The Incorporation of Human Rights Standards into Australian Extradition Law

Peter Johnston

ABSTRACT:

This paper in Part I explores the extent to which the Extradition Act 1988 (Cth) incorporates international human rights standards such as the fair trial standards under the International Covenant on Civil and Political Rights 1966 (ICCPR). It argues that modification of the Act to accommodate conditions in bilateral treaties between Australia and other countries authorising the Attorney General to refuse to surrender a requested person where it would be ‘unjust, oppressive or incompatible with humanitarian standards’ imports into extradition decisions the fair trial standards in Article 14 of the ICCPR. Further, satisfaction of those fair trial standards arguably amount to a relevant consideration in determining the issue.

Part II by way of qualification questions the capacity of Australian courts to effectively exercise judicial review in respect of an extradition decision even if the foreign trial is likely to be inconsistent with Australian and international standards of fairness. The article concludes that due to limitations on and practical difficulties with the reviewability of the decision to surrender, regard for ‘fair trial’ standards may be rendered irrelevant due to a lack of any statutory or constitutional requirement for the Attorney to explain and justify a surrender decision. In the absence of any obligation to reveal the basis of the decision a person who faces extradition to a country that is unlikely to afford a fair trial will find it practically impossible to advance any objection founded on that possibility.
The incorporation of human rights standards into Australian extradition law

Dr Peter Johnston*

INTRODUCTION

The tension between the obligation to extradite and protection of the individual’s civil liberties

It is accepted that challenges to deportation in the field of refugee law in the quarter century since *Kioa*¹ have provided a great source of energy fuelling the development of administrative law principles. In that respect they resemble the galaxies revealed by the Hubble telescope tracking the expansion of the Universe.

Although not so prolific, extradition challenges have also played a substantial role in that regard. The two fields overlap but also have their distinct features, and the High Court has been vigilant to ensure that deportations do not mask a process of disguised extradition.² Because of its legal complexity, aggravated by encrustations of amendments, the arcane systems of foreign law often encountered, and the often highly charged political profile of the cases, to enter the labyrinthine territory of extradition law entails the risk faced by the sojourner venturing into that country from whose dread boundaries no visitor ever returns.³ Even then, immigration law and extradition law tend to represent opposite polarities in that challenges brought by refugees are often regarded benignly while those mounted by persons facing extradition tend to be looked down upon with suspicion and scepticism as instances of seriously dangerous or deviously corrupt criminals drawing upon secret funds to advance spurious technical objections. Although a species of criminal proceedings⁴ applicants in extradition cases tend not to be accorded the benefit of the presumption of innocence.

It is a commonplace of international extradition law that it exists to facilitate cooperation between states so that perpetrators of serious crimes fleeing from one territorial jurisdiction are not immune from prosecution by claiming sanctuary in another. Rather, predominantly under bilateral treaty agreements, provision is made for the surrender of criminal fugitives to a state that seeks the return of an alleged offender. Equally, it is also accepted that extradition is a coercive administrative process that entails removing a person from his or her place of residence and subjecting them to criminal legal process in another country. Even if a person is not surrendered involvement in extradition proceedings results in substantial incursions on one's

---

¹ *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550.
³ With due apologies to William Shakespeare, *Hamlet*, Act 3 Sc 1 Lines 78-79 referring to death as ‘the undiscovered country from whose bourn no traveller returns’.
⁴ *O’Donoghue v Ireland* [2008] HCA 14; (2008) 234 CLR 599 at [23] (Gleeson CJ);
liberty, interference with one's normal life, and usually considerable expense. It is not surprising then that extradition arrangements among countries address that problem by importing restrictions on the process to afford protection against arbitrary abuse and violation of the civil and political rights of a person whose extradition is sought. These two objectives, returning offenders in a proper case to answer criminal charges while nevertheless protecting accused persons against undue incursion into their personal freedoms represent two polarities that create an inherent tension in the extradition process.

