of executive discretion in this area. Article VI provided that extradition shall be granted only if the evidence is found sufficient, according to the laws in the territory where the person whose extradition is requested is found, to justify his trial or committal for trial[23]. There are no corresponding provisions in the Regulations which apply to Croatia.

Validity

31 Three questions have been reserved by a Justice for the consideration of a Full Court. They are:

---

21 *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389.

22 *Brown v Lizars* (1905) 2 CLR 837; *Barton v The Commonwealth* (1974) 131 CLR 477 at 494-495.

23 Note, however, the protocol done at Seoul on 4 September 1990.

1. Is Part II of the Extradition Act invalid to the extent, if any, to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than in the exercise of the judicial power of the Commonwealth?

2. Is Part II of the Extradition Act read together with the Extradition (Croatia) Regulations 2004 (Cth) invalid to the extent to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than upon a finding that there exists a prima facie case against that person of the commission of the offences alleged by the State requesting extradition?

3. Is Regulation 4 of the Extradition (Croatia) Regulations 2004 (Cth) invalid because it was not made pursuant to the power conferred by s 51(xxix) of the Constitution or any other legislative power of the Commonwealth?

32 The Act is framed upon the assumption, which is consistent with international law and practice, and with constitutional theory, that it is the executive branch of government that conducts Australia's foreign relations, enters into treaties and other international arrangements concerning extradition, communicates with foreign governments, and responds to a request by another State to surrender a person who is found in Australia to be dealt with by that other State's criminal justice system, either by granting or refusing the request, or by complying with it subject to conditions. The interference with personal liberty inevitably involved in the process of extradition of an unwilling person requires legislative authority. It is the legislature that gives domestic legal effect to treaties and other arrangements made by the executive branch, and that decides the terms and conditions upon which the process of extradition may take place. In accordance with international practice, the Parliament has given the executive authority, subject to the requirements of the Act, the ultimate discretion, even if all other conditions are satisfied, to decide whether, and upon what conditions, a person will be surrendered to a requesting State. The judiciary has the role assigned to it by the Act, which is primarily the determination of eligibility for surrender, and dealing with questions of bail. The judiciary also has the power to enforce compliance by the executive authority with the Constitution, with the Act and with any other applicable laws[24].

33 Extradition is not part of the Australian criminal justice system. It involves no determination of guilt or innocence. By hypothesis (leaving to one side convicted fugitives), it concerns a person who is accused of an offence against a law other than an Australian law, and whom Australia does not intend

---

24 For a description of the comparable United States position see Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 68-69.

to bring to trial for that offence. If, after the conditions stipulated by legislation have been satisfied, the person is surrendered, such surrender is the result of an executive decision.

34 Plainly, extradition has serious implications for the human rights, and in particular for the personal liberty, of the person who is the subject of a request for surrender. Those implications are not limited to the case of a person who is an Australian citizen. The interference with personal liberty involved in detention during the extradition process (if that occurs), and in involuntary delivery to another country and its justice system is not undertaken as a form of punishment. No doubt, to the person involved, some of its practical consequences may be no different from punishment, but the purpose is not punitive. To repeat, the process involves no adjudication of guilt or innocence. It is undertaken for the purpose of enabling such an adjudication to be made in a foreign place, according to foreign law, in circumstances where Australia has no intention itself of bringing the person to trial for the conduct of which the person is accused.

35 The legislative provisions concerning remand, and bail, were considered by this Court in *United Mexican States v Cabal*[25]. The practical implications of arrangements concerning an alleged offender's custody during the process of determining whether compliance with Australia's international obligations requires that the person be surrendered to the criminal justice system of a foreign State were discussed. In *Barton v The Commonwealth*[26], Mason J pointed out that "[d]etention inevitably is an incident in the process of extradition". Any form of involuntary detention, under any conditions, involves an interference with liberty. There was reference in argument to the plaintiff being kept in an ordinary prison. His liberty would be interfered with wherever he was kept against his will. Sending him, against his will, to Croatia for further custody and interrogation, even if he were on bail in the meantime, plainly interferes with his liberty. In *DJL v Central Authority*[27], Kirby J referred to extradition pursuant to international treaty obligations relating to criminal offenders as a paradigm of lawful removal of a citizen notwithstanding a citizen's basic right to live in Australia. So it is. What is more, it is removal by an executive act undertaken with legislative authority; not removal by judicial decision.

36 The Regulations, and Pt II of the Act, are supported by s 51(xxix) of the Constitution: the external affairs power. As French J said in *Hempel v Attorney-*

---

25 (2001) 209 CLR 165.

26 (1974) 131 CLR 477 at 503.

27 (2000) 201 CLR 226 at 278-279 [136].

General (Cth)[28]: "[T]he subject-matter of extradition is directly concerned with international relations. ... The nature of extradition is such that a law with respect to it is likely to be a law with respect to external affairs whether or not there is in existence any supporting treaty."[29] The external affairs power is not confined to the implementation of treaties. Making arrangements, by treaty or otherwise[30], for the extradition of alleged fugitive offenders, and giving effect to those arrangements, are matters that directly concern Australia's relations with other countries and are part of that aspect of its external affairs.

37 The conferral of power in s 51(xxix) is subject to the Constitution. Is the deprivation of liberty necessarily involved in the extradition process, or the particular scheme of Pt II of the Act, contrary to the Constitution? It may be accepted that, subject to qualifications, "the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts"[31]. However, as Gaudron J pointed out in *Kruger v The Commonwealth*[32], there are well-known exceptions to that general proposition and, further, those exceptions do not fall within precise and confined categories. They include, for example, arrest and custody pending trial, and detention by reason of mental illness or infectious disease. They also include the process of extradition.

38 Although there is judicial involvement at various stages of the extradition process, in Australia extradition is, and always has been, ultimately an executive act undertaken with legislative authority. It is the executive branch of government that conducts Australia's relations with other nations and, for the reasons earlier explained, the making of a final decision to surrender a person to a requesting State may involve a variety of discretionary considerations concerning and affecting such relations. The separation of powers inherent in the structure of the Constitution does not mandate that the decision to surrender a person be regarded as an exercise of judicial power and given to the judicial branch of government. It does not mandate that the process of extradition be

---

28 (1987) 77 ALR 641 at 671.

29 See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Sharkey* (1949) 79 CLR 121 at 136; *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 437.

30 *Barton v The Commonwealth* (1974) 131 CLR 477.

31 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

32 (1997) 190 CLR 1 at 109-110.

treated (if that were otherwise possible) as part of the system of administration of criminal justice. If it did, Australia's extradition laws have never conformed to the Constitution, and they would not conform to the Constitution even if there were a prima facie evidence requirement in all cases.

39 Is there, nevertheless, some minimum level of judicial involvement in the process of extradition which Pt II of the Act does not satisfy? In particular, does the Constitution mandate that decisions about eligibility for surrender must involve an assessment by a judicial officer of the sufficiency of the evidence against the alleged offender? To put the matter differently, is the "no evidence" model of extradition an option that is constitutionally unavailable to Australia? That is the issue raised by the second question. There is nothing in the express terms of the Constitution, corresponding to the Fourth Amendment to the United States Constitution, that says so. There is no problem of interpretation of the text of the Constitution, or of the Act, that arises. If a prohibition exists, it must be found in the structure of the Constitution, as a matter of implication. What, exactly, is the implication? It cannot be enough to say that the Constitution implies that the legislature cannot adopt the "no evidence" model of extradition. That would simply be to assert that the plaintiff should succeed, without assigning any reasons. Nor is it enough to say that such a conclusion would better protect the plaintiff's liberty. So it would. The process of reasoning must contain a major as well as a minor premise.

40 If it is accepted that Parliament, consistently with the constitutional separation of powers, may confer on the executive authority the power finally to decide for or against surrender, and may confine judicial involvement in the extradition process to determining eligibility for surrender (and, even then, subject to judicial review, as an administrative function), then Parliament may determine the criteria of eligibility. Parliament has not done so in a manner that is inconsistent with international practice, or that provides some other ground for arguing that there is not sufficient connexion with the subject of external affairs to warrant a conclusion that the law is to be regarded as an exercise of the external affairs power. The policy reflected in the Act may be controversial, but it is not idiosyncratic. It is an available legislative choice, reflecting a not uncommon response to the problems of international relations raised by questions of extradition.

41 The submissions of the plaintiff invoked the concept of proportionality. In *Mulholland v Australian Electoral Commission*[33] I referred to the danger that use of that concept might bring with it considerations relevant only to a different constitutional context. In considering whether Pt II of the Act is a valid exercise of the power to make laws with respect to external affairs, because that conferral

---

33 (2004) 220 CLR 181 at 200 [39].

of power is subject to the Constitution there is a question whether the legislation offends the principle of separation of powers enshrined in the Constitution. It is not easy to see what proportionality has to do with that. Once that question is decided against the plaintiff (as, for the reasons already given, it should be) then what remains is essentially an issue of characterisation. In an appropriate constitutional context, as explained in *Mulholland*, proportionality may require a judgment as to whether a law which limits a fundamental right does so by means which are no more than is necessary to accomplish a legislative objective which is sufficiently important to justify limiting the constitutional right. The most familiar context in which such a judgment is required is that of human rights protections which permit restrictions of fundamental rights and freedoms provided they are demonstrably justified in a free and democratic society. That is a long way removed from the task that confronts this Court in deciding whether Pt II of the Act is a law with respect to external affairs. It cannot be denied that the law is a rational method of pursuing Australia's international relations. In a context such as the present, inappropriate use of the concept of proportionality may amount to an invitation to the judicial branch of government to impose its own ideas of policy upon the legislature. The separation of powers works in more than one direction. It prevents the legislature and the executive from exercising judicial power. It also prevents the judiciary from exercising legislative power. Where, as here, the legislation is so obviously with respect to external affairs, and where it offends no express or implied provision of the Constitution, a conclusion that the legislation is not the method of dealing with extradition that has the least impact on human rights does not result in invalidity. It is possible to design alternative systems of extradition that are more protective of human rights. The existing prima facie evidence requirement, in those cases where it applies, may itself be deficient in that regard. That, however, is not the test of legislative validity. If proportionality does not have the meaning referred to above, but is no more than another way of asking whether the law is capable of being regarded as appropriate and adapted to the end of pursuing Australia's international relations, then it does not assist the plaintiff.

Conclusion

42 For these reasons I joined in the order made on 15 June 2006.

43 The Special Case asks nothing about costs, which will be for the Justice dealing with the action to decide.

44 GUMMOW AND HAYNE JJ. One of the stated principal objects of the *Extradition Act* 1988 (Cth) ("the Act") is to codify the law respecting extradition from Australia "without determining the guilt or innocence of the person of an offence" (s 3(a)). The plaintiff, an Australian citizen by naturalisation, challenges the valid operation of the Act to authorise his detention pending determination of his eligibility for surrender to the Republic of Croatia ("Croatia").

45 Writing at the time of the adoption of the Constitution, Quick and Garran remarked[34]:

> "Extradition is the surrender or delivery of fugitives from justice by one sovereign State to another. It is justified by the principle that all civilized communities have a common interest in the administration of the criminal law and in the punishment of wrongdoers."

46 It has long been the case that pursuit of that common interest cannot effectively be confined within national boundaries[35]. However, any comprehensive extradition law must allow for national differences both in constitutional imperatives and in the administration of the criminal law under, for example, what are often contrasted as the common law and civilian systems. The challenge by the plaintiff concerns alleged limitations upon the power conferred by s 51(xxix) of the Constitution to legislate with respect to "external affairs" and hence extradition, and requirements said to be imposed by Ch III of the Constitution upon the processes under the Act for extradition from Australia.

47 Before turning to consider the particular grounds upon which the plaintiff claims his detention is illegal, it is appropriate to refer to some general considerations respecting the relationship between the executive and legislative branches of government and the consequent necessity for extradition legislation such as the Act.

Constitutional immunity from removal

48 In *DJL v Central Authority*, the Court rejected a submission that Australian citizens enjoyed a constitutional immunity from removal from Australia and, in particular, that Regulations made to give effect to The Hague

---

34 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 635.

35 *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 134 [8], referring to remarks by the Supreme Court of Canada in *United States v Cotroni* [1989] 1 SCR 1469 at 1485.

Convention[36] were for that reason invalid in their application to Australian citizens[37]. In the course of so holding, Kirby J, with whose reasons on this issue Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ agreed[38], noted the concession in argument that the only power to remove a citizen would stem from international treaty obligations relating to criminal offenders, such as extradition, and added[39]:

> "Once removal of a citizen to a foreign country pursuant to extradition law and an extradition treaty is accepted, it is impossible to differentiate such a case (for constitutional purposes) from removal of a child pursuant to the Regulations."

49 There is, however, a qualification to any general proposition respecting the absence of a constitutional immunity of Australian citizens from removal from Australia. The qualification is well settled and applies not only to citizens but to individuals generally. It reflects a division under the Constitution between the competence of the executive and legislative branches of government. The joint judgment of six members of the Court in *Oates v Attorney-General (Cth)*[40] stated, with reference to remarks of Mason J in *Barton v The Commonwealth*[41], that "it was, and is, settled law in the United Kingdom and Australia that a fugitive offender cannot be arrested for extradition overseas in the absence of a warrant issued under the authority of statute. Wrongful arrest could give rise to tortious liability, and could be an occasion for the remedy of habeas corpus." In his judgment in *Re Bolton; Ex parte Beane*[42], Brennan J explained that by 1815 it

---

36 The Convention on the Civil Aspects of International Child Abduction concluded at The Hague on 25 October 1980.

37 (2000) 201 CLR 226 at 240 [21], 279 [137].

