HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

COMMONWEALTH MINISTER FOR JUSTICE APPELLANT

AND

ADRIAN ADAMAS & ANOR RESPONDENTS

Commonwealth Minister for Justice v Adamas
[2013] HCA 59
18 December 2013
P50/2013

ORDER

1. *Appeal allowed.*

2. *Set aside order 1 of the orders of the Full Court of the Federal Court of Australia made on 15 February 2013 and, in its place, order that:*

   (a) the appeal to that Court be allowed; and

   (b) the orders of the Federal Court of Australia made on 15 March 2012 be set aside and, in their place, order that the application to that Court be dismissed.

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with S B Lloyd SC and H Younan for the appellant (instructed by Australian Government Solicitor)

G R Donaldson SC with A K Sharpe for the first respondent (instructed by O'Connor Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Commonwealth Minister for Justice v Adamas

Extradition – Surrender determination by Attorney-General or Minister – Where respondent convicted by Indonesian court in his absence and sentenced to life imprisonment – Where Minister required to be satisfied that surrender would not be "unjust, oppressive or incompatible with humanitarian considerations" within meaning of extradition treaty between Australia and Indonesia – Whether Minister's satisfaction required to be based upon "Australian standards" of fair trial.

Words and phrases – "Australian standards", "surrender determination", "unjust, oppressive or incompatible with humanitarian considerations".

Extradition Act 1988 (Cth), ss 10(1), 11, 22.
Extradition (Republic of Indonesia) Regulations 1994 (Cth), Schedule.
Extradition Treaty between Australia and the Republic of Indonesia, Art 9(2)(b).

FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ.

Introduction

1 The Minister for Home Affairs and Justice ("the Minister") made a determination under the *Extradition Act* 1998 (Cth) ("the Act") that Mr Adrian Adamas, an Australian citizen, be surrendered to the Republic of Indonesia to serve a sentence of life imprisonment for an offence against Indonesian law of which he was convicted in his absence by an Indonesian court.

2 The outcome of this appeal turns on whether the Minister acted on a correct interpretation of Art 9(2)(b) of the Extradition Treaty between Australia and the Republic of Indonesia ("the Treaty"), as given force by the Act, in being satisfied, for the purpose of making that determination, that the surrender of Mr Adamas would not be "unjust, oppressive or incompatible with humanitarian considerations".

3 Contrary to the conclusion of the primary judge in the Federal Court (Gilmour J)[1] and of a majority of the Full Court of the Federal Court (McKerracher and Barker JJ, Lander J dissenting)[2], the interpretation on which the Minister acted was correct.

The Act and the Treaty

4 A principal object of the Act is to enable Australia to carry out its obligations under extradition treaties[3], which the Act relevantly defines to mean treaties relating to the surrender of persons accused or convicted of offences[4]. Regulations made under the Act may declare a country to be an extradition country for the purposes of the Act[5]. Regulations made under the Act may also state, and by force of s 11 of the Act have the effect, that the Act applies in

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1 *Adamas v O'Connor (No 2)* (2012) 291 ALR 77.

2 *O'Connor v Adamas* (2013) 210 FCR 364.

3 Section 3(c).

4 Section 5 ("extradition treaty").

5 Section 5 ("extradition country").

relation to a specified extradition country subject to limitations, conditions, exceptions or qualifications necessary to give effect to a bilateral extradition treaty, a copy of which is to be set out in those regulations[6].

5 The Extradition (Republic of Indonesia) Regulations 1994 ("the Regulations") declare the Republic of Indonesia to be an extradition country[7]. The Regulations also state that the Act applies in relation to the Republic of Indonesia subject to the Treaty[8], a copy of the English text of which is set out in the Schedule to the Regulations.

6 That the Act is applied in relation to the Republic of Indonesia subject to the Treaty has an effect at the final stage of the multi-stage process for extradition under the Act. A person sought to be extradited from Australia will by that stage, in the ordinary course, have been the subject of: a provisional arrest warrant issued by a magistrate on application made on behalf of the Republic of Indonesia[9]; remand by a magistrate following arrest under that provisional arrest warrant[10]; an extradition request to the Attorney-General by the Republic of Indonesia[11]; a determination by a magistrate of eligibility for surrender in relation to the extradition offence or extradition offences in respect of which surrender is sought by the Republic of Indonesia[12]; and a warrant by that magistrate ordering commitment to prison to await surrender or release as determined by the Attorney-General[13].

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6 Section 11(1)(a) and (1C).