**The propounded theses**

Part I of this article explores the extent to which the *Extradition Act 1988* (Cth) (the Act) arguably incorporates international human rights standards such as the fair trial standard under the *International Covenant on Civil and Political Rights 1966* (ICCPR) so as to restrain extradition in cases where a requested person is likely to face an unfair trial in the requesting country. It comes down affirmatively on the side of the proposition that modification of the Act to accommodate extradition exceptions included in bilateral extradition treaties between Australia and other countries is capable of importing, in a relevant case, the fair trial standards in Article 14 of the ICCPR into the evaluation of whether extradition should be refused. Further, reference to international fair trial standards arguably amounts to a relevant consideration in determining that issue. Accordingly, they provide a basis for advancing more illuminating submissions in legal argument before the courts.

This prompts a further question: irrespective of whether Article 14 has been given a statutory status in Australian law, to the extent that Australia is under an international obligation to observe the provisions of the ICCPR should the fact that Australia may breach that obligation if the Attorney General authorises the surrender of a person be a relevant consideration when making an extradition decision? The article concludes that it should.

As a subsidiary consequence, the recognition of the relevance of these international standards opens the way for Australian courts to more readily access, in an appropriate case, the comparative jurisprudence of other human rights tribunals such as the European Court of Human Rights. Further, if there is a substantive incorporation of international standards, there may be greater scope for invoking arguments based on considerations of proportionality.

Part II by way of qualification questions the capacity of Australian courts to effectively exercise judicial review in respect of an extradition decision even if the foreign trial is likely to be inconsistent with Australian and international standards of fairness. The article concludes that

---


6. Matthew Groves, ‘International Law and Australian Prisoners’ (2001) 24 University of New South Wales Law Journal 17 at [58] endorses the view that reference to equivalent concepts in European human rights instruments is instructive, engaging decisions of the European Commission on Human Rights and the European Court of Human Rights. In Momcilovic v The Queen [2011] HCA 34; (2011) 245 CLR 1 the High Court referred extensively to such decisions. Unlike the Victorian legislation considered in Momcilovic having regard to international human rights standards in making surrender decisions under the Act does not require a court to make declarations that the Act is in some aspect incompatible with those standards.

7. As a matter of caution it should be observed that it will only be in specific instances that reference to such comparative human rights jurisprudence will prove illuminating and informative.
due to extreme limitations on, and practical difficulties with the judicial reviewability of the Attorney General’s decision (or more usually that of the Minister to whom the function is delegated)\(^8\) regard for ‘fair trial’ standards may be shielded\(^9\) and hence rendered immune from review due to a lack of any statutory or constitutional requirement for the Attorney to disclose and justify\(^10\) a surrender decision. In the absence of any obligation to reveal the basic reasons for such a decision a person facing extradition to a country that is unlikely to afford a fair trial will find it impossible, or at least be practically prejudiced, in attempting to advance any objection founded on that basis.

**PART I: THE RELEVANCE OF FAIR TRIAL STANDARDS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**The principle of a fair trial**

It is incontestable that a fair trial is one of the fundamental elements of the common law system as developed in Australia and a central pillar of our criminal justice system.\(^11\) This article explores the extent to which a person subject to extradition can resist extradition based on the objection that he or she is unlikely to receive a fair trial in the other country.

---

8 In this article ‘the Attorney’ and ‘Minister’ are used interchangeably to describe the relevant officer performing surrender functions under s 22 of the Act, except where the expression ‘Minister’ is more apt in a particular case. Regarding whether there is any special significance in the statutory nomination of the Attorney General as the decision-maker Lander J in *Honourable Brendan O’Connor v Adamas (Adamas)* [2013] FCAFC 14 at [123] suggested that the fact that Parliament has vested the functions in the first law officer permits an implication to be drawn that the person administering the Act will have special legal insights concerning its interpretation and operation. That is arguably a questionable assumption, especially in the modern era when an Attorney General is a political member of the Government and not necessarily an independent legal advisor (as was the case in the UK earlier in the 20th century). See Len King, ‘The Attorney-General, Politics and the Judiciary’ (2000) 29 University of Western Australia Law Review 155; Alana McCarthy, ‘The Evolution of the Role of the Attorney-General’ (2004) 11 Murdoch University Electronic Journal of Law; David Bennett, ‘The Roles and Functions of the Attorney-General of the Commonwealth’ (2002) 23 Australian Bar Review 62 and Christos Mantziaris, ‘The Federal Division of Public Interest Suits by an Attorney-General’ (2004) 25(2) Adelaide Law Review 211.