38 (2000) 201 CLR 226 at 240 [21].

39 (2000) 201 CLR 226 at 279 [137].

40 (2003) 214 CLR 496 at 503-504 [13]. See also *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 134 [7].

41 (1974) 131 CLR 477 at 497.

42 (1987) 162 CLR 514 at 521-522.

was established in England that statutory authority was required for the surrender not only of British subjects but also of aliens[43].

50 Similarly, in the United States, Hughes CJ, delivering the opinion of the Supreme Court in *Valentine v United States; ex rel Neidecker*[44], spoke of the "fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual", and continued:

> "Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law."

51 To understand the grounds of the challenge presented by the plaintiff, something more first should be said respecting the scheme of the Act.

The scheme of the Act

52 Part I (ss 1-11) contains a number of detailed definitional and structural provisions. The term "extraditable person" is explained in s 6 in terms which apply both to those already convicted of an extraditable offence and to those for whose arrest a warrant is in force. The plaintiff is in the latter category.

53 The term "extradition country" is so defined in s 5 of the Act as relevantly to include any country that is declared to be an extradition country by regulations made under the power conferred by s 55. The Extradition (Croatia) Regulations[45] ("the Croatia Regulations") came into force on 8 December 2004. Croatia is declared to be an extradition country (regs 3, 4). Although there are instruments which may give rise to a treaty relationship concerning extradition between Croatia and Australia, the Croatia Regulations were not made in order to give effect to any treaty. The Commonwealth and the Minister for Justice and Customs, the first and second defendants and active parties on that side of the record, place no reliance upon any treaty for the steps that have been taken under the Act with respect to the plaintiff.

54 Section 11 of the Act provides that regulations may apply the Act subject to limitations, conditions, exceptions or qualifications necessary to give effect to

---

43 The opinion to that effect of the Law Officers to the Home Office, delivered on 30 September 1815, is reprinted in McNair, *International Law Opinions*, (1956), vol 2 at 44.

44 299 US 5 at 9 (1936).

45 SR No 339/2004.

a bilateral extradition treaty (s 11(1)(a)). The regulations also may apply the Act in such a fashion to a specified extradition country (s 11(1)(b)). The Croatia Regulations make no presently pertinent adjustment under s 11(1)(b).

55 Part II of the Act (ss 12-27) is headed "EXTRADITION FROM AUSTRALIA TO EXTRADITION COUNTRIES". The plan of Pt II was described as follows by the Full Court of the Federal Court in *Harris v Attorney-General (Cth)*[46]:

> "The Act contemplates four stages in extradition proceedings as follows: (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered."

56 The statutory responsibilities of the Attorney-General with respect to the issue of surrender warrants were considered in *Foster v Minister for Customs and Justice*[47]. That stage has not been reached in the present case.

57 Rather, steps with respect to the plaintiff have been taken at what in *Harris* were identified as the first and second stages in extradition proceedings, namely, commencement and remand. The plaintiff remains remanded in custody, pursuant to the power conferred by s 15(2), pending embarkation by the magistrate upon the third stage of the procedures under Pt II of the Act, determination of eligibility to surrender.

---

46 (1994) 52 FCR 386 at 389. Any claim by the arrested person that he or she in fact was not the person whose surrender was sought might be raised when the arrested person is brought before the magistrate under s 15(1): *Federal Republic of Germany v Parker* (1998) 84 FCR 323 at 336.

47 (2000) 200 CLR 442.

58 It is settled by authorities preceding and including *Pasini v United Mexican States*[48] that, in determining eligibility to surrender and in making consequential orders, the magistrate exercises administrative functions, not the judicial power of the Commonwealth[49]. That will be significant for the consideration later in these reasons of the submission by the plaintiff as to what is required of that administrative process by Ch III of the Constitution.

59 It should be noted that s 46 of the Act provides for the making of arrangements between the Governor-General and State Governors for the performance by State magistrates of the functions of a magistrate under the Act[50]. The fourth defendant is such a magistrate. The making of these arrangements between respective executive branches of government is consistent with the administrative nature of the functions of the magistrates.

60 There is a related matter which should be remarked upon at this point. Section 15 confers a power to remand on bail, but the magistrate is not to remand on bail "unless there are special circumstances justifying such remand" (s 15(6))[51]. The phrase "special circumstances" has its source in the United States decisions, beginning in 1903 with *Wright v Henkel*[52], which were considered by Gleeson CJ, McHugh and Gummow JJ in *United Mexican States v Cabal*[53]. From those authorities it emerges that in this field of discourse "historical ideas about bail"[54] are not controlling, given among other things the engagement in extradition cases of Australia's international relations and standing, the importance of effective reciprocity, and the consequences for those relations of supervening flight by those whose extradition is sought and who have been apprehended in Australia.

---

48 (2002) 209 CLR 246 at 254-255 [16]-[18], 264-265 [48]-[50].

49 A conclusion to corresponding effect has been reached in the United States: *Lo Duca v United States* 93 F 3d 1100 at 1105-1108 (1996); Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings", (1991) 76 *Cornell Law Review* 1198 at 1209.

50 cf *Austin v Commonwealth* (2003) 215 CLR 185 at 268-269 [178]-[181]; *Aston v Irvine* (1955) 92 CLR 353 at 364-365.

51 The phrase "special circumstances" appears also in s 21(6)(f)(iv) dealing with the grant of bail in review proceedings under that section.

52 190 US 40 at 62 (1903).

53 (2001) 209 CLR 165 at 183-187 [47]-[54].

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

The extradition request

61 The plaintiff was born in 1954 in the country then known as the Federal People's Republic of Yugoslavia. He came to Australia in 1969 with his family when he was 15 years of age and, in 1975, was granted Australian citizenship pursuant to the *Australian Citizenship Act* 1948 (Cth). The plaintiff has retained that status ever since.

62 On 19 January 2006, a successful application was made for a warrant of arrest under s 12(1) of the Act. On the same date, the warrant was executed upon the plaintiff and he was taken into custody by officers of the Australian Federal Police. The plaintiff was remanded in custody in reliance upon s 15 of the Act and an application for bail was refused by the fourth defendant on 27 January 2006. The plaintiff remains in detention at the Parklea Correctional Centre in New South Wales[55]. The third defendant is Governor of that institution. The third and fourth defendants have taken no active part in the proceeding in this Court.

63 The supporting documents upon which the magistrate conducts proceedings under s 19 to determine eligibility to surrender vary by reference to the status of the person concerned as one already convicted in the extradition country (s 19(3)(b)) or as one accused there (s 19(3)(a)). In the latter case, which applies to the plaintiff, the critical document is the arrest warrant issued by the extradition country.

64 The affidavit sworn by a member of the Australian Federal Police and provided in support for the issue of the warrant of arrest in Australia stated that the deponent had been informed of and believed matters, including the following:

> "(a) On 12 December 2005 at Croatia, warrant number KIO-86/05 was issued by the County Court of Šibenik for the arrest of Dragan VASILJKOVIC (also known as Daniel Snedden). The warrant remains in force as at the date of my swearing this affidavit. A copy of the warrant is annexed and marked 'DJB1'.
>
> (b) The offences which [are] the subject of the warrant, and in relation to [] Dragan VASILJKOVIC (also known as Daniel Snedden) are:

---

55 Section 53 of the Act operates to apply to the plaintiff, so far as they are applicable, the laws of New South Wales respecting conditions of imprisonment of those awaiting trial for offences against State law.

(i) two war crimes against prisoners of war under Article 122 of the Basic Criminal Code of Croatia; and

(ii) one war crime against civil population under Article 120, Paragraphs 1 and 2 of the Basic Criminal Code of Croatia.

(c) The offences are punishable under the laws of Croatia by a maximum penalty of 20 years imprisonment.

(e) Croatia is, by virtue of section 5 of [the Act] and regulation 4 of [the Croatia Regulations], an extradition country.

(f) Dragan VASILJKOVIC (also known as Daniel Snedden) was born on 12 December 1954 at Beograd, Serbia and Monte Negro and is a citizen of Australia, Serbia and Monte Negro."

65 The annexed warrant, marked "DJB1", is the relevant "supporting document" for the s 19 surrender determination. It was addressed to the Extradition Unit of the Attorney-General's Department and signed under the Seal of the Ministry of Justice of Croatia. The alleged war crimes offences against the Basic Criminal Code of Croatia are stated to have been committed during June and July 1991 in the town of Knin, in July 1991 in Glina, and in February 1993 in a place near Benkovac. All three places are stated to be the location at the relevant time of an armed conflict between forces of Croatia and armed Serbian paramilitary troops; in addition, in the case of Glina, the Yugoslav People's Army is stated also to have been involved.

66 Attached to the warrant was a copy of the Decision of an investigating magistrate that the investigation requested on 28 November 2005 by the Šibenik County Office of the Public Prosecutors shall be conducted against the plaintiff on the grounds of a well-founded suspicion that he committed the criminal offences in question.

67 The form taken by the Decision is illustrated by the reference made in it to reports by police authorities which were:

> "made from the information gathered, especially interviews with witnesses, captured members of the Croatian Army and police who were imprisoned at Knin fortress, or at Bruška near Benkovac, as well as with eyewitnesses of and participants in the attack on Glina".

68 With respect to events at the Knin fortress, the Decision recites "a well-founded suspicion" that the plaintiff was commander of a Serbian Special Unit and:

> "[o]n the occasion in question, a group of captured Croatian soldiers and policemen, consisting of Velibor Bračić, Nikica Plivelić, Zvonko Magdić, Ivan Krizmanić, Mile Luketić, Nikola Luketić, Tomislav Ceronja, Marko Mijić and Osman Vikić, were brought in a dugout with poor sanitary conditions serving as prison, where they were maltreated by [the plaintiff's] subordinates on a daily basis by being punched and kicked, hit with truncheons and rifle butts all over their bodies, by having rifle barrels pushed into their mouth[s], by having been sent to [fictitious] execution by firing squad, by being maltreated mentally and by being tortured by thirst, which [the plaintiff] saw and knew. The prisoners, too, warned [the plaintiff] of it as they complained to him as the commander and he convinced himself by seeing their injuries. Moreover, as Velibor Bračić was being interrogated and the members of the unit of [the plaintiff] were hitting him with truncheons and rifle butts all over his body, [the plaintiff], with his army boots on, took a powerful swing with his leg at Bračić and hit him in the head while saying: 'Now you'll see how this should be done!' The prisoner was covered with blood due to the inflicted injuries."

The plaintiff's case in this Court

69 At its basic level and as formulated in oral submissions, the substance of the plaintiff's complaint respecting the materials before the magistrate is that the treatment in the Decision of the allegations in such terms as those shown above is inadequate. The plaintiff contends that before the magistrate determining the eligibility of the plaintiff for surrender there should be, conformably with requirements of Ch III of the Constitution, sworn statements by the named witnesses. This would not require the availability of those persons for cross-examination, but would enable a submission to be made that the statements "would not suffice to put the requested person on trial for the offence charged".

70 Before the Full Court is a special case which poses three questions arising in a proceeding instituted by the plaintiff in the original jurisdiction of this Court. The principal relief sought is habeas corpus to secure his release from custody. The custody is said to be illegitimate by reason of the constitutional infirmity of the legislation supporting his detention. The questions for the Full Court ask whether Pt II of the Act is invalid to the extent to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than in the exercise of the judicial power of the Commonwealth (question (a)). Question (b) asks whether Pt II is invalid to the extent to which it purports to confer a power to deprive an Australian citizen of liberty otherwise than upon a finding that there exists a prima facie case against that person of the commission of the offences alleged by the state requesting extradition.

71 The effect of the third question is whether, in the absence of a treaty, the declaration by the Croatia Regulations of Croatia as an extradition country is

invalid for want of support by the power conferred by the external affairs power in s 51(xxix) of the Constitution or any other legislative power of the Commonwealth (question (c)).

72 With respect to questions (a) and (b), the plaintiff contends in his written submissions that the involuntary detention of an Australian citizen in aid of possible extradition to face pending criminal charges in a foreign country is penal in character if the law authorising the detention and extradition "lacks any machinery for testing the validity of the charges". It is said that Pt II of the Act is such a law and therefore is invalid because it attempts to usurp the judicial power of the Commonwealth established by Ch III of the Constitution. The submission continues that an Australian citizen consistently with Ch III cannot be subjected by a law of the Commonwealth to involuntary detention in the absence of judicial determination of guilt of an offence against a law of the Commonwealth. Here, the plaintiff has been detained with a view to determining his surrender without recourse to the judicial power to test any issue of a prima facie case of his guilt of the offence under the law of Croatia in respect of which the extradition is sought.

73 Before turning further to consider these submissions, something should be said respecting the emphasis placed in them, first upon the character of the plaintiff as an Australian citizen and, secondly, upon the absence of reliance upon a treaty with Croatia.

Absence of a treaty

74 First, as to the absence of a treaty, the following may be noted. The *Extradition Act* 1870 (Imp) ("the 1870 Imperial Act") and the *Fugitive Offenders Act* 1881 (Imp) ("the Fugitive Offenders Act") dealt respectively with foreign state extradition, and return of fugitives within what was then the Empire. The Imperial legislation applied in Australia together with ancillary Australian federal legislation[56] until the passage of comprehensive legislation in 1966. This was the *Extradition (Foreign States) Act* 1966 (Cth) ("the 1966 Act") and the *Extradition (Commonwealth Countries) Act* 1966 (Cth). This in turn was replaced in 1988 by the present legislation.