7 Regulation 4.

8 Regulation 5.

9 Section 12.

10 Section 15.

11 Section 16.

12 Section 19(1).

13 Section 19(9).

7 The Attorney-General, or other Minister of State for the Commonwealth administering the provision[14], is required by s 22(2) of the Act to determine at that final stage of the extradition process whether the person is to be surrendered in relation to the extradition offence or extradition offences in respect of which the person has been determined to be eligible for surrender. Determination that the person is to be surrendered is ordinarily to be followed by the issue of a warrant under s 23 for the surrender of the person to the Republic of Indonesia. Determination that the person is not to be surrendered is to be followed by the making of an order that the person be released[15].

8 Section 22(3) of the Act provides that, for the purpose of s 22(2), the person is to be surrendered only if specified conditions are met. Section 22(3)(e) specifies one of those conditions in the following terms:

> "where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:
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> …
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> (ii) surrender of the person in relation to the offence may be refused;
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> in certain circumstances – the Attorney-General is satisfied:
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> …
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> (iv) where subparagraph (ii) applies – either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused".

9 A provision of the Treaty which, by force of s 11, engages s 22(3)(e)(ii) and (iv) of the Act is Art 9(2)(b). Article 9(2)(b) provides that extradition may be refused in circumstances:

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14 Section 19A of the *Acts Interpretation Act* 1901 (Cth).

15 Section 22(5).

> "where the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is requested, the extradition of that person would be unjust, oppressive or incompatible with humanitarian considerations".

10 Other provisions of the Treaty which bear on the interpretation of Art 9(2)(b) include Art 1(1) and Art 11(2)(b). Article 1(1) provides:

> "Each Contracting State agrees to extradite to the other, in accordance with the provisions of this Treaty, any persons who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence."

It may be noted that an extraditable offence within the meaning of the Treaty includes an offence involving embezzlement or fraud punishable by the laws of both Contracting States by a term of imprisonment of not less than one year or by a more severe penalty[16]. Article 11(2)(b) provides that "a request for extradition shall be accompanied":

> "if a person has been convicted in his absence of an offence – by a judicial or other document, or a copy thereof, authorising the apprehension of the person, a statement of each offence for which extradition is sought and a statement of the acts or omissions which are alleged against the person in respect of each offence".

11 Bearing also on the interpretation of Art 9(2)(b) of the Treaty is s 10(1) of the Act. Section 10(1) provides and, when the Treaty was done in 1992, provided:

> "Where a person has been convicted in the person's absence of an offence against the law of an extradition country, whether or not the conviction is a final conviction, then, for the purposes of this Act, the person is deemed not to have been convicted of that offence but is deemed to be accused of that offence."

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16 Article 2(1)(20).

The significance of s 10(1) for Art 9(2)(b) of the Treaty lies in its express contemplation of the Act applying to the extradition of a person who has been convicted in his or her absence of an offence against the law of an extradition country even where the conviction is a final conviction. The Treaty does not, as do some extradition treaties to which Australia is a party, contain a provision to the effect that a person convicted in his or her absence is not to be extradited unless the Requesting State gives assurances that the person will have an opportunity to put forward a defence[17]. The consequences of a person being deemed by s 10(1) not to have been convicted, but to be accused, of an offence are confined to the nature of the supporting documents required to be produced to the magistrate determining eligibility for surrender: a warrant for arrest rather than a document providing evidence of conviction and sentence[18].

Facts

12 Mr Adamas, then an Indonesian citizen and then known as "Adrian Kiki Ariawan", was between 1989 and 1998 the President Director of Bank Surya. Mr Bambang Sutrisno was then the Vice President Commissioner of Bank Surya. Mr Adamas moved to Australia in 1999 and became an Australian citizen in 2002.

13 Mr Adamas and Mr Sutrisno were in 2002 each tried and convicted in their absence by the Central Jakarta District Court of an offence against Art 1(1.a) of Indonesian Law No 3 Year 1971 on Combating Corruption Crime. Each was sentenced in his absence to life imprisonment.

14 The conduct of Mr Adamas and Mr Sutrisno found to give rise to each offence involved misusing funds of Bank Surya for their own purposes, leading to serious liquidity problems for Bank Surya, and then engineering the extension of discount facilities to Bank Surya by the Indonesian Central Bank, leading to extensive losses by the Indonesian Central Bank and therefore to the finances of the Republic of Indonesia.

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17 For example Art 12 of the Treaty on Extradition between Australia and the United Mexican States; Art 6 of the Treaty on Extradition between the Government of Australia and the Government of the Republic of Argentina.