9 Or to adopt the expression used by Flick J in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [387], to “insulate” herself or from review.

10 As will later be explained, this article distinguishes between an Australian common law duty to give reasons and the Canadian principle of a requirement to justify an administrative decision.

11 *Dietrich v R* (1992) 177 CLR 292 at [6] (Mason CJ and McHugh J). It is another thing, however, to attempt to list exhaustively the attributes of a fair trial; ibid, [8]. In *Rivera v United States of America* [2004] FCAFC 154 the appellant sought to invoke the *Dietrich* principle and also rely on Article 14 of the ICCPR in relation to the fairness of proceedings before an Australian magistrate under s 19 of the Act. The Full Federal Court (Heerey, Sundberg and Crennan JJ) at [24]-[30] held that reliance in each case was predicated on the misconception that the criminal charge against him was being determined in the proceedings conducted under the Act; those proceedings were, however, an administrative determination of his eligibility for surrender not a determination of his guilt. *Dietrich* was therefore inapplicable. See similarly *O’Donoghue v Honourable Brendan O’Connor* [2012] FCAFC 47 (Keane CJ, Rares and Lander JJ) at [52] noting that extradition proceedings are civil not criminal, but query that view: see Gleeson CJ note 4 above. In *Momiclovic v The Queen* note 7 above at [96] French CJ observed that in declaring whether statutory provisions were inconsistent with human rights a distinction could be drawn between civil and criminal proceedings.
Means of including provisions in Australian extradition law protecting human rights

For Australian purposes, it has been claimed that the Act purports to resolve the tension between cooperating to extradite fugitives from justice and protecting the liberty of individuals by "striking a balance" between the interests of the extradition country in retrieving those whose return it seeks for violation of its laws, those of Australia in upholding its dominion over those presently on its territory, and those of the alleged extraditable persons." Those underlying purposes are not, however, immediately evident from a perusal of the principal objects of the Act. Relevantly, regarding extradition from Australia, s 3 expresses the Act's objects as "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 eligible to be extradited ... and ... to enable Australia to carry out its obligations under extradition treaties."

To appreciate the extent to which the Act affords protection of the human rights of a person whose extradition is sought it is necessary to have regard to:

- First, statutory objections and prohibitions against extradition directly set forth in the Act; and
- Secondly, guarantees and limitations provided for in extradition treaties which are given legal effect so as to modify the operation of Part II of the Act.

Among the first category, s 7 of the Act explicitly provides that a person is not eligible for extradition if:

- the offence for which extradition is sought is a 'political offence';
- the surrender of the person is sought in order to punish the person on account of, among other reasons, the person's race, religion, nationality, or political opinion; or
- they may be prejudiced at their trial by reason of such factors.

Significantly, these restrictions reflect fundamental human rights standards which are the subject of existing human rights instruments.

---

12 Whether it is possible to perform a 'balancing' calculation objectively in exercising the discretion to refuse extradition is questioned later in this article. Regarding the notion of 'balance' see E P Aughterson, 'Australian Extradition Law', paper delivered at the Commonwealth Criminal Law Conference, Sydney, September 2008, p 1.

13 Director of Public Prosecutions (Cth) & the Republic of Austria v Kainhofer (Kainhofer) (1995) 185 CLR 528 per Gummow J at [48]. To similar effect regarding English law prior to 2002, see Lord Griffiths in R v Horseferry Road Magistrates' Court; Ex parte Bennett [1994] 1 AC 42, 61-62: 'Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country.' (Emphasis added.) In general concerning the protective object, see Aughterson, above note 13, p1.

14 Section 3 of the Act also includes a further object of providing for “proceedings by which courts may determine whether a person is to be ... extradited, without determining the guilt or innocence of the person.”