75 The 1870 Imperial Act, in dealing with surrender, operated by reference in s 2 to the existence of treaty arrangements with foreign states for the surrender of fugitive criminals and the making of the appropriate Order in Council[57]. After

---

56 The *Extradition Act* 1903 (Cth).

57 *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 503 [12].

the enactment of the 1870 Imperial Act, a Royal Commission[58] recommended legislation giving power for the delivery of fugitive criminals whether or not a treaty existed between the United Kingdom and the requesting state. That recommendation was not acted upon at the time in the United Kingdom but, in Australia, extradition in such circumstances was provided for by s 3 of the *Extradition (Foreign States) Act* 1974 (Cth) ("the 1974 Act"). This amended the 1966 Act by empowering the Governor-General to apply the 1966 Act to foreign states by regulation[59].

76 The advantages of such legislation were identified by Professor Shearer as follows[60]:

> "[T]he treaty method will remain the principal basis of regulating extradition relations with other countries as the only one which secures full reciprocity of obligation. Resort to [the new legislation], however, will be a useful adjunct in establishing an extradition facility in respect of countries with which, for the present, it is not possible to conclude a treaty, or as a stop-gap measure while negotiations for a treaty are in progress. It might also be used as a species of ad hoc extradition, since the Act applies to offences committed before or after the Act commenced to apply in relation to the State concerned."

77 The scheme of the 1974 legislation has been carried forward into the Act by the definition adopted of "extradition country" in s 5. Reference to this has been made earlier in these reasons.

The role of citizenship

78 The second matter to which reference now should be made concerns the role of citizenship in the identification of those subject to extradition procedures. Sections 2 and 6 of the 1870 Imperial Act in identifying fugitive criminals who were liable to surrender did not distinguish between them by reference to their nationality. In *In re Galwey*[61], the surrender of a British subject had been demanded by the Government of Belgium pursuant to a treaty with the United

---

58 Parry (ed), *A British Digest of International Law*, (1965), vol 6 at 805-806.

59 See Shearer, "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 182-184.

60 "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 184 (footnote omitted).

61 [1896] 1 QB 230.

Kingdom. It was held in the Queen's Bench Divisional Court that, although a British subject, the accused was a person "liable to be ... surrendered" within the meaning of s 6 of the 1870 Imperial Act and that an order of committal into custody with a view to his surrender had been rightly made. That decision then was followed by the Full Court of the Supreme Court of Queensland, presided over by Griffith CJ, in *R v Macdonald; Ex parte Strutt*[62]. To that it may be added that in *Charlton v Kelly*[63], the Supreme Court of the United States held that a treaty providing for the extradition of "persons" included United States citizens as well as aliens and upheld the extradition of a United States citizen to Italy.

79 The definition of the term "extraditable person" in s 6 of the Act, to which reference has been made earlier in these reasons, like the 1870 Imperial Act, does not distinguish those liable to surrender by reference to their nationality.

80 In oral submissions, the plaintiff submitted that the Australian citizenship of the plaintiff was significant as accentuating the application of constitutional principle to him and was "relevant colour".

81 There is no such relevant colour. This is so as to the arguments concerning both the limits of the external affairs power and Ch III of the Constitution.

82 As to the first, the history of that aspect of foreign relations concerned with extradition sought by foreign states, even as it had developed at the time of the adoption of the Constitution, denied any special position to British subjects. A statutory basis for rendition to a foreign state was required for subject and alien alike. The power of the Parliament to enact the Act and to create the regulation-making authority which has been exercised by the Croatia Regulations has no inhibition or restriction to reflect any privileged position of Australian citizens. As indicated earlier in these reasons, citizens enjoy no constitutionally conferred general immunity against removal by the processes of federal law from Australia.

83 As to Ch III of the Constitution, the following may be said. Those persons who may invoke the exercise in their favour of the judicial power of the Commonwealth or rely upon principles derived from Ch III as an answer to legislative or executive action respecting them are not limited by any particular

---

62 (1901) 11 QLJ 85 at 90.

63 229 US 447 (1913). See also *Restatement of the Foreign Relations Law of the United States*, 3d, vol 1, §475, Reporters' Note 4 (1986); Rafuse, *The Extradition of Nationals*, (1939).

constitutional status. The frequent recourse to the judicial power by those with the status of "aliens" within the meaning of s 51(xix) of the Constitution illustrates the point. The impact of Ch III upon the exercise of the legislative power of the Commonwealth with respect to extradition and its preparatory processes, whatever that impact may be in a given situation, is neither diminished nor accentuated by the national status of the person the object of that exercise of power.

84 Counsel for the plaintiff properly invited attention to the statement by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* that[64]:

> "the involuntary detention *of a citizen* in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". (emphasis added)

But subsequent consideration indicates that the beneficiaries of this principle derived from *Lim* are not necessarily limited to citizens[65].

The external affairs power

85 The stage now has been reached in these reasons where answers may be given to the questions posed for the Full Court by the special case. It is convenient to begin with question (c) and the denial by the plaintiff of support for the Croatia Regulations by the external affairs power.

86 The plaintiff emphasises the absence of reliance upon any treaty with Croatia. Irrespective of any operation of Ch III, the question is said by the plaintiff then to become whether the regulation-making power in s 55 of the Act can support the Croatia Regulations by reliance upon the power with respect to external affairs conferred by s 51(xxix) of the Constitution. It is said that, unlike the situation considered in *Polyukhovich v The Commonwealth*[66], Pt II of the Act and the Croatia Regulations do not operate by reference to the conduct of the plaintiff external to Australia. Rather, they operate by reference to an untested and untestable allegation of such conduct. Further, the mere fact of a request by

---

64 (1992) 176 CLR 1 at 27.

65 *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1536 [78]; 210 ALR 50 at 73-74.

66 (1991) 172 CLR 501.

a foreign state such as Croatia does not make the subject-matter of the request amenable to the exercise of the legislative power conferred by s 51(xxix).

87 As indicated by Dawson J in *The Tasmanian Dam Case*[67] and French J in *Hempel v Attorney-General (Cth)*[68], the treatment of fugitive offenders provides subject-matter for a law supported by s 51(xxix) without the necessity for a treaty obligation in that behalf. The width of the present definition in the Act of "extradition country" has its provenance in recommendations made in the United Kingdom over 130 years ago, as explained earlier in these reasons. Likewise, the employment of extradition in aid of determination of guilt or innocence, not in the country yielding up the fugitive but in the country to which there is the rendition, has a long history. Indeed, that outcome is of the essence of the concept of rendition as indicated by Quick and Garran in the passage set out in the second paragraph of these reasons.

88 The answer to question (c) should be "No". Section 51(xxix) provides sufficient support for the legislation in question. No reliance was placed in submissions upon s 51(xxviii) ("the influx of criminals") and we say nothing here on that subject.

89 There remain questions (a) and (b), where the plaintiff seeks to engage in his favour consequences said to flow from Ch III of the Constitution. They also each should be answered "No" and thus adversely to the plaintiff.

Section 19(5) of the Act

90 Question (b) fixes upon the detention of the plaintiff, pending the magistrate's determination under s 19 of the Act of his eligibility to surrender, without any requirement of a finding by the magistrate of the existence of a prima facie case of his commission of the offences alleged by Croatia.

91 The plaintiff complains both of what Pt II of the Act does not require for consideration of eligibility to surrender and of what the Act does stipulate in s 19(5) by way of limitation upon the conduct of the determination proceedings. Section 19(5) states:

> "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 contradict an allegation that the person has engaged in

---

67 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 300-301.

68 (1987) 77 ALR 641 at 671.

conduct constituting an extradition offence for which the surrender of the person is sought."

92 Something first should be said respecting that provision. Its forerunner was in the amendment made to s 17 of the 1966 Act by s 9 of the *Extradition (Foreign States) Amendment Act* 1985 (Cth). In the Second Reading Speech on the Bill for that measure, the Attorney-General said[69]:

> "The first amendment will enable Australia to conclude extradition arrangements with countries which do not require the requesting country to furnish evidence of guilt but rather information as to the allegations against the fugitive. This amendment is of particular significance to civil law countries whose systems have difficulty in adapting to the provision of pre-trial evidence. The extradition arrangements of most European countries which are reflected in the European Convention on Extradition do not require the production of prima facie evidence."

Reference to the text of the European Convention on Extradition[70] (which was opened for signature in Paris on 13 December 1957), particularly Art 12, dealing with the request and supporting documents, bears out the remarks by the Attorney-General.

93 The European Convention falls within the third of the categories described under the heading "*Required showing of extraditability*" in Comment b to §476 of the *Restatement of the Foreign Relations Law of the United States*[71]. The Comment reads in part:

> "Extradition laws and treaties use various formulations to describe the proof required to support extradition. Under United States law and treaties, the standard is generally such evidence of criminality as would justify the requested state in holding the accused for trial if the act had been committed within its jurisdiction[72]. In Great Britain and states

---

69 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 March 1985 at 596.

70 Between 17 Member States of the Council of Europe, with signature or accession by four non-member states.

71 3d, vol 1 (1986).

72 See the judgments of Hughes J in *McNamara v Henkel* 226 US 520 at 523-524 (1913), of Brandeis J in *Collins v Loisel* 259 US 309 at 314-315 (1922) and, more recently, the judgment of the Second Circuit of the Court of Appeals in *Lo Duca v United States* 93 F 3d 1100 at 1104 (1996).

> following the British model, the standard is stricter, equivalent to a prima facie case, *ie*, such showing as, in the absence of a defense, would be required for committal of the accused. Among some states, including the parties to the European Convention on Extradition *inter se*, no review of the evidence is conducted in the requested state."

94 The 1870 Imperial Act (s 10) was construed as requiring prima facie proof of guilt, and importance was attached to the observance by the magistrate of the demeanour of the witnesses[73].

95 Particular treaties may require more of the supporting documents supplied with an extradition request than the arrest warrant supplied in the case of the plaintiff. Thus, Art VI of the Treaty on Extradition between Australia and the United States of America, as it stood when considered in *Riley v The Commonwealth*[74], required evidence which, according to the law of the requested state, would justify trial or committal for trial if the offence had been committed there[75].

96 Variations in what supporting documents are required, exemplified by the above examples, are accommodated by modifications to the Act which are permitted under s 11 to be made by regulation. These modifications encompass the application of a "*prima facie* evidence test". That term is explained as follows in s 11(5)(b):

> "a reference to the *prima facie* evidence test being satisfied is a reference to the provision of evidence that, if the conduct of the person constituting the extradition offence referred to in that subsection had taken place in [a] part of Australia ... would, if uncontroverted, provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence".

97 But the presence of such a provision does not deny the validity of s 19(5). The operation of that sub-section has not been displaced or qualified with respect to requests by Croatia. The validity of s 19(5) was unsuccessfully called into

---

73 *Re Guerin* (1888) 60 LT (NS) 538 at 540-541.

74 (1985) 159 CLR 1 at 10, 13.

75 Article VI was deleted from the Treaty by Art 4 of the Protocol done at Seoul on 4 September 1990 and not replaced. The Treaty and the Protocol are, respectively, Sched 1 and Sched 2 to the Extradition (United States of America) Regulations.

question in *Todhunter v Attorney-General (Cth)*[76]; a submission that the Commonwealth lacked power to legislate for the surrender of residents to other states without them being heard in their defence was not accepted.

98 The validity of s 19(5) was called into question again in *Cabal*[77] in aid of a bail application, but the Court was not persuaded by the arguments in support of invalidity[78]. The submission was that s 19(5) invalidly denied the exercise of judicial power to stay surrender proceedings as an abuse of process.

99 In some respects the attack on s 19(5) in the present case is presented on a narrower front. As mentioned earlier in these reasons, the plaintiff grounded his argument upon the apparent denial to him of the opportunity before the magistrate to contradict by submission "sworn statements" by the witnesses relied upon by the requesting state; it was contended that the "allegation" spoken of in s 19(5) must be more than the warrant issued by the extradition country and must include such "sworn statements".

100 The plaintiff sought to strengthen his arguments by referring to what was said to be the limited opportunity of judicial review of the procedures under Pt II, at least in cases where, unlike this case, constitutional invalidity was not raised. It is true that decisions under the Act are a class which are not decisions to which the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) applies[79].

101 However, if the fourth defendant were to determine under s 19 of the Act that the plaintiff was eligible for surrender to Croatia, s 21 would provide a distinct system for judicial review, as *Pasini*[80] affirms. Further, s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth), which confers original jurisdiction on the Federal Court with respect to certain matters arising under any laws made by the Parliament, may also render amenable to judicial review decisions at the earlier stages of warrant (s 12) and remand (s 15). In their written submissions, the first and second defendants expressly accepted the decision in *Bertran v Vanstone*[81] that the Federal Court has such jurisdiction.

---

76 (1994) 52 FCR 228 at 249-251. The point was not reagitated on appeal: *Todhunter v United States of America* (1995) 57 FCR 70 at 81-82.

77 (2001) 209 CLR 165 at 173 [11].

78 (2001) 209 CLR 165 at 199 [84].

79 Sched 1, par (r).

80 (2002) 209 CLR 246.