18 Sections 19(2)(a) and 19(3)(a) and (b).

15 Mr Sutrisno appealed against his conviction to the High Court of Jakarta. That appeal was taken under Indonesian law also to be made on behalf of Mr Adamas. The High Court of Jakarta dismissed the appeal in 2003.

16 In 2008, Indonesian authorities issued a warrant for the arrest of Mr Adamas and the Republic of Indonesia formally requested his extradition. Also in 2008, a magistrate issued a provisional arrest warrant on application made on behalf of the Republic of Indonesia. In 2009, following arrest and remand of Mr Adamas, another magistrate determined his eligibility for surrender and, by warrant, ordered that he be committed to prison to await surrender or release.

17 At the end of 2010, the Minister determined under s 22(2) of the Act that Mr Adamas be surrendered to the Republic of Indonesia. He did so on the basis of a recommendation by officers of the Attorney-General's Department. The recommendation was contained in a written submission to the Minister which analysed in detail representations made by Australian lawyers acting for Mr Adamas.

18 On the topic of s 22(3)(e) of the Act and Art 9(2)(b) of the Treaty, the submission to the Minister propounded the criterion in Art 9(2)(b) as involving broad overlapping, qualitative concepts "which call for the making of assessments and value judgments about which reasonable minds may differ". The submission did not limit the criterion by reference to standards defined by Australian domestic law and practice, although reference was made to Australian case law on the right to a fair trial.

19 The submission informed the Minister that Indonesian law permitted the conviction of Mr Adamas in his absence and that the trial of Mr Adamas accorded with Indonesian law. The submission informed the Minister that it was nevertheless open to the Minister to conclude that the trial was not conducted in accordance with Australian standards and that the sentence of life imprisonment was excessive by Australian standards. The submission also informed the Minister that a limited form of review of the conviction and sentence remained available to Mr Adamas under Art 263 of the Indonesian Criminal Procedure Code and that there was no information to suggest that the review could not be conducted to accord with fair trial rights under Art 14 of the International Covenant on Civil and Political Rights. The submission also made reference to the very serious nature of the offence of which Mr Adamas was convicted and to Indonesia's interest in pursuing those responsible for major corruption in

Indonesia. The submission concluded its analysis of the topic by stating that, taking the totality of the circumstances into account, it was open to the Minister to conclude that it would not be unjust, oppressive or incompatible with humanitarian considerations for Mr Adamas to be surrendered to the Republic of Indonesia.

20 The submission did not ask the Minister to indicate his reasoning or conclusion on the topic of s 22(3)(e) of the Act and Art 9(2)(b) of the Treaty, or on any other specific topic which it covered. The submission rather recommended that the Minister read the whole of the analysis "and determine under s 22(2) of the Act that [Mr Adamas] be surrendered to Indonesia". The Minister indicated his adoption of that recommendation by circling the word "approved" and signing the submission, and by going on to sign a warrant for the surrender of Mr Adamas to the Republic of Indonesia.

Federal Court of Australia

21 On being notified of the Minister's decision, Mr Adamas commenced a proceeding in the Federal Court of Australia for judicial review under s 39B of the *Judiciary Act* 1903 (Cth). He was successful both before the primary judge and, on appeal by the Minister, before the Full Court.

22 The primary judge inferred, uncontroversially, that the Minister adopted the analysis set out in the submission in making the determination under s 22(2) of the Act[19]. The primary judge held that the analysis so adopted by the Minister incorporated a wrong legal test in that the analysis failed to recognise that whether or not it would be unjust, oppressive or incompatible with humanitarian considerations for Mr Adamas to be surrendered was to be determined according to "Australian standards"[20]. The adoption of that wrong legal test had the further result that the analysis took account of an irrelevant consideration (that the trial of Mr Adamas accorded with Indonesian law) and failed to take account of relevant considerations (most significantly, the application of Australian law)[21]. The primary judge went on to hold that the Minister, had he applied the correct

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19 (2012) 291 ALR 77 at 88 [66].

20 (2012) 291 ALR 77 at 91 [81].

21 (2012) 291 ALR 77 at 90-91 [75]-[80].

legal test, could not reasonably have concluded that it would not be unjust, oppressive or incompatible with humanitarian considerations for Mr Adamas to be surrendered[22].

23 The primary judge did not elaborate on what he saw as the content of the obligation to apply "Australian standards" but appeared to equate it to a requirement that the Minister "apply Australian law", the relevant law being "case law relating to a fair trial"[23].