15 The distinction is sometimes drawn between express statutory provisions as objections and protections under treaties as exceptions or conditions, the latter reflecting the terms of s 11 of the Act. An objection to extradition for political offences can be raised to bar extradition; see ss 5 (definition) and 7 of the Act.
Protections within the second category are necessarily dependent on specific provisions made in individual extradition treaties and therefore vary according to the arrangements entered into by the parties to a particular treaty. In many cases these exceptions replicate statutory exceptions within the first category, such as the prohibition on extradition in relation to a 'political offence'. However, most bilateral treaties normally go further and incorporate articles which provide, for example, that extradition shall not be granted where a person may be subjected to torture or to 'cruel, inhuman or degrading' treatment or punishment.

One such specific exception common in many recent treaties (referred to hereafter as the 'unjust' exception' and which is the subject of this analysis) is expressed as follows:

*Extradition may be refused* in any of the following circumstances:

- if 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 sought, the extradition of that person would be
  - unjust,
  - oppressive,
  - incompatible with humanitarian considerations, or
  - too severe a punishment. (Emphasis added)

### Applying protective limitations in treaties under the Extradition Act

The question arises: what is the legal effect of including a provision like the 'unjust exception' in an extradition treaty? The legislative mosaic is set forth in sub-ss 11(1) and (1A) of the Act. They relevantly provide that regulations may be made in relation to specific countries applying the Act "subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country." The legal consequence is that where regulations are made under s 11 to give effect to a bilateral treaty, the Act applies in relation to extradition arrangements between Australia and the other country in a modified form that adapts the operation of the Act to conform to exceptions provided in the relevant treaty.

Hence if a treaty includes a provision like the 'unjust exception' it takes effect as a provision of the Act. Consequently, it forms part of domestic Australian law governing extradition between

---

16 These include the ICCPR and the International Convention on the Elimination of Racial Discrimination 1965.

17 A measure of protection is also given by the principle requiring ‘dual criminality’ in many extradition treaties; namely that there must be a measure of substantial correspondence between the extradition offence and offences under Australian criminal law that would be applicable if the relevant acts or omissions of the person occurred in Australia; see E P Aughterson, *Extradition: Australian Law and Procedure*, Law Book Company, Sydney, 1995, 60. For a judicial discussion of the significance of dual criminality as a protection see *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 at [20]-[29] (French CJ), and [68]–[69] (Gummow, Crennan, Kiefel and Bell).

18 Such as in Article 3(1) of the Extradition Treaty between Australia and the Republic of Hungary 1995: “Extradition shall not be granted ... if the offence for which extradition is sought is a political offence.”

19 For an analysis of the statutory framework of the Act see French CJ in *Minister for Home Affairs of the Commonwealth v Zentai*, note 17 above, at [12]-[16].
Australia and the other party. In other words, it has *direct* legal effect as if written into the Act itself.

The immediate effect of incorporating the ‘unjust exception’ is therefore, at the least, to compel the Attorney or the Minister to consider when determining under s 22 of the Act whether to surrender a requested person, the personal and other circumstances of the person against the relevant criterion/criteria with a view to deciding whether to *refuse extradition*. In that context, this article addresses a wider question:

Does engrafting the ‘unjust exception’ into the Act’s operation directly incorporate *more general international human rights standards*, particularly those relating to *rights to a fair trial established by the ICCPR*, into Australian extradition law?

As will be discussed below, this is essentially a question of construction. It entails a consideration of whether the notion of an extradition of a person being *unjust, oppressive, incompatible with humanitarian considerations* could include, as part of its textual content, the sense of ‘unjust’ etc according to the fair trial standards recognised in Article 14 of the *ICCPR*.

**The international fair trial standards**

Relevantly to this analysis, Article 14 provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him … everyone shall be entitled to a *fair and public hearing* by a competent, independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall have the *right to be presumed innocent* until proved guilty according to law.

---

20 Whether the various descriptors in the unjust exception should be treated as separate and individual tests or should be approached as a composite test is discussed below. The preferable view is that they represent an amalgam of conditions with separate meanings but which overlap and tend to work cumulatively.