81 (1999) 94 FCR 404 at 409-410.

102 These conferrals of federal jurisdiction meet the plaintiff's objection. They also make it unnecessary for present purposes to consider any further federal jurisdiction with respect to the decisions of magistrates under Pt II of the Act which may be provided by s 75(v) of the Constitution. In particular, it is unnecessary to enter upon the question whether State magistrates performing administrative functions under the Act in accordance with inter-government arrangements pursuant to s 46 are, to that extent, "officer[s] of the Commonwealth" within the meaning of s 75(v)[82]. It is sufficient to note that what Barwick CJ called "a large and most important jurisdiction"[83] is one whose scope the Court "should itself be jealous to preserve and maintain"[84].

103 It is convenient to return to the main outline of the argument respecting Ch III. On this branch of the case, it is assumed that s 19(5) otherwise is within legislative power, the point being the subjection of the powers in s 51 of the Constitution to what flows from Ch III. But what relevantly could flow from Ch III? Nothing could do so.

104 The magistrate by whom the plaintiff was remanded in custody was not exercising the judicial power of the Commonwealth. The plaintiff sought to draw an analogy between the procedures in Pt II of the Act and committal processes as an integer in the common law system of criminal trial. *R v Murphy*[85] establishes that, whilst committal proceedings for trial of an indictable offence against a law of the Commonwealth are administrative not judicial in nature, so that the exercise of the judicial power of the Commonwealth is not engaged at that stage, they are part of the one "matter" which a trial ultimately determines.

105 But the scheme of Pt II of the Act stamps the procedures with which it deals with a different character. The ultimate determination is not a trial by

---

82 cf *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437; *In re Anderson; Ex parte Bateman* (1978) 53 ALJR 165; 21 ALR 56; *Trimbole v Dugan* (1984) 3 FCR 324 at 327-328; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

83 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 200-201.

84 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103].

85 (1985) 158 CLR 596.

Australian judicial process. The procedures provided by Pt II are employed with a view to the rendition of the person in question to a foreign state, to suffer the consequences of an existing conviction there or to undergo trial there but, in either case, with no determination in Australia of guilt or innocence.

106 Where then is the Ch III "matter" of which the administrative proceedings under Pt II of the Act are an integer? What is the controversy between parties as to their respective rights and obligations which is to be resolved by the exercise of the judicial power of the Commonwealth in a court of federal jurisdiction?[86] The necessary matter and controversy are not manifested. For that reason alone, the answer to question (b) must be adverse to the interests of the plaintiff.

Involuntary detention

107 There remains question (a). This is framed more generally than question (b). It should receive a response which places involuntary detention pending determination of eligibility to surrender to a foreign state and without determination of guilt or innocence, in the manner provided in Pt II of the Act, outside any general proscription by Ch III of involuntary detention under federal law other than as a consequential step in the adjudication of guilt for past acts.

108 Reference has been made earlier in these reasons to the statement by Brennan, Deane and Dawson JJ in *Lim*[87] of a principle derived from Ch III enjoining as penal or punitive in character involuntary detention in custody by the state other than as an incident of the adjudging and punishing of criminal guilt. In *Fardon v Attorney-General (Qld)*[88], Gummow J explained a preference for a somewhat differently expressed formulation of the principle. But, in each instance, the formulation has been subject to "exceptional cases". In our view, those cases are not necessarily confined to such examples given in *Lim*[89] as involuntary detention in cases of mental illness, quarantine and infectious disease, punishment by military tribunals and by Parliament for contempt, and committal to custody to await trial. The outcome in *Lim* itself was to uphold the detention of aliens for the purposes of deportation[90].

---

86 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

87 (1992) 176 CLR 1 at 27.

88 (2004) 78 ALJR 1519 at 1536 [80]; 210 ALR 50 at 74.

89 (1992) 176 CLR 1 at 28, 55, 71.

90 cf the subsequent division of opinion in *Al-Kateb v Godwin* (2004) 219 CLR 562 as to the effect to be given to *Lim*.

109 All of the above examples, in particular that concerned with committal to custody to await trial, were well established at the time of the adoption of the Constitution. So also detention as a step to extradition. The law and practice of extradition had a long history in the United Kingdom. In the United States, the first reported extradition case occurred in 1799[91], pursuant to Jay's Treaty with the United Kingdom of 1794[92].

110 The well-founded fear of flight which has influenced the United States authorities dealing with bail and the decision of this Court in *Cabal*[93] has also informed the proposition of Mason J that[94]:

> "[d]etention inevitably is an incident in the process of extradition".

A similar recognition founds the reservation in par (f) of Art 5 of the European Convention on Human Rights[95] in respect of lawful arrest or detention of persons against whom action is being taken with a view to deportation or extradition.

111 The question in the present case is not in such broad terms as to ask whether involuntary detention pending determination under any extradition system of eligibility to surrender to the requesting state is necessarily an exceptional case.

112 Question (a) properly is focused upon the particular legislative structure supplied by Pt II of the Act and the Croatia Regulations. In that regard, the provisions made for bail in special circumstances and for judicial review at various stages of the extradition procedures under Pt II are significant. The importance of such matters in treating committal to custody pending trial in a

---

91 *United States v Robins* 27 F Cas 825 (No 16,175) (1799). The United States District Court rejected (at 832) a submission that rendition of Robins, a United States citizen, to the United Kingdom would deny him his rights under the Constitution to trial by jury.

92 Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings", (1991) 76 *Cornell Law Review* 1198 at 1206-1207.

93 (2001) 209 CLR 165 at 183-187 [47]-[54].

94 *Barton v The Commonwealth* (1974) 131 CLR 477 at 503.

95 The Convention is Sched 1 to the *Human Rights Act* 1998 (UK).

domestic forum as not appertaining exclusively to judicial power was stressed in the joint judgment in *Lim*[96].

113 The detention here is in aid of determination of guilt or innocence not in a domestic forum, but in the requesting state. This circumstance does not deny the exceptional nature, in the relevant sense, of that detention. The long history of extradition before the adoption of the separation of judicial power by Ch III of the Constitution is a weighty consideration. The legislatively based surrender, even of citizens, to foreign states for determination there of criminal guilt or innocence, or for suffering of punishment there upon earlier conviction, is an instance where the general subjection to Ch III of the legislative powers of the Parliament does not necessarily constrain law-making.

114 In *R v Cox; Ex parte Smith*[97], when speaking of military justice and the reposing by Ch III of the judicial power of the Commonwealth exclusively to courts of justice, Dixon J said that any "exception" here was not "real". The necessity and occasions for the imposition of military discipline stood that system outside Ch III. The same is true of extradition processes but to a more limited degree.

115 Extradition processes, to be effective and reciprocal, must provide, as a general proposition, for determination in the requesting state of issues of criminal guilt or innocence, and for detention by the requested state pending its determination of surrender. The reasons why this is so are recounted earlier in these reasons and were developed in *Cabal*[98].

116 To the extent that there is no prior adjudication of guilt by a domestic court, and the detention is not with a view to the conduct of such a trial by a domestic court, it may be said that the necessity and occasions for detention pending determination of surrender of the person requested to the requesting state and its judicial processes stand outside Ch III, rather than as an exception to its application. But to confine consideration of the relationship between Ch III and detention pending determination of surrender in this way would be to examine the question too narrowly. While the scope of Ch III may be seen to be restricted, in so far as there is no prior adjudication of guilt by a domestic court

---

96 (1992) 176 CLR 1 at 28.

97 (1945) 71 CLR 1 at 23.

98 (2001) 209 CLR 165 at 189-190 [58]. The extent to which the military justice system stands outside Ch III remains an unsettled question: *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

and the detention is not with a view to seeking a trial in a domestic court, nevertheless that apparent restriction must be accompanied by a scheme for judicial review of the relevant administrative action, at least to the degree of that applicable to Pt II of the Act. The scheme for judicial review of the relevant administrative action is not to be dismissed as providing no real right of access to the courts for which Ch III provides. It is that scheme which is the means by which the law determining the limits, and governing the exercise, of the relevant statutory powers is declared and enforced[99]. Detention, in accordance with the Act, pending surrender of a requested person to the requesting country, thus does not bypass the independent courts envisaged by Ch III.

117 Finally, the proposition that federal legislation providing for detention of a requested person pending determination of surrender, without a decision of an Australian court about that person's guilt or innocence, must, in order to be valid, provide for an Australian court to assess the quality of the evidence against that requested person depends upon a much more particular prescription of the limits on legislative detention derived from Ch III than the principle expressed either in *Lim* or in *Fardon*. It is more particular because it seeks to limit what, by hypothesis, is identified as an exception to the proscription by Ch III of involuntary detention under federal law other than as a consequential step in the adjudication of guilt for past acts. The content of that more particular principle (which would yield the asserted limitation to the exception) is not identified.

Orders

118 For these reasons we joined in the order made on 15 June 2006. The answers given by that order determined adversely to the plaintiff the grounds upon which relief is claimed in the action. It will now be for a single Justice to make orders disposing of the action and providing for costs.

---

99 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348 [73].

119 KIRBY J. These proceedings were brought by Mr Dragan Vasiljkovic ("the plaintiff") in the original jurisdiction of this Court[100]. On 15 March 2006, Gummow J ordered that a special case, agreed between the parties, be set down for hearing before the Full Court. The case formulated three questions. The Court made its orders on 15 June 2006, answering each of the questions stated in the negative. It now remains for the Court to provide its reasons. As will appear, I did not join in the orders of the Court disposing of the proceedings. In my view, the plaintiff was entitled to succeed. I will now state my reasons for my minority opinion.

The nature of the special case

120 The three questions formulated by the case arise out of arguments which the plaintiff raised to contest the constitutional validity of steps taken to extradite him to the Republic of Croatia ("Croatia"). The law pursuant to which extradition was sought is found, relevantly, in Pt II of the *Extradition Act* 1988 (Cth) ("the Extradition Act") and the Extradition (Croatia) Regulations 2004 (Cth) ("the Regulations").

121 The plaintiff submitted that Pt II of the Extradition Act was invalid in so far as it purported to deprive him of liberty, otherwise than in the exercise of the judicial power of the Commonwealth. He also submitted that the Regulations were invalid in so far as they declared Croatia to be an "extradition country" for the purposes of the Extradition Act[101].

122 The plaintiff is a national ("citizen") of Australia. He claimed that that fact was relevant to the answers to be given to each of the three questions in the special case[102]. His complaint was that he could not be extradited from Australia to Croatia on the basis of nothing more than an assertion by Croatia that he had committed offences there. Nor, he argued, could extradition be effected by agreement between governments without affording him the opportunity (formerly provided by Australian law in all cases of extradition[103]) to have a magistrate or judge consider the evidence said to justify his apprehension and involuntary extradition.

---

100 Constitution, s 75(iii) and (v); *Judiciary Act* 1903 (Cth), ss 30, 33.

101 The Regulations, reg 4.

102 cf *Singh v The Commonwealth* (2004) 78 ALJR 1383 at 1429-1430 [219]-[220]; 209 ALR 355 at 419.

103 See *Extradition (Foreign States) Act* 1966 (Cth), s 17(6) and *Extradition (Commonwealth Countries) Act* 1966 (Cth), s 15(6).

123 To the extent that the Extradition Act and the Regulations failed to uphold these requirements, the plaintiff submitted that they were invalid under the Australian Constitution. This was so because they failed to demonstrate the engagement of, or were disproportionate to, the postulated head of constitutional power relied on by the Commonwealth. Alternatively, the plaintiff argued that, if the laws relied upon fell within that head of power, they failed to observe the proper place envisaged for the Judicature by the Constitution, in respect of governmental action that deprived a person of liberty.

124 In my view, the plaintiff made good the last of these complaints. Part II of the Extradition Act is invalid in so far as it provides for the deprivation of the plaintiff's liberty otherwise than in the exercise of the judicial power of the Commonwealth. The first question reserved should therefore have been answered in the affirmative. That answer was sufficient, without more, to uphold the plaintiff's challenge to his extradition. Extradition should have been denied. Orders to restrain the extradition should have been made until, lawfully, a judge had considered the evidence propounded against the plaintiff and determined that a case was established to warrant such a serious imposition upon his liberty.

The facts

125 *The plaintiff's background*: The plaintiff was born in 1954 in what was then the Republic of Yugoslavia. In 1969, at the age of fifteen years, he migrated to Australia with his family. In 1975, the plaintiff was naturalised and became an Australian citizen[104]. He retains that nationality status. An affidavit of an Australian federal agent, annexed to the special case, stated that the plaintiff is also a citizen of Serbia and Montenegro, originally part of the six republics that made up Yugoslavia. Croatia declared itself an independent republic in 1991 when it withdrew from Yugoslavia.

126 In January 2006, the plaintiff was living in Perth, Western Australia. He had permanent employment there. In the middle of that month, he travelled to Sydney and stayed in the suburb of Liverpool. It was there that he was arrested for the express purpose of extradition to Croatia. That action precipitated these proceedings.

127 *Croatia's decision and request*: In December 2005, the County Court in Šibenik in Croatia decided that a person bearing the plaintiff's name, "known as Captain Dragan", described as "a national of Serbia and Montenegro and Australia", should be submitted to investigation by public prosecutors, pursuant to the Basic Criminal Code of Croatia.