24 The primary judge made orders that the determination made under s 22(2) of the Act and the warrant issued under s 23 of the Act be quashed.

25 The Full Court dismissed an appeal from those orders. The Full Court was unanimous in holding that the primary judge erred in finding that the Minister's decision was unreasonable[24]. The Full Court was divided, however, on whether the Minister adopted a wrong legal test, took account of an irrelevant consideration or failed to take account of relevant considerations. The majority, agreeing in substance with the primary judge, held that whether surrender would be unjust, oppressive or incompatible with humanitarian considerations "must be assessed from an Australian perspective against Australian standards, not by any other perspective or standards that do not form part of Australian law"[25]. The analysis in the submission adopted by the Minister did not adopt that approach. The minority found no error in the analysis adopted by the Minister[26].

Appeal

26 The Minister, in this appeal by special leave from the decision of the Full Court of the Federal Court, argues that the majority in the Full Court erred in holding that the Minister was obliged to assess whether surrender of Mr Adamas

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22 (2012) 291 ALR 77 at 95 [99].

23 (2012) 291 ALR 77 at 91 [78].

24 (2013) 210 FCR 364 at 377 [72], 382 [127], 447 [441].

25 (2013) 210 FCR 364 at 382 [127], 420 [332].

26 (2013) 210 FCR 364 at 382 [124].

would be unjust, oppressive or incompatible with humanitarian considerations against Australian standards.

27 Mr Adamas resists that argument. He further argues by notice of contention that the decision of the Full Court should be affirmed on the basis that the Full Court ought to have upheld the primary judge's finding that the Minister's decision was unreasonable. His further argument that the Minister's decision was unreasonable is premised, however, on the correctness of the conclusion of the majority in the Full Court that the Minister was obliged to apply Australian standards.

Analysis

28 The starting point for analysis is the text of the Act. Section 22(2) of the Act confers a power subject to preconditions. The power, relevantly, is to determine that a person be surrendered to the Republic of Indonesia in relation to one or more extradition offences in respect of which the person has been determined to be eligible for surrender. A precondition, imposed by s 22(3)(e)(ii) and (iv) of the Act read with Art 9(2)(b) of the Treaty as given force by s 11 of the Act, is that the Attorney-General, or other Minister of State for the Commonwealth administering s 22 of the Act, be "satisfied": either that circumstances permitting Australia to refuse surrender under Art 9(2)(b) of the Treaty do not exist; or that circumstances permitting Australia to refuse surrender under Art 9(2)(b) of the Treaty do exist, but that nevertheless surrender should not be refused. Implicit in the statutory requirement that the Attorney-General or other Minister of State be so satisfied is a requirement that the Attorney-General or other Minister of State form that satisfaction reasonably and on a correct legal understanding of Art 9(2)(b) of the Treaty as given force by s 11 of the Act[27].

29 Turning next to the text of the Treaty as set out in the Schedule to the Regulations, it is apparent that, to be satisfied that circumstances permitting Australia to refuse to surrender a person under Art 9(2)(b) of the Treaty do not exist, the Attorney-General or other Minister of State, as the relevant decision-maker for Australia as the Requested State under the Treaty, must be satisfied that he or she does not consider that "the extradition of that person would be

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27 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5.

unjust, oppressive or incompatible with humanitarian considerations" within the meaning of those words in Art 9(2)(b) of the Treaty. That satisfaction must be formed "in the circumstances of the case, including the age, health or other personal circumstances of the person" and "also taking into account the nature of the offence and the interests of [the Republic of Indonesia as] the Requesting State"[28].

30 It follows that, to proceed to the making of a determination under s 22(2) of the Act that a person be surrendered to the Republic of Indonesia in relation to an extradition offence in respect of which the person has been determined to be eligible for surrender on the basis of satisfaction that circumstances permitting Australia to refuse surrender under Art 9(2)(b) of the Treaty do not exist, the Attorney-General or other Minister of State must form the following satisfaction reasonably and on a correct legal understanding of Art 9(2)(b). The Attorney-General or other Minister of State must be satisfied that, in all the circumstances of the case and taking into account the nature of the offence and the interests of the Republic of Indonesia, surrender of the person to the Republic of Indonesia would not be "unjust, oppressive or incompatible with humanitarian considerations" within the meaning of Art 9(2)(b) of the Treaty.