21 Regarding the primacy of Australian law where an international instrument has been adopted in an enactment, the correct approach is to first ascertain with precision what the Australian law is then to say how much of the international instrument Australian law requires to be implemented: *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 CLR 52 at 71 [61] (Callinan, Heydon and Crennan JJ) applied in *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous (Mahrous)* [2013] FCAFC 75. In *Mahrous* Kenny, Flick and Kerr JJ at [38]; [52]-[55] also noted that the principles set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969 (Vienna Convention)* guide the process of construing provisions of an international agreement where they have, by enactment, become part of the law of Australia, citing *Minister for Immigration and Multicultural Affairs v QAAH of 2004* [2006] HCA 53; (2000 6231 CLR 1 at 14-16 [34]; also *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* [1998] HCA 65; (1998) 196 CLR 161 at 186 [70] (McHugh J) and *Povey v Qantas Airways Ltd* [2005] HCA 33; (2005) 223 CLR 189 at 202 [24]-[25] and 230 [128]. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-6 McHugh J adverted to the general principle that international instruments should be interpreted *in a more liberal manner* than would be adopted if the court was required to construe *exclusively domestic* legislation. See generally R K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 71. Regarding resort to Article 31 of the *Vienna Treaty see Minister for Home Affairs (Cth) v Zentai* note 17 above, 246 CLR 213 at 229-230 [36] (French CJ); 238-239 [65] (Gummow, Crennan, Kiefel and Bell JJ) and *Maloney v The Queen* [2013] HCA 28 at [15] (French CJ).
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence ...;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; ......
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) ....
(g) Not to be compelled to testify against himself or to confess guilt; ......

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. ......

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.22 (Emphasis added)

It may be claimed that because of their relative specificity, the enumeration in paragraph 3 of Article 14 of fairness requirements such as the right to examine prosecution witnesses, identifies categoric situations that detract from a fair trial and thus provides more utilitarian guidance than broader statements about 'equality before the law'.

To similar effect, in relation to extradition treaties with countries that are parties to the European Convention on Human Rights 1950 (ECHR) Article 6 of that Convention prescribes standards governing fairness of trials that a requesting European country will be obliged to observe when making an extradition request.23

Necessarily, the analysis of whether the 'unjust exception' imports Articles 14 of the ICCPR and Article 6 of the ECHR into the Act must extend beyond the mere words used in the unjust exception and have regard to the whole scope and purpose of the Act24 and the other terms of the exception.

---

22 This replicates the common law principles of autrefois convict or autrefois acquit barring double jeopardy for the same offence; this objection is encapsulated in s 7(e) of the Act.

23 Where, for example, reliance is placed to 'a decisive extent' on statements by anonymous witnesses the European Court has held that in accordance with Article 6 defendants to criminal charges must have reasonable means of testing the witnesses' reliability or credibility, particularly where a witness's identification is the only evidence indicating a defendant's presence at the scene of the crime; see Windisch v Austria (1990) 13 EHRR 281, Kostovski v Netherlands (1989) 12 EHRR 434; Doorson v Netherlands (1996) 22 ECHR 330 and Van Mechelen v Netherlands (1997) 25 ECHR 647, applied by the House of Lords in R v Davis [2008] UKHL 36; at [24] - [25] and [44] [Lord Bingham]; [75] -[90] (Lord Mance). Regarding the importance of the opportunity to test evidence of a decisive character under Article 6 ECHR see Secretary of State for the Home Department v AF [2009] UKHL 28. The Grand Chamber of the European Court of Human Rights has somewhat confusedly recognised that in some specific instances hearsay evidence of a deceased witness may be given provided there are reasonable safeguards as to its authenticity; see Al-Khawaja and Tahery v United Kingdom (App Nos 26766/05; 22228/06).