---

104 Under the *Australian Citizenship Act* 1948 (Cth). See special case at [2].

128 According to a translated copy of this decision, annexed to the special case, the investigation was authorised "on the grounds of a well-founded suspicion" that the plaintiff had taken part in "the armed conflict between the armed forces of the Republic of Croatia and armed Serbian paramilitary troops of 'the Republic of Krajina'". The court decision contains accusations against the plaintiff concerning alleged acts and omissions on his part whilst acting with "paramilitary troops" and whilst serving as their "superior officer". The conduct alleged is asserted to have occurred in Knin in June and July 1991, in Glina in July 1991 and in Bruška in February 1993, and is alleged to have involved attacks on, and maltreatment of, soldiers and policemen; torture of prisoners of war; and wrongs to civilians and their property, including the looting of civilian property and protected facilities; and attacks against churches and schools.

129 The court decision states that there is a "well-founded suspicion" that the plaintiff committed offences against the Croatian Basic Criminal Code. It also says that the conduct amounted to crimes against humanity, and therefore violated international law[105].

130 Self-evidently, the accusations, if they could be proved, are of a grave kind. Yet no evidence, attributed to identified witnesses, sworn, affirmed or otherwise formally taken, was provided to support the accusations. On the face of the decision, nothing more is shown than that the public prosecutors, in accordance with Croatian criminal procedure, had sought consent from the Croatian court to conduct an investigation and had provided that court with unspecified materials that ultimately convinced the court that the investigation request was well founded. The request appears to have relied on undisclosed interviews with eye-witnesses, participants and victims, as well as military documentation and other materials from "the meetings of the paramilitary troops officers … under the direct command of the suspect himself".

131 Following the foregoing developments, an assistant to the Minister in the Croatian Ministry of Justice wrote on 17 January 2006 to the Extradition Unit of the federal Attorney-General's Department in Canberra. The assistant to the Croatian Minister requested the delivery of the plaintiff to the Croatian

---

105 Within Arts 13 and 14 of the Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Arts 27 and 53 of the Geneva Convention relative to the Protection of Civilian Persons in Times of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); and Arts 13 and 16 of the amending Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

authorities by way of extradition. For that purpose, she sought the plaintiff's temporary arrest in order to facilitate investigation by the Croatian public prosecutors' office. Contained within this document was a description of the plaintiff's allegedly "punishable conduct". That description generally followed the details of the Šibenik court decision.

132 On receipt of this request, and following the initiative of the federal Attorney-General, a member of the Australian Federal Police ("AFP") in Perth quickly set in train the procedures provided for by the Extradition Act (applied to the request from Croatia by the Regulations[106]).

133 *Australian proceedings*: On 19 January 2006, the federal agent applied to a magistrate of the State of Western Australia for a warrant under the Extradition Act to arrest the plaintiff[107]. In support of that request, she annexed the Šibenik court decision (which she described as a "warrant") and deposed that the offences, subject to the "warrant", involved two war crimes against prisoners of war under Art 122 of the Basic Criminal Code of Croatia, and one crime against the civilian population under Art 120 of that Code. She stated that such offences were punishable under Croatian law by a maximum penalty of twenty years imprisonment. By reference to the Regulations, she said that Croatia was "an extradition country". On this basis, she sought a warrant for the provisional arrest of the plaintiff, pursuant to s 12 of the Extradition Act.

134 On the same day, Magistrate R H Burton issued the provisional arrest warrant addressed to federal, State and Territory police officers throughout Australia[108]. The warrant was executed in Sydney on the same day. The plaintiff was taken into custody by AFP officers. The following day he was brought before a magistrate sitting in the Local Court of New South Wales. In reliance on s 15 of the Extradition Act, the plaintiff was remanded in custody to appear at the Central Local Court in Sydney. On 27 January 2006, the plaintiff appeared in custody before Magistrate A D Moore. The magistrate refused bail, remanding the plaintiff in custody to the Parklea Correctional Centre, where he was detained at the time of the hearing before this Court, pending its orders.

135 *Detention and imprisonment*: The special case describes the conditions of the plaintiff's detention following his arrest. They were severe:

---

106 The Regulations, reg 4.

107 Pursuant to the Extradition Act, s 12(1).

108 See the definition of "police officer" in the Extradition Act, s 5. See also ss 12(1) and 13(1)(a).

> "The plaintiff has been imprisoned in circumstances where he has been required to share a prison cell with persons convicted of criminal offences and where he has been subject to the full rigours of prison discipline. He has had limits placed on his telephone communications with persons outside the prison (and at times has been unable to contact his solicitors). Attendance upon him by his legal advisers at the prison has been hampered by the unavailability of separate interview facilities, with the result that he has had to provide instructions to his legal advisers in open areas of the prison to which other inmates had ready access."

136 There is no contest that Croatia was recognised by Australia as an independent State in 1992 and that the Regulations were duly made thereafter. It appears that negotiations for an extradition treaty between Croatia and Australia were then commenced. However, the contesting defendants placed no reliance on the existence of a treaty to sustain the designation of Croatia as an "extradition country". By s 5 of the Extradition Act, "extradition country" means, relevantly, "(a) any country … that is declared by the regulations to be an extradition country". By the Regulations, Croatia was so declared.

137 A list of the presently declared "extradition countries" was supplied by the Commonwealth. Of the extradition regulations that do not relate to extradition for particular offences[109] or to groups of countries[110], most are made with individual countries pursuant to particular extradition treaties. Fourteen, however, involve non-treaty extradition countries[111]. Some of these involve common law countries with legal systems similar to Australia's. Others involve legal systems that are quite different. Some in the latter category might be accepted, on the basis of permissible judicial knowledge, to be comprised of uncorrupted, competent, independent and impartial courts. The features of others

---

109 See, for example, Extradition (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations; Extradition (Bribery of Foreign Public Officials) Regulations 1999; Extradition (Safety of United Nations and Associated Personnel) Regulations 2000; Extradition (Suppression of Terrorist Bombings) Regulations 2002; Extradition (Transnational Organised Crime) Regulations 2004; Extradition (Convention against Corruption) Regulations 2005; Extradition (Suppression of the Financing of Terrorism) Regulations 2006.

110 See, for example, the Extradition (Commonwealth Countries) Regulations 1998.

111 Including Extradition (United Kingdom) Regulations 2004; Extradition (Canada) Regulations 2004. In respect of non common law countries, they include Extradition (Thailand) Regulations; Extradition (Hashemite Kingdom of Jordan) Regulations 2002; Extradition (Lebanon) Regulations 2003; Extradition (Kingdom of Cambodia) Regulations 2003; Extradition (Croatia) Regulations 2004; Extradition (Slovenia) Regulations 2004; Extradition (Lithuania) Regulations 2005.

might not be known. A number, to certain knowledge, involve courts with well-reported defects that fall short of international human rights standards. Despite this, non-treaty extradition arrangements have been made with them by executive regulations that have not been disallowed by the Federal Parliament[112].

138 Some of the regulations reflect treaty obligations demanded by the requesting country. They superimpose on the Extradition Act a more stringent standard of proof than those envisaged by the Extradition Act itself. For instance, the Extradition (Commonwealth Countries) Regulations 1998 impose upon a requesting State an obligation to satisfy the *prima facie* evidence test in order to secure the extradition of a person under the Extradition Act[113]. Treaty provisions vary, but generally adopt the standards set out in the Extradition Act[114]. However, unless specific provision is made by treaty and accepted by the regulations, the Extradition Act applies to the process of extradition from Australia. At least, the Act does so if Pt II of the Act is a valid law of the Commonwealth.

139 *Commencement of proceedings*: In January 2006, the plaintiff commenced his proceedings in this Court for a writ of *habeas corpus* and other relief. In pursuit of that relief, the plaintiff joined as defendants in the proceedings both Magistrate Moore (under whose order he was remanded without bail) and the Governor of the Parklea Correctional Centre (in whose custody he was detained). Those proceedings resulted in the special case. Magistrate Moore and the Governor submitted to this Court's orders. The Commonwealth and the Minister (together "the Commonwealth") defended the validity of the challenged provisions of the Extradition Act and Regulations. The three attacks on the validity of the Act and Regulations are identified in the questions reserved for the opinion of this Court.

---

112 The Regulations are made under the regulation-making power contained in Extradition Act, s 55.

113 Extradition Act, s 11(5)(b); Extradition (Commonwealth Countries) Regulations, reg 6(1)(b).

114 Extradition Act, s 19. For example, there are some treaties that impose a "*prima facie* evidence" test. Others require a "sufficient evidence test". Still others, like the Extradition Act, involve a "no evidence" test. See Appendix D to the Australian Parliament, Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy*, Report No 40, (August 2001).

The questions reserved

140 The three questions reserved were as follows:

1. Is Pt II of the Extradition Act invalid in so far as it purports to deprive an Australian citizen of liberty otherwise than in the exercise of the judicial power of the Commonwealth?

2. Is Pt II of the Extradition Act, read together with the Regulations, invalid in so far as it purports to deprive an Australian citizen of liberty otherwise than on a finding that there exists a *prima facie* case against that person that he or she committed the offences alleged by the State requesting extradition?

3. Is reg 4 invalid because it was not made pursuant to the power conferred by s 51(xxix) of the Constitution, or any other legislative power of the Commonwealth?

The legislation

141 *History and background to the Act*: The history of extradition law in Australia has been described in several recent decisions of this Court[115]. That history has passed through distinct phases, beginning with the *Extradition Act* 1870 (Imp)[116], followed by the *Fugitive Offenders Act* 1881 (Imp)[117], the *Extradition Act* 1903 (Cth), the *Extradition (Commonwealth Countries) Act* 1966 (Cth) and the *Extradition (Foreign States) Act* 1966 (Cth). Both of the latter Acts were repealed when the Extradition Act came into effect. By the Extradition Act, a new regime was adopted, creating common provisions for extradition *from* Australia to "extradition countries" and *to* Australia from other countries (with the exception of New Zealand, for which separate provisions were enacted[118]).

142 Certain features have survived this series of amendments to Australian extradition law. Under such law, the consequences that flow from extradition, including a serious interference with the rights of the person sought to be extradited, cannot follow from extradition treaties entered into by the Executive

---

115 See, eg, *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 556-557; *AB v The Queen* (1999) 198 CLR 111 at 141-143 [81]-[84].

116 33 and 34 Vict c 52; cf *AB v The Queen* (1999) 198 CLR 111 at 142 [83].

117 44 and 45 Vict c 69.

118 Extradition Act, Pt III.

Government alone. They require the authority of legislation[119]. The provisions of the legislation, if valid, govern each case in accordance with their terms. Accordingly, close attention must be paid to the language and scheme of the governing law, as well as to any regulations validly made under it.

143 *The scheme of the Act*: Part II of the Extradition Act envisages an "extradition request"[120] in respect of an "extradition offence"[121] by an "extradition country"[122] in relation to an "extraditable person"[123].

144 The overall scheme for which the Extradition Act provides was described by the Full Federal Court in *Harris v Attorney-General (Cth)*[124] in terms that were accepted by this Court[125]:

> "The Act contemplates four stages in extradition proceedings as follows: (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered."

145 A superficial consideration of this scheme might suggest that a magistrate (and thus, a court exercising the judicial power of the Commonwealth) is

---

119 See reasons of Gleeson CJ at [6].

120 Defined in Extradition Act, s 5.

121 Defined in Extradition Act, s 5.

122 Defined in Extradition Act, s 5.

123 Defined in Extradition Act, s 6.

124 (1994) 52 FCR 386 at 389.

125 *Kainhofer* (1995) 185 CLR 528 at 547.

engaged in the extradition process in an effective way from its commencement. It might be thought that the magistrate affords an independent and impartial scrutiny on the part of the judiciary of the executive acts performed by various agents of the Commonwealth. When, however, the language of the Extradition Act is examined closely, it becomes clear that the general rule for which the Act provides (including in respect of a request made by Croatia) is one that effectively confines the magistrate to administrative functions alone. So much was decided by this Court in *Pasini v United Mexican States*[126]. However, in that case no objection was taken (as it was in this case) that the legislation was constitutionally invalid because it omitted to interpose the judicial power before decisions were made by the magistrate depriving the person subject to an extradition request of liberty[127].

146 The magistrate, before whom the person subject to the extradition request must be brought "as soon as practicable" for remand[128], is not then engaged in an examination of the merits, substance or adequacy of the evidence or other material propounded to deprive that person of liberty and to secure that person's removal from Australia. Instead, as occurred in this case, the initial request for a provisional arrest warrant is performed by the magistrate without the person who is subject to the request being represented or heard. Moreover, at the later stage of the magistrate's determination of eligibility for surrender, it is specifically provided in s 19(5) of the Extradition Act that:

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

147 In short, the magistrate, participating in the process created by the Extradition Act, is effectively reduced to checking documents. His or her function, at the provisional arrest warrant stage, is to ensure that the application is made in the statutory form on behalf of a country that is shown to be an "extradition country". He or she is to be satisfied that the person to whom the offence relates is an "extraditable person"[129]. These matters involve no more than formal scrutiny of the existence of warrants or convictions; or an allegation of an

---

126 (2002) 209 CLR 246 at 253 [11].

127 The issues in *Pasini* are explained at (2002) 209 CLR 246 at 253 [11], 261 [37]-[38].

128 Extradition Act, s 15(1).

129 As defined by the Extradition Act, s 6.

offence defined as an "extradition offence". The Act clearly envisages that there will be no "hearing" at first instance. This might not be entirely surprising given the circumstances of many alleged offenders, residing outside the country requesting extradition, for whom the risk of flight will often be substantial[130].