31 Section 11 of the Act gives force to the Treaty only to the extent of the text set out in the Schedule to the Regulations. Article 9(2)(b) of the Treaty as given force by s 11 of the Act, for that reason, could not be affected by any subsequent agreement or practice of Australia and the Republic of Indonesia[29].

32 Article 9(2)(b) of the Treaty as set out in the Schedule to the Regulations is nevertheless to be interpreted for what it is: a provision of a treaty[30]. As a provision of a treaty, its text is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of

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28 Article 9(2)(b) of the Treaty.

29 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238 [65]; [2012] HCA 28. Cf Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties.

30 See *Maloney v The Queen* (2013) 87 ALJR 755 at 764 [14] fn 25; 298 ALR 308 at 313; [2013] HCA 28; *Riley v The Commonwealth* (1985) 159 CLR 1 at 15; [1985] HCA 82.

the object and purpose of the Treaty[31]. If that meaning were to be ambiguous or obscure or manifestly absurd or unreasonable, recourse could be had to supplementary means of interpretation[32].

33 In the specific context of the interpretation of the provision of a bilateral extradition treaty, the Supreme Court of the United States long ago observed[33]:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."

34 Interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Treaty, the expression "unjust, oppressive or incompatible with humanitarian considerations" in Art 9(2)(b) of the Treaty admits of no relevant ambiguity. The expression encapsulates a single broad evaluative standard to be applied alike by each Contracting State whenever that Contracting State finds itself in the position of the Requested State. The standards applied within each Contracting State are relevant to its application, as are international standards to which each Contracting State has assented, but none is determinative.

35 The words "where the Requested State … considers" emphasise the qualitative nature of the evaluation to be made by the Requested State in the application of that single standard. They provide no warrant for the application of a different standard by each Contracting State, much less for the application by each Contracting State of a standard based wholly on domestic laws and practices prevailing within that Contracting State.

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31 Article 31(1) of the Vienna Convention on the Law of Treaties.

32 Article 32 of the Vienna Convention on the Law of Treaties.

33 *Factor v Laubenheimer* 290 US 276 at 293 (1933).

36 The circumstance that, under s 22(3)(e)(ii) and (iv) of the Act, the consideration required by Art 9(2)(b) is to be given by a Minister of the executive government is an indication that the standards to be applied are not to be equated with Australian domestic law, the exposition and application of which are the province of the judiciary.

37 The primary judge and the majority in the Full Court were therefore wrong to hold that the Minister was obliged to apply Australian standards in assessing whether surrender of Mr Adamas to the Republic of Indonesia would be unjust, oppressive or incompatible with humanitarian considerations within the meaning of Art 9(2)(b) of the Treaty as given force by s 11 of the Act. Mr Adamas relied upon statements in previous cases that he submitted supported this aspect of the reasoning of the courts below. Those statements were made in materially different circumstances. *Bannister v New Zealand*[34] concerned a judicial determination of whether "it would be unjust, oppressive or too severe a punishment to surrender [a] person"[35] to New Zealand. *Foster v Minister for Customs and Justice*[36], though it concerned a determination by a Minister, concerned a standard for determination in reg 7 of the Extradition (Commonwealth Countries) Regulations (Cth) and not a bilateral treaty. The application of Australian standards is implicit in both of those circumstances[37]. In assessing whether extradition of a person is "unjust, oppressive or incompatible with humanitarian considerations" within the meaning of Art 9(2)(b) of the Treaty, Australian standards are appropriate to be taken into account. Australian standards cannot, however, be determinative of that assessment.

Conclusion

38 The Minister acted on a correct interpretation of Art 9(2)(b) of the Treaty. The Minister was not obliged to apply Australian standards and would have been

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34 (1999) 86 FCR 417.

35 See s 34(2) of the Act.

36 (2000) 200 CLR 442; [2000] HCA 38.

37 *Bannister v New Zealand* (1999) 86 FCR 417 at 430 [26]; *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 458 [43].

wrong to confine his consideration to the application of Australian standards. It follows that the Minister's principal argument in the appeal must be accepted and that Mr Adamas's argument that the Minister's decision was unreasonable cannot succeed.

39 The Minister does not seek to disturb the orders for costs made by the primary judge or by the Full Court. Accordingly, the appropriate orders to be made are as follows:

1. Appeal allowed.

2. Set aside order 1 of the orders of the Full Court of the Federal Court of Australia made on 15 February 2013 and, in its place, order that:

   (a) the appeal to that Court be allowed; and

   (b) the orders of the Federal Court of Australia made on 15 March 2012 be set aside and, in their place, order that the application to that Court be dismissed.