24 It is well established that the correct approach in determining the scope of a statutory discretion that is unconfined by express statutory criteria is to ascertain the factors that may be taken into account by reference to the subject matter, scope and purpose of the statutory provision (see, for
The principles regarding the incorporation of international obligations into Australian domestic law

It is now well established that lacking statutory ratification and endorsement, provisions in an international instrument do not have any immediate and direct legal effect in Australian municipal law.\textsuperscript{25} They may, however, perform other functions such as providing guidance in the event of interpretive difficulties with the construction of an ambiguous provision in an Australian statute. They may also constitute a matter which ought properly to be taken into account in the process of executive administrative decision-making. Finally, in some instances, they may indirectly contribute to the development of common law principles where such a development might otherwise be inconsistent with an international standard or prohibition.\textsuperscript{26}

Turning to the specific instance of the ICCPR it is virtually a truism, often repeated as a judicial mantra, that it is not part of Australian domestic law.\textsuperscript{27} That proposition may be accepted in so far as there is no Commonwealth legislation explicitly enacted for that purpose. That is not to say that since the provisions of the ICCPR have not been enacted so as to give them a statutory status they therefore can be ignored in the course of the Commonwealth decision-making as not constituting a relevant consideration.\textsuperscript{28}


\textsuperscript{25} See Minister of State for Immigration & Ethnic Affairs v Teoh (Teoh) (1995) 183 CLR 273, [25]-[28] (Mason CJ and Deane J). Regarding the capacity of international standards to affect the development of the common law, it may be argued that provisions such as Article 14 of the ICCPR also declare or shape customary international law obligations, such as the notion of a fair trial, and hence would be accessible in relation to Australian extradition decisions if not inconsistent with domestic statute law; see Groves note 7 above at [60]. The issue of incorporation of customary international norms and prohibitions in the field of human rights is vexed; see Nulyarimma v Thompson [1999] FCA 11; (1999) 165 ALR 421.

\textsuperscript{26} Teoh, ibid, at [17]: “Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.” To similar effect see Dietrich v R (Dietrich) 1992) 177 CLR 292 and Coleman v Power [2004] HCA 39; 220 CLR 1 at [17]-[21] (Gleeson J); see also [223]-[267] (Kirby J). Arguably s 11 of the Act has achieved a limited incorporation.

\textsuperscript{27} In Dietrich ibid several members of the Court considered how the ICCPR conformed to the common law concept of a fair trial.
assessing whether an extradition would be ‘unjust’, ‘oppressive’ or ‘incompatible with humanitarian considerations’ should the meaning of those terms be construed by reference to the international human rights standards set forth in Article 14 of the ICCPR?

**Fairness by what standards?**

This engages a broader issue of whether in addressing the fairness of criminal procedures in another country, both systemically and in the particular circumstances of the requested person, are the requirements of a fair trial to be measured by Australian or international standards? That predicates that there may be a divergence between the two, although one would normally start from the assumption that the Australian standards are no lower than those recognised in the ICCPR. This issue is addressed further below. The authoritative position is now that the matter is one to be determined according to Australian standards.

**The starting point: the interpretation of ‘unjust’, ‘oppressive’ or ‘incompatible with humanitarian considerations’**

Whether the incorporation of the ‘unjust exception’ in a bilateral treaty when given Australian domestic effect carries, as a matter of its content, the additional freight of embodying fair trial standards under the ICCPR is admittedly debatable. The first difficulty in making a case that the international fair trial standards in Article 14 of the ICCPR are now comprehended within the ‘unjust exception’ is the fact that the criteria of injustice and oppression have long been a feature in the history of extradition legislation of the United Kingdom and other Commonwealth countries. As a bar to surrender, the notions go back as far as the Fugitive Offenders Act 1881 (UK). As constraints on extradition the criteria of “unjust” and “oppressive” have been taken up in later Australian legislation, including that relating to interstate extradition. While not expressly appearing in the Extradition Act 1988 they are now commonly found in treaties incorporated into the Act. Over time, they have taken on a broad meaning that predates