148 Yet once the subject is arrested under a provisional arrest warrant and brought before a magistrate, the functions of the magistrate remain no more substantive. It is, as the Commonwealth correctly explained, a "no evidence" regime. The Act places no general obligation on the requesting State to demonstrate a basis of merit (however thin) in support of the request. That function is reserved to the next stage in the process[131]. It is performed by the Attorney-General and is called a "surrender determination".

149 It is true that the Attorney-General is obliged to make the surrender determination "as soon as … reasonably practicable, having regard to the circumstances, after [the] person becomes an eligible person"[132]. But the relevant decision is effectively placed beyond the reach of the Judicature. It does not involve a public, transparent hearing by someone independent of the Executive Government, deciding the request on the basis of an assessment of the weight and sufficiency of the material presented to justify the extradition and consequent detention. The role of the magistrate is not judicial in character.

150 The Extradition Act provides for review of a magistrate's decision by application in the first instance to the Federal Court of Australia or to the Supreme Court of a State or Territory; and thereafter, by appeal to the Full Court of the Federal Court[133]. In their reasons, Gummow and Hayne JJ place reliance on that facility[134]. Heydon J bases his finding of validity on the existence of this "system of judicial review"[135]. However, I am unconvinced. Owing to the nature of the magistrate's primary decision, this involvement of the courts is also extremely limited. What is being reviewed is an order confined to the scrutiny of formal matters. There is little, if any, ambit for judicial consideration of wider questions, such as the sufficiency of the extradition request. Apart from the

---

130 The risk of flight is discussed in *United Mexican States v Cabal* (2001) 209 CLR 165 at 189 [57].

131 Extradition Act, s 22(2).

132 Extradition Act, s 22(2).

133 Extradition Act, s 21(3).

134 Reasons of Gummow and Hayne JJ at [100]-[101].

135 Reasons of Heydon J at [222].

normal limitations inherent in procedures for judicial review, and the usual injunctions placed on appellate courts to avoid intruding into the merits[136], the powers of the reviewing courts are confined to affirming the order of the magistrate or quashing that order and directing the magistrate to[137]:

> "(i) in the case of an order under subsection 19(9) – order the release of the person; or
>
> (ii) in the case of an order under subsection 19(10) – order, by warrant in the statutory form, that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5)."

151 Thus, s 19 clearly excludes judicial scrutiny of the eligibility for surrender of the person the subject of the request. Amongst other things, the magistrate is required to consider whether the person has had reasonable time in which to prepare for the conduct of the proceedings[138]. Given the limited function of the proceedings (being "to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country"[139]) this would not normally present any difficulty. Qualifying for this and other confined requirements will ordinarily be purely a matter of form (as it was in the plaintiff's case).

152 That this is so is made even clearer by s 19(2) of the Extradition Act, which is central to the plaintiff's charge of constitutional invalidity. That sub-section describes the nature of the magistrate's determination of eligibility for surrender and the issues to which the magistrate must turn his or her mind:

---

136 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 599.

137 Extradition Act, s 21(2)(b). The order under s 19(9) is made where the magistrate determines that the person is eligible for surrender. The order under s 19(10) is made where the magistrate determines that the person is not, in relation to any extradition offence, eligible for surrender. The order under s 22(5) is made where the Attorney-General determines that the person should not be surrendered.

138 Extradition Act, s 19(1)(d).

139 Extradition Act, s 19(1).

"… [T]he person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country 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."

153 Lest it be thought that an "extradition objection", referred to in s 19(2)(d), would include an objection to the failure of the requesting country to produce viable evidence to substantiate the request, it is necessary to note the definition of an "extradition objection" contained in s 7 of the Extradition Act.

154 By s 7, an "extradition objection" is limited to cases where the extradition offence is a political offence; where the surrender is sought for ulterior racial, religious, national or political reasons; where the person surrendered would suffer prejudice by reason of race, religion, nationality or political opinion; where the conduct for which extradition was sought would have constituted an offence under military but not ordinary criminal law; or where the person has already been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia[140]. These are narrow and highly particular grounds of objection.

155 It is true that this definition affords substantive grounds to object to extradition. But it does not permit the magistrate (even if confined to the material provided by the requesting country) to scrutinise that material and to ask whether, if the allegations contained in that material were proved before the

---

140 Extradition Act, s 7(a), (b), (c), (d) and (e).

courts, tribunals or authorities of the requesting country, they would justify imposing such a heavy burden on the liberty of the person the subject of the request.

156 *Plaintiff's submissions*: The plaintiff submitted that, in converting the scheme of Australian extradition law from that contained in the 1966 Acts[141] to the "no evidence" scheme of the present Act, the Parliament took a wrong turning. He argued that to arrest him; deprive him of his liberty for an extended period of time; remand him without bail; confine him during the entire process to a general prison; house him with convicted offenders; and contemplate sending him to a foreign country without ever affording him substantive access to the independent courts of Australia, was contrary to the requirements of the Australian Constitution.

157 Chapter III of the Constitution does not provide an explicit guarantee of access to the courts. However, the plaintiff submitted that access to an Australian court in a case such as the present was *implicit* in the subjection of the applicable legislative powers of the Parliament to the other provisions of the Constitution, including Ch III. The plaintiff also argued that, in his own case, such an entitlement was inherent in his status as an Australian national, enjoying the status of a citizen. This country's Constitution grants both citizens and aliens the protection of Ch III courts[142]. However, the plaintiff argued that it was his status as a constitutional national and statutory citizen of Australia that rendered invalid his removal in custody to a foreign country in circumstances where he was denied anything other than a formal judicial scrutiny of the foreign request.

Relevant fundamental rights

158 *Australian constitutional context*: The Australian Constitution does not contain an express list of relevant fundamental rights, equivalent to the "due process" provisions of the United States Constitution[143] that have informed American extradition law and its requirements[144]. Nor does the Constitution

---

141 *Extradition (Foreign States) Act* 1966 (Cth), ss 16(1), 17(6); *Extradition (Commonwealth Countries) Act* 1966 (Cth), s 15(6).

142 The same was true in Australia's colonial times. See *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221 at 235-236, 244, 248; *Ex parte Leong Kum* (1888) 9 NSWLR (L) 250, noted in Bennett, *Colonial Law Lords*, (2006) at 31-32.

143 United States Constitution, Amendments V and VI. See *Kainhofer* (1995) 185 CLR 528 at 559, in which Amendment VI is discussed.

144 See Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 773-780.

contain an explicit provision akin to s 11 of the *Canadian Charter of Rights and Freedoms*[145]. Nor are there statutory rights of an equivalent kind to which a person such as the plaintiff may appeal, other than the rights contained in the Extradition Act itself.

159 This does not mean that Australian law is silent on questions of fundamental human rights. Certainly when the common law or statutory provisions are unclear (and perhaps more generally), it is permissible for Australian courts to inform themselves about any suggested infractions of fundamental rights. This is particularly so since Australia, by ratifying the First Optional Protocol to the International Covenant on Civil and Political Rights ("the ICCPR"[146]), has subjected its laws to the scrutiny of the United Nations Human Rights Committee[147].

160 The Constitution is also subject today to the influences emanating from the international context in which it now operates[148]. Unsurprisingly, in the present age, this view has been accepted by many national final courts, including the Supreme Court of the United States[149], traditionally less open to the influence of comparative law than Australian courts have been.

161 In deriving implications from the language and structure of the Constitution, Australian judges, like their foreign counterparts, are entitled to inform themselves of the developing content of the international law of human rights[150]. Such law does not bind them to particular outcomes. But it is often informative and helpful to the performance of the judicial task, including in constitutional adjudication.

---

145 *Constitution Act* 1982 (Can), Pt I, discussed in *Kainhofer* (1995) 185 CLR 528 at 559.

146 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

147 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

148 eg *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 658; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [175]-[176].

149 See cases cited in *Al-Kateb* (2004) 219 CLR 562 at 627 [185]-[186]: *Atkins v Virginia* 536 US 304 at 316 n 21 (2002); *Lawrence v Texas* 539 US 558 at 576-577 (2003); *Grutter v Bollinger* 539 US 306 at 344 (2003) per Ginsburg J.

150 *Al-Kateb* (2004) 219 CLR 562 at 625-630 [179]-[193]; cf at 589 [63].

162 *Provisions of the ICCPR*: The ICCPR contains, in Art 9, an express prohibition against arbitrary detention. That Article provides:

> "(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> …
>
> (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. …
>
> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> …"

163 The right to liberty, stated in this way, reflects the emphasis of the common law, consideration of which informs the interpretation of the Constitution by Australian courts[151]. In a number of cases, the United Nations Human Rights Committee has upheld complaints against Australia in respect of Art 9 violations[152]. In one of those decisions[153], the Human Rights Committee reaffirmed its conclusion that a State party to the ICCPR places itself in breach of the requirements of Art 9 where:

> "there was no discretion for a court … to review the [complainant's] detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention

---

151 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 192.

152 *A v Australia* (HRC No 560/93); *C v Australia* (HRC No 900/99): see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 312-315 [11.16], 315-317 [11.17], 342-343 [11.61].

153 *C v Australia* (HRC No 900/99): see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 342-343 [11.61].

that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4."

164 This reasoning would appear to apply with equal force where, as here, the complainant is an Australian national; is detained in severe prison conditions although on remand; is imprisoned in a fashion undifferentiated from convicted offenders; is denied bail except in "special circumstances" that are extremely difficult to prove[154]; is restricted substantially to formal objections to his extradition; and is denied any consideration by an Australian court of the veracity of the hearsay assertions that alone constitute the propounded basis for his detention and removal in custody to a foreign country.

Recent changes to extradition law

165 After a lengthy period of near universal rules (such as the rules of speciality[155] and double criminality[156]) changes have recently been made to extradition law in a number of countries. These changes are designed to address what are described as new problems. For example, in 1999, the Canadian Parliament enacted the *Extradition Act* 1999 (Can) to deal with a perceived increase in transnational organised crime. In the same year, the New Zealand Parliament enacted the *Extradition Act* 1999 (NZ), designed to simplify extradition procedures. By the *Extradition Act* 2003 (UK), a new British statute on extradition was introduced to implement European Union arrangements, both between European Union countries, and between European Union and non-European Union countries[157].

166 Concerns about delay and expense have occasioned numerous international inquiries and proposals addressed to the supposed inefficiencies of the pre-existing law[158]. Similar thinking lay behind the explanations offered to

---

154 See eg *Cabal* (2001) 209 CLR 165 at 187-189 [55]-[56].

155 See eg *AB v The Queen* (1999) 198 CLR 111 at 141-145 [80]-[91]; *Truong v The Queen* (2004) 78 ALJR 473 at 478 [18], 488 [75], 495-497 [120]-[129]; 205 ALR 72 at 78, 92, 101-104. See also reasons of Gleeson CJ at [7].

156 *Riley v The Commonwealth* (1985) 159 CLR 1 at 15-20; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 504-505 [17]. See also reasons of Gleeson CJ at [7].

157 Described in Australian Government, Attorney-General's Department, *A New Extradition System: A Review of Australia's Extradition Law and Practice*, (December 2005) at 61 ("the 2005 Paper").

158 See for example, United Nations Office on Drugs and Crime, Informal Expert Working Group on Effective Extradition Casework Practice, *Report*, (2004).

the Federal Parliament when the Extradition Acts of 1966 were amended by the *Extradition (Commonwealth Countries) Amendment Act* 1985 (Cth) and the *Extradition (Foreign States) Amendment Act* 1985 (Cth). Those Acts followed the report of a taskforce established by the federal Attorney-General in February 1985. The following month, amendments were introduced into the Federal Parliament. The Attorney-General explained[159]:

> "The first amendment will enable Australia to conclude extradition arrangements with countries which do not require the requesting country to furnish evidence of guilt but rather information as to the allegations against the fugitive. This amendment is of particular significance to civil law countries whose systems have difficulty in adapting to the provision of pre-trial evidence. The extradition arrangements of most European countries which are reflected in the European Convention on Extradition do not require the production of prima facie evidence."

167 Current proposals argue for still further amendments, designed to remove or modify remaining (and sometimes longstanding) provisions of Australian extradition law. The justifications refer to the rapid expansion of international travel; developments in information technology; the increase in transnational crime; and the threat of terrorism[160].

168 Obviously, these developments are subjects worthy of attention, as are the advances in national and international efforts to bring to justice those who are alleged to have committed international crimes. However, in Australia any action taken in this regard must conform to the requirements of the Constitution. The multilateral extradition treaty which Australia has signed with other Commonwealth countries ensures that, in respect of extradition proceedings with those countries, the *prima facie* evidence test is satisfied. In this respect, the extradition scheme conforms to Australian constitutional requirements. If Australian constitutional norms necessitate a similar adjustment in respect of extradition arrangements with other countries, this must follow from the obligation of all branches of government in Australia to conform to the requirements of the Constitution.

169 So much was uncontested by the Commonwealth. It does not appear from anything placed before this Court that proof of a *prima facie* case, required by the Extradition (Commonwealth Countries) Regulations, has rendered that procedure unworkable. In effect, the plaintiff asked why any lesser standard should be

---

159 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 March 1985 at 596 (Attorney-General L F Bowen).

160 2005 Paper at 3.

applied to him as an Australian national, protected by a Constitution that establishes an independent judiciary.

The issues

170 Three issues arise for decision by this Court:

(1) *The judicial power issue*: Whether the Extradition Act is invalid in so far as it fails to interpose judicial consideration of the sufficiency of evidence warranting surrender prior to depriving a requested person of his or her liberty;

(2) *The legislative power issue*: Whether, in the case of an Australian national, the absence of a requirement that a *prima facie* case be proved against the requested person renders the detention and extradition invalid, notwithstanding the other provisions of the Extradition Act and the Regulations; and

(3) *The validity of the Regulations issue*: Whether, notwithstanding the absence of a treaty with Croatia, constitutional power exists to support the provisions of the Act and the Regulations in the plaintiff's case.

171 These issues are inter-related. If the plaintiff were to succeed in relation to one of them, that would have been sufficient to invalidate his detention. It would then be unnecessary to address the remaining issues.

Common ground

172 Some aspects of the parties' arguments on the first issue, described above, represented common ground.

173 *Subjection to judicial scrutiny*: As explained above, it is clear from the text and structure of the Constitution, and from past authority[161], that any constitutional grant of legislative power to enact a law with respect to extradition (and the surrender of persons lawfully within Australia) is subject to the other provisions of the Constitution, including the provisions of Ch III to the extent that it is engaged.

174 The design of the Constitution makes it plain that, even where the Parliament can lawfully enact provisions for the handing over of a person to another country, that person must ordinarily have a real right of access to the courts for which Ch III provides. In this way, the legislature and the Executive

---

161 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

are subjected, when requested, to the requirements of judicial scrutiny. Because of the opening words of s 51, "subject to this Constitution", this scrutiny cannot be excluded.

175 *Inalienable rights of nationals*: There is no absolute right under the Constitution for an Australian national to remain in this country. So much was held in *DJL v Central Authority*[162]. Yet a national has an inalienable right to enter Australia[163], and cannot be refused entry at the "barrier". Once admitted, he or she will be subject to Australian law, including any law requiring, or authorising, the loss of liberty. Legal demands that other countries and international organisations may make, in accordance with law, can authorise the surrender of a person to enable the removal of that person from Australia, in custody where necessary.

176 Nonetheless, surrender is a serious step. This is so given the normal entitlement of a person, lawfully present in Australia (whether a national or otherwise), to be undisturbed in liberty and life by the demands of foreign countries and external organisations without the clear authority of a valid law. No such country or organisation has a right to have an Australian national or lawful resident surrendered to it by Australia except under Australian law[164]. Even an alien present in Australia is entitled to the protection of Australian law. Such protection is itself an attribute of Australia's sovereignty.

177 *Extradition implies loss of liberty*: Because compliance with an extradition request within the terms of the Extradition Act obliges arrest, detention and removal from Australia (and ordinarily, lengthy detention in the country to which the person is surrendered), an extradition decision places an obvious and immediate burden on the liberty of the surrendered person. Accordingly, Australian extradition legislation typically enlivens those constitutional provisions which control the imposition of a loss of liberty on persons subject to it. This is especially so where the loss of liberty has the character of punishment, and more so where it occurs in a criminal context.

---

162 (2000) 201 CLR 226 at 278-279 [136]-[137] of my reasons; Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ agreeing at 240 [21]. Regarding my comments in *DJL*, I would note, consistently with these reasons, that my concern was with the absence of judicial authority. Extradition pursuant to treaty will not be lawful unless the requested person has substantive access to a court.

163 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469: "The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive."

164 *Riley* (1985) 159 CLR 1 at 15.

178 *Judicial determination of loss of liberty*: There is no reason why extradition should be frozen in the procedures of the nineteenth century, a time when, typically, individual treaties were negotiated between nations to provide the terms for such exceptional acts, and did so with considerable particularity[165]. In this context, as in others, the Constitution is susceptible to adaptation to contemporary circumstances[166]. Those circumstances include a large increase in international travel and the numbers engaging in it; the growth of transnational crime; and the necessity for extradition procedures to adapt to these phenomena.

179 The plaintiff accepted that a full-scale trial in Australia before extradition, involving witnesses and other evidentiary material, where the proper venue for such a trial was in the country requesting extradition, was neither necessary under the Australian Constitution nor feasible[167]. The issue in contest was therefore reduced to whether, as a precondition to detention and with a view to removal and surrender, a minimum requirement was an assessment by an Australian court, designed to assure the person subject to the extradition request, and the community at large, that the surrender and consequent loss of liberty was effected on the basis of sufficient evidence, rather than upon a mere assertion.

180 *Punishment as a judicial function*: It is beyond doubt that, in Australia, there is a portion of involuntary detention that can only occur under federal law "as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[168]. This is so notwithstanding differences in this Court as to the precise constitutional restrictions on the power of officials in the Executive Government to impose detention without judicial authority.

181 Different views have been stated about what that portion is and how it might be defined[169]. Yet it cannot be doubted that it exists. Its definition cannot

---

165 cf *Kainhofer* (1995) 185 CLR 528 at 560-561, citing *Muller's Case* 17 Fed Cas 975 at 975 (1863).

166 *Singh* (2004) 78 ALJR 1383 at 1436 [258]; 209 ALR 355 at 429.

167 cf Aughterson, *Extradition: Australian Law and Procedure*, (1995) at 210, citing *In the matter of Jack Mandel* [1958] VR 494 at 498.

168 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; cf *Al-Kateb* (2004) 219 CLR 562 at 573 [4], 581-583 [36]-[41], 604-605 [109]-[110], 609-610 [128], 617 [153], 636 [216], 648-649 [256]-[258].

169 See, for example, *Al-Kateb* (2004) 219 CLR 562 at 586-589 [49]-[61], 615-616 [145]-[149]; *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1530 [43]-[44], 1544 [135]; 210 ALR 50 at 65-66, 86.

belong solely to the subjective intentions of parliamentarians or officials in the laws they make or implement. Nor can the incidents, duration and circumstances of the detention be regarded as irrelevant to enlivening the constitutional requirements. Here, according to the facts in the special case, the detention of the plaintiff was in support of proposed criminal proceedings in another country. The detention was to be (and, at the hearing, had already been) significant in duration and arduous in execution.

182 *The exceptions of executive detention*: The authorities clearly accept that some orders depriving persons of their liberty are treated as "exceptions" to the requirement of judicial involvement in governmental deprivations of liberty. In such exceptional cases, detention by the Executive will not contravene the requirements of Ch III. Nor will it involve an impermissible investment of the judicial power of the Commonwealth in bodies other than Ch III courts[170].

183 In the present case it was common ground that the Executive might, consistently with the Constitution, detain aliens (for a time at least) if present in the Commonwealth without lawful authority; persons arrested and detained "pending trial"; persons who are mentally ill or infectiously diseased; and those who have to be deprived of liberty for the welfare and protection of others whom they endanger[171]. The list of such exceptions is not closed[172]. However, in Australia, it has not previously been held that involuntary detention, including arrest, surrender and removal at the request of a foreign country, is exempt from the requirement of judicial authority under the Constitution.

The arguments of the parties

184 In support of the validity of the Extradition Act and the Regulations, the Commonwealth advanced a number of arguments which the plaintiff sought to answer.

185 *Inherent features of extradition*: The Commonwealth pointed to the fact that detention, usually involuntary, was inevitable in the case of extradition as an inherent incident in the process itself, because of the danger of flight[173]. For this reason, in Europe (including now in the United Kingdom) such detention has

---

170 cf *Lim* (1992) 176 CLR 1 at 10.

171 *Lim* (1992) 176 CLR 1 at 28; *Re Woolley; Ex parte Applicants M276/2003* (2004) 79 ALJR 43 at 56 [58]; 210 ALR 369 at 384.

172 cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162.

173 *Barton v The Commonwealth* (1974) 131 CLR 477 at 503.

been accepted as a permissible derogation from the right to liberty as long as it is effected "in accordance with [the] procedure prescribed by law"[174].

186 So much may be accepted. But it does not answer the question of what any such law must contain in the Australian constitutional context, which is different in this respect from that of the United Kingdom and Europe.

187 *Exceptional executive detention*: The Commonwealth relied on the established exceptions to judicially authorised detentions, many of which are of long standing and pre-date the Australian Constitution. This too may be accepted. But the present case is not an established exception under Australian law[175].

188 *Detention and criminal punishment*: The Commonwealth argued that the broad statements in *Chu Kheng Lim v Minister for Immigration*[176], about the exclusive judicial role in imposing involuntary detention in the context of criminal punishment, were not endorsed by a majority of the Court in that case. They were not, therefore, part of the *ratio decidendi* of that case.

189 So much may also be accepted. There are other features in the passage in the joint reasons in *Lim*, including the reference to the "immunity" from executive detention, which the citizens of this country enjoy[177]. The constitutional protections are not confined to citizens. Nonetheless, the acceptance of a general immunity from executive detention runs through the case law. Established exceptions apart, it is normally the case in our society that individuals cannot lose their liberty upon the final decision of an official. Normally, until now, such a loss of liberty has required an order of a court.

190 The Extradition Act partially reflects this rule by requiring that, after arrest on a preliminary warrant, the person subject to the request for extradition

---

174 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), Art 5. See Jones and Doobay, *Extradition and Mutual Assistance*, 3rd ed (2005) at 235. See also Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 161.

175 It is true that extradition is a procedure that has traditionally been carried out by the Executive Government. See *Pasini* (2002) 209 CLR 246 at 265 [50]. However, in the Australian context, this tradition must adapt to the requirements of the Constitution.

176 (1992) 176 CLR 1

177 *Lim* (1992) 176 CLR 1 at 28.

be brought "as soon as practicable before a magistrate"[178]. However, after the introduction of the "no evidence" procedures and removal of the need to show a *prima facie* case, the utility of this speedy submission to the judicial branch was almost entirely lost. It became, in effect, a mere formality – a statutory leftover from the former requirement that involved judicial scrutiny of the justification for continued custody, removal and surrender.

191 Upon the Commonwealth's submission, a law of the Parliament could provide for unlimited detention on an executive order, and courts could do nothing about it. This is an offensive proposition. Rightly, our Constitution is vigilant against detention by the Executive alone. It has favoured the interposition of judicial authority for extensive deprivations of liberty, outside strictly exceptional cases. This Court should continue to insist on that principle. This is not a time to retreat from it and to allow exceptions to become the rule.

192 The growth of executive detention, especially in criminal proceedings, on executive warrants is offensive to the Australian Constitution. Such detention is not limited purely for the benefit of a person such as the plaintiff. It is done for all persons, nationals and otherwise, who look to the Constitution to protect them from the erosion of liberty by ill-judged laws, and by official conduct alien to our legal tradition[179].

193 In *Fardon v Attorney-General (Qld)*[180], Gummow J suggested that the relevant *discrimen* was not whether the impugned law was "penal or punitive in character" (as proposed by the joint reasons in *Lim*[181]). His Honour said that he would "prefer a formulation of the principle derived from Ch III in terms that, the 'exceptional cases' aside … involuntary detention … in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt … for past acts". Subject to what is said below about the relevance of detention conditions, I would accept that formulation. I would apply it to this case.

194 *Relevance of detention conditions*: The Commonwealth rejected the relevance of the agreed facts concerning the punitive conditions in which the plaintiff was detained at the time of hearing. It argued that such conditions could not determine whether the plaintiff was undergoing detention in custody by the State for past acts, otherwise than by judicial order. It argued that irksome

---

178 Extradition Act, s 15(1).

179 cf *Fardon* (2004) 78 ALJR 1519 at 1555 [187]; 210 ALR 50 at 101; *Baker v The Queen* (2004) 78 ALJR 1483 at 1501-1502 [94]; 210 ALR 1 at 27.

180 (2004) 78 ALJR 1519 at 1536 [80]; 210 ALR 50 at 74.

181 (1992) 176 CLR 1 at 27.

burdens could not transform administrative detention into impermissible punishment. The reasons of other members of this Court indicate that punishment must be consequential upon a finding of guilt, and that the conditions of the detention are irrelevant to this consideration[182].

195 However, if a person, under the process set in train by the Extradition Act, *must* be arrested; remanded in custody without bail (in all but the rarest case); detained for a lengthy period in order to be expelled in custody for detention in a foreign country; and submitted to the legal processes of that country, whilst in custody and facing criminal charges, the conditions of such custody are not irrelevant to determining whether the custody should be characterised as "punishment". With respect to those who have expressed a contrary view[183], it is not irrelevant to examine the incidents of the detention, its circumstances and duration when deciding its actual character for constitutional purposes.

196 *Analogy to criminal remand*: The Commonwealth urged the acceptance of detention in aid of extradition as an exception similar in quality to detention without bail pending a criminal trial. Whilst there are some analogies between these two forms of coercive custody, there are essential differences that render this argument unpersuasive.

197 Detention pending trial within Australia is, in most cases, subject to a substantive judicial order. Such detention is therefore supervised by the independent judiciary. It is subject to consideration of the supporting evidence at trial before one of the independent courts established by or under the Constitution. On the other hand, detention, in accordance with the Extradition Act, with a view to removal and surrender to another country and submission to its legal system, now relevantly bypasses the independent courts envisaged by Ch III of the Constitution. Under the present law, such detention deprives the person concerned of even the slightest consideration by an Australian judicial officer of the sufficiency of evidence to justify such steps being taken, drastic as they are for that person's liberty.