---

29 The wider issue of whether the interpretation of terms in the Act such as “accused” (see definition of “extraditable person” s 6) should be considered primarily as a matter of domestic Australian law or according to their international meaning is something that requires separate consideration. French CJ in Maloney v The Queen [2013] HCA 28 at [15], for example, discusses the interpretive difficulties that may arise where domestic law incorporates criteria drawn from international instruments, the text of which may lack precision and clarity. He referred to Gummow J in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 275. While the issue cannot be sufficiently addressed in this article, the preferable view in light of the High Court’s decision in Minister for Home Affairs of the Commonwealth v Zentai note 17 above at [65]-[72] (Gummow, Crennan, Kiefel and Bell JJ) appears to be that construction is essentially a domestic matter, although capable of being informed by the relevant jurisprudence of international tribunals. See also Minister for Immigration v Haji Ibrahim [2000] HCA 55; 204 CLR 1 at [136] (Gummow J) holding that a treaty should be construed by first giving its terms their ordinary meaning but bearing in mind the Convention as a whole, including its context, object and purpose, citing McHugh J in Applicant A v Minister for Immigration and Ethnic Affairs (Applicant A) (1997) 190 CLR 225 at 272-275. McHugh J there referred to the interpretive guidelines in Article 31 of the UN Vienna Convention on the Law of Treaties 1969. For an ostensibly contrary English approach see the majority in Assange v The Swedish Prosecution Authority [2012] UKSC 22 where primacy was given to the European rather than British understanding and practice in interpreting the notion of a ‘judicial authority’ charged with issuing extradition warrants as not requiring the officer to be independent of government.


31 The unjust and oppressive test was incorporated in s 18(6) of the Service and Execution of Process Act 1901 (Cth), based on the Fugitive Offenders Act 1881 (UK).
Australia’s accession to the ICCPR. The objection can be raised therefore that each represents a sui generis concept that draws no content from the ICCPR.\(^\text{32}\)

Against this, it can be said that the concepts of injustice and oppressive are facultative so are capable of gravitationally pulling into their notional compass later emerging definitions of rights (such as those in the ICCPR) that aid and inform those tests in particular factual circumstances. That is the very proposition on which this article is founded. It is predicated on the premise that the criteria in the ‘unjust exception’ are flexible and have no fixed meaning that would create a disconformity or inconsistency with the fair trial standards in the ICCPR.

In the first instance, of course, one must start with the way that the notions of unjust, oppressive or not compatible with humanitarian considerations have been interpreted and applied in decisions of Australian courts.

In approaching the meaning of these expressions is as well to heed the injunction of Heydon J in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* that words like “unfair”, “unjust”, “oppressive” or “prejudicial” are not words of exact meaning.\(^\text{33}\)

**One test or three?**

The issue is complicated by a logical objection. Should the phrase “unjust, oppressive or incompatible with humanitarian considerations” be read as setting forth a composite test to be assessed cumulatively, as part of a general evaluation or may it be regarded as a test comprising three separate and disjunctive criteria to be individually assessed?

In *Foster v Minister for Customs and Justice (Foster)*\(^\text{34}\) Gaudron and Hayne JJ suggest that the expression “unjust or oppressive or too severe a punishment” would be better understood as providing a single description of the relevant criterion which is to be applied rather than as three distinctly different criteria. They continued:

> The use of the disjunctive “or” might suggest the need to consider each element of the expression separately but for several reasons we think it preferable not to approach the provision in that way. First, there is the fact that the terms used are, as we have already said, qualitative descriptions requiring assessment and judgment. Secondly, the use of the words “too severe” suggests a need for comparison with some standard of punishment that is regarded as correct or just or, at least, not too severe. Thirdly, the considerations which may contribute to the conclusion that something is “unjust” will overlap with those that are taken into account in considering the other two descriptions. It would, then, be artificial to treat the three ideas as rigidly distinct. Each takes its content, in part, from the use of the others.\(^\text{35}\) (Emphasis added)

An ostensibly different if not contrary view is that stated in *In New Zealand v Moloney,*\(^\text{36}\) There the Court (Black CJ, Branson, Weinberg, Bennett and Lander JJ) said that “as a matter of

\(^{32}\) A similar argument was dismissed by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [64]-[65]; he rejected a submission that the Constitution should be read contemporaneously in accordance with international instruments even though they had been entered into long after the Constitution had been enacted.