198 Remand, in the extradition context, denies any substantive consideration of the accused person's case. The reception of evidence to support substantive consideration is forbidden. In this case, the plaintiff, although a national of this country, is to be sent to Croatia from Australia, and detained for a considerable time in both countries, without an independent court ever considering the

---

182 Reasons of Gleeson CJ at [33]-[34]; reasons of Gummow and Hayne JJ at [107].

183 *Al-Kateb* (2004) 219 CLR 562 at 595 [74] per McHugh J, 650-651 [264]-[268] per Hayne J; *Woolley* (2004) 79 ALJR 43 at 87 [227] per Hayne J, 93 [261] per Callinan J; 210 ALR 369 at 428, 434-435.

sufficiency of evidence said to justify that course. Why should that course be treated as constitutionally acceptable?

199 *The need to adapt extradition procedures*: The Commonwealth relied on the need for adaptation of extradition procedures to accommodate a number of emerging considerations, including:

- the growing number of persons subject to extradition requests;
- the growth, change and significance of transnational crime; and
- the desirability of Australia's entering into efficient extradition arrangements with other countries so that Australia might reap benefits in return, and avoid isolation as a haven for international fugitives.

200 In light of these considerations, one can accept the need to adopt some new procedures for international extradition. However, any such procedures must conform to the national Constitution, as much in Australia as elsewhere. In matters of international cooperation, efficiency does not trump constitutionality.

201 I can envisage steps that do not involve risks of undue delay, substantial cost or inconvenience but which guarantee judicial consideration of the evidence said to support lengthy detention in custody prior to extradition. This is what Australian law provides for in respect of extradition proceedings with other Commonwealth countries. I do not exaggerate the utility and effectiveness of the form of judicial scrutiny which the plaintiff insists upon[184]. However, in some cases, it could have utility and would provide a check against excessive executive decisions that have the effect of curtailing liberty. To deny this is to deny this nation's constitutional tradition and experience.

202 *Procedures of civil law jurisdictions*: The Commonwealth urged that, if this Court insisted upon such requirements, it would effectively frustrate the conduct of extradition proceedings between Australia and civil law countries. I find this argument the least persuasive of all.

203 Even before the *Extradition Act* 1870 (Imp), the United Kingdom had negotiated extradition treaties with France and Denmark, two civil law systems[185]. It is true that the role of the investigating magistrate and courts in

---

184 The functions of judicial (as opposed to non-judicial) officers are discussed in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 44-45.

185 *In re Rees* [1986] AC 937 at 953 per Lord Mackay of Clashfern.

civil law jurisdictions is different from that of prosecutors and the courts in the accusatorial criminal trial conducted in Australia and other common law jurisdictions[186]. However, for a very long time extradition arrangements have existed, under legislation and treaties, between countries of the two systems. They have existed for a century between the United States and France[187]. Dating back to Biblical times, nations have negotiated arrangements for the extradition of persons wanted for trial for alleged crimes by other nations having very different legal systems. Professor Bassiouni attributes the first recorded extradition arrangement to a peace treaty agreed in 1280 BC between Ramses II, Pharaoh of Egypt, and the Hittites after the latter were defeated in an attempt to invade Egypt[188].

204 The notion that evidentiary material could not be produced, sufficient for the kind of scrutiny by a court propounded by the plaintiff, is totally unconvincing. The very documents from the Croatian Ministry and the Šibenik County Court, annexed to the special case, contradict that suggestion. Those documents, especially the latter, are replete with references to unseen and unsupplied statements by eye-witnesses including some attributing words to the plaintiff as direct quotes. In addition, the County Court decision refers to documentary evidence and to the interrogation of witnesses, presumably recorded by police or other officials in preparation for a prosecution under Croatian law.

205 There is no serious practical impediment to discharging the minimal requirements of judicial scrutiny inherent in the terms and structure of the Australian Constitution. When the Parliament introduced the "no evidence" form of extradition in 1985, it followed immediately a report of a departmental taskforce. There appears to have been little, if any, consideration of the available alternatives. There was no apparent consideration by the Parliament of any constitutional impediments in this regard[189]. It may be hoped that, in the current

---

186 cf *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

187 Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 926. The author states that the original treaty was signed between the United States and France in 1909 and came into force in 1911 (37 Stat 1526). A second treaty was signed in February 1970 and came into force in April 1971 (22 UST 407).

188 Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 32. The Roman Republic entered into such treaties as far back as 266 BC: see *Brown v Lizars* (1905) 2 CLR 837 at 850.

189 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 March 1985 at 596-597.

review of the Act, closer attention will be given to libertarian constitutional imperatives normal to Australia[190].

Conclusion: invalidity is established

206 The result is that the plaintiff established the invalidity of so much of Pt II of the Extradition Act as failed to afford him consideration by an Australian court of whether the evidence upon which Croatia requested his surrender was sufficient in law to justify his apprehension and detention, and a subsequent surrender determination by the Attorney-General. It follows that the first question reserved in the special case should have been answered "Yes".

207 I can understand that this outcome would cause concern, particularly in light of the seriousness of the allegations made against the plaintiff. However, the outcome followed, in my view, because Croatia provided only unsubstantiated allegations to justify the arrest, detention, removal and surrender of the plaintiff. It supplied documents that referred to potential evidence that, by inference, existed. But it provided no such evidence whatever, sworn, affirmed or formalised in any way according to Croatian legal procedures.

208 No doubt, Croatia took this course because, under the Australian Extradition Act, accusations were all that were required to support an extradition request from Croatia. However, under the Australian Constitution, more, in my opinion, was required. Before a national (or any other person living under the protection of Australian laws) might lose liberty in such a way, and be subjected to a lengthy imposition upon that person's basic freedoms, a sufficient case for imposing such deprivations had to be demonstrated, in the form of evidence, provided to a judge or magistrate in one of the independent courts of Australia.

209 This conclusion would not mean subjecting each extradition request to a full trial on the merits in this country. However, it would mean permitting a court to examine evidence and to consider whether, if proved, such evidence would be sufficient to warrant the continued detention of the individual and the making of a surrender decision with its large consequences for that person's liberty. Self-evidently, such a decision is a serious one, particularly, one might say, where the person in question is an Australian national. It constitutes an exception to the protection that each nation State owes to people living under its laws. To comply with Australian constitutional requirements, in my view, it would be sufficient for the Parliament to revert to the scheme of legislation which existed prior to the precipitate adoption of the "no evidence" amendments in 1985.

---

190 2005 Paper at 7. In the "guiding principles", no reference is made to the need to minimise infractions of personal liberty, but see at 20.

210 The stated purpose of Croatia was to institute criminal proceedings in Croatia for the prosecution of the plaintiff on serious charges which, if proved, would be offences against the criminal law of Croatia and also offences against international humanitarian law. Every nation is duty-bound to cooperate in upholding the universal principles of international law. However, Australia does not contribute towards global efforts to enhance the rule of law by failing to uphold its own laws, particularly the law of the Constitution.

211 No submission was made in this case that, apart from the Extradition Act, there existed any other basis for surrender of the plaintiff. Thus, it was not argued, for example, that the surrender of the plaintiff was required by any international law principle of universal jurisdiction recognised by the law of Australia[191]. However, it should be noted that even if such a principle were to apply, it would be subject to Australian constitutional norms[192].

212 National constitutional law is not really tested when it is invoked by popular persons or their supporters. It is tested, and the judges' fidelity to law is examined, when that law is invoked by an unpopular person such as one accused of grave crimes. In this respect, in such cases in the past, this Court has shown fidelity to the Constitution[193]. Recently, the Constitutional Court of Indonesia was subject to a similar test when it upheld a constitutional objection to the conviction of persons for involvement in an attack on tourists in Bali, prosecuted under retrospective anti-terrorism legislation. Such legislation was held incompatible with the new Constitution's prohibition on retrospective criminal laws[194]. This Court should be no less committed to the requirements of the Australian Constitution.

---

191 Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (2004).

192 See Lord Browne-Wilkinson, quoted by Macedo, "Introduction", in Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (2004) 1 at 6. See also Kirby, "Universal Jurisdiction and Judicial Reluctance: A New 'Fourteen Points'", in Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (2004) 240 at 243.

193 See eg *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124; *Australian Communist Party Case* (1951) 83 CLR 1.

194 Butt and Hansell, "The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003", (2004) 6 *Australian Journal of Asian Law* 176 at 185ff; Clarke, "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials", (2003) 5 *Australian Journal of Asian Law* 1;

(Footnote continues on next page)

213 There may be other lawful bases, under Australian law, pursuant to which, absent his consent, the plaintiff might be held in custody, pending any restoration of the pre-1985 legislative scheme and renewal of Croatia's request under the restored provisions. This would be a decision for the Commonwealth, to be considered by the Justice of this Court to whom the proceeding should be returned. But if no lawful basis could be demonstrated for detaining the plaintiff further, an order that he be restored to his liberty would necessarily have followed.

The remaining issues

214 *The legislative power issue*: From the outcome to the first question reserved, it follows that the second question, although unnecessary to answer, would also have been answered in the affirmative.

215 Except to the extent that the reference to the status of the plaintiff as an Australian citizen (or national) might be relevant to the proportionality of the legislation, such status would not appear to be determinative of any question of constitutional invalidity in issue in this case. Save in particular cases[195], the Constitution does not distinguish between citizens and non-citizens in the entitlements that it confers. Citizens and non-citizens are entitled to invoke the Constitution without discrimination based on their nationality. Whilst the substance of the second question might therefore be answered "Yes", in the light of the answer given to the first question reserved, the second should be formally answered: "Unnecessary to answer".

216 *The validity of the Regulations issue*: The third question reserved concerns the validity of reg 4 of the Regulations. This question also would not have needed to be answered in light of the answer that I would have given to the first.

217 The attack on the Regulations was based on the making of extradition arrangements between the Executive Governments of Australia and Croatia, without the ratification of a treaty. The plaintiff argued that, absent a treaty, the external affairs power contained in s 51(xxix) of the Constitution was not engaged to support extradition to Croatia under the Act and Regulations. Those arguments were unconvincing.

Kirby, "Terrorism and the Democratic Response 2004", (2005) 28 *University of New South Wales Law Journal* 221 at 239.

195 See, for example, Constitution, ss 30, 41, 44(i), 117.

218 Extradition without legislation is forbidden in Australia[196], but extradition without a bilateral treaty is permitted[197]. Professor Bassiouni, in his authoritative text, explains[198]:

> "Extradition is regarded by states as a sovereign act. Most states' view is that the duty to extradite arises by virtue of a treaty. In the absence of an international duty, states can and do rely on reciprocity and comity, which are part of international principles of friendly cooperation among nations. Reciprocity could become binding under international law if it manifests the custom of a state as evidenced by its consistent practice. … A state's non-treaty basis concerns the granting or requesting of extraditions carried out on the basis of national legislation which authorises it[199] and provides the framework, substantive conditions, exceptions, and procedures inherent in it[200]. … *Ad hoc* arrangements are occasionally entered into by states to suit their particular needs at certain times … There is also a growing practice based on multilateral treaties. Furthermore, the emerging custom or duty to extradite for international crimes is gaining ground[201]."

219 In Australia, treaty obligations do not represent the only way to engage the legislative powers of the Parliament under the external affairs power. In *XYZ v The Commonwealth*[202], I referred to the argument that a federal law, with respect

---

196 *Brown v Lizars* (1905) 2 CLR 837 at 850-851; *Barton* (1974) 131 CLR 477 at 494-495; cf Shearer, "Extradition Without Treaty", (1975) 49 *Australian Law Journal* 116 at 118-119.

197 cf *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640, concerning the Family Law (Child Abduction Convention) Regulations 1986 (Cth). See also *Oates* (2003) 214 CLR 496 at 502-503 [9].

198 Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 47-48.

199 For example, the French practice started with the Decret-Loi of 19 February 1791, followed by the Ministry of Justice Circulaire of 30 July 1872, and the law of 10 March 1927. For a more recent practice which permits reciprocity by a common law based system, see the *Extradition (Foreign States) Act* 1974 (Cth).

200 National legislation serves the same purpose for States that rely on treaties.

201 This is dealt with by Bassiouni, *International Extradition: United States Law and Practice*, 4th ed (2002) at 35ff.

202 [2006] HCA 25.

to conduct geographically external to Australia, was necessarily a law with respect to external affairs[203]. Whatever problems and difficulties such an approach presents for Australian constitutional doctrine, it provides no impediment to the validity of the Regulations in this case.

220 Here, the making of the Regulations, designating Croatia as an "extradition country", was directly relevant to Australia's relations with Croatia and thus to Australia's "external affairs"[204], as that phrase is incontestably used in the Constitution. It follows that the attack on the validity of reg 4 would fail. However, the formal answer to the third question, in my view, was: "Unnecessary to answer".

Orders

221 The orders that I favoured in these proceedings were as follows:

(1) Answer the questions reserved as follows:

(a) Yes.

(b) Unnecessary to answer; and

(c) Unnecessary to answer.

(2) Return the proceedings to a single Justice with these answers to dispose of the matter, including in respect of costs.

---

203 *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 530-531, 602, 638, 695-696: see *XYZ v The Commonwealth* [2006] HCA 25 at [40].

204 cf *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643; *R v Sharkey* (1949) 79 CLR 121 at 136.

222 HEYDON J. I agree with Gummow and Hayne JJ, save in one respect. I would reserve to a case in which it is necessary for decision the question whether, if the system of judicial review described by their reasons for judgment[205] had not existed, detention of the plaintiff pending deportation would have been valid.

---

205 At [101].