\(^{33}\) Ibid at [58].

\(^{34}\) [2000] HCA 38; (2000) 200 CLR 442 at [43].

\(^{35}\) Ibid at [41].

\(^{36}\) Above note 30. It may be objected that, as noted by Barker J in *Honourable Brendan O'Connor v Adams* note 9 above at [325] the qualification found in s 34(2) of the Act differs in form from the terms in which the ‘unjust exception’ is expressed in treaties and regulations made under the Act.
construction, it seems clear that each component in the composite expression "unjust, oppressive or too severe a punishment", must be given some separate meaning. This is so even if there is a degree of overlap between them.”

In *New Zealand v Johnston*[^37] the Full Federal Court treated the concepts of ‘injustice’ and ‘oppression’ in the context of extraditions to New Zealand as forming a composite expression in which the concepts are not entirely distinct. Accordingly, each component in the composite expression should be given some separate meaning even if there is a degree of overlap between them. Building on this their Honours observed that in the composite expression ‘injustice’ is directed primarily to the *risk of prejudice* to the accused in the conduct of the trial itself and oppression is directed to the *hardship* visited upon the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration.[^38]

In *Honourable Brendan O’Connor v Adamas (Adamas)*[^39] Barker J, with whom McKerracher J agreed, commented that that, having regard to *Foster*, one should not take an unduly limited view to the meaning of the words “unjust” and “oppressive” and that they should have a broad connotation that would comprehend any other sufficient cause, including the passage of time since the offences are alleged to have occurred, the health of the person sought, hardship likely to arise through extradition, the likelihood of conviction, prison conditions in the requesting state, the *prospects of a fair trial*, the issue of natural justice and the gravity of the offence.[^40] He went further and added that the concept of “humanitarian considerations” should be considered an extremely broad concept that may, depending on the circumstances of the case, go beyond the notion of a particular circumstance being “unjust” or “oppressive”[^41]. His Honour thereby engaged in a dual operation, attributing a broad sense to each of the words in the ‘unjust exception’ while accepting that those meanings could overlap, and the test overall be satisfied by factors including the prospect of a unfair trial in the requesting country that fall within one or more senses of the individual components of the composite phrase.

It is submitted that in the end there is no real contradiction between the various views expressed in these cases. Cumulatively they represent a compromise between taking a global approach to the circumstances under consideration and evaluating them according to each of the various criteria without treating the various conditions as mutually exclusive.[^42]

[^38]: At [72]. The Court referred to Aughterson, above note 17, 163–164.
[^39]: Note 8 above at [352]. The decision is currently subject to an application to seek leave to appeal the Full Court decision to the High Court.
[^40]: At [323]-[331], [335].
[^41]: At [355]; regarding "incompatible with humanitarian considerations" his Honour referred to Aughterson, above note 17, 171-172. See also *de Bruyn v Minister for Justice* [2004] FCAFC 334 at [63] (Kiefel J).
[^42]: To do so does not, it is submitted, entail the kind of error noted by Gordon J in *Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68 (Besanko, Gordon and Dodds-Stretton JJ) at [34]. Regarding the interrelationship between the meaning to be attributed to individual words in a phrase in construing and applying that phrase Gordon J identified the task as one of construing the language of the phrase as a whole in context rather than selecting the
Decisions to surrender involving the ‘unjust exception’ should therefore be approached in a broad manner that favours a cumulative assessment of all the circumstances. However, in making that evaluation the Attorney should be guided, in a case where fair trial might be an issue, by a correct understanding of particular matters such as whether the proceedings in the requesting country would be considered unfair according to Australian and arguably international standards, and as such, fall specifically within the “unjust” criterion. Alternatively, the same standards can be applied in concluding that the requested person who may have to wait for some time before being subjected to an unfair trial in another country would be pre-eminently subject to “oppression”. Finally, depending on the particular circumstances of the individual, including their health, the third criterion, “incompatibility with humanitarian considerations” could also come into play.

A resolution along the latter lines appears to be consistent with the view adopted by Barker J in Adamas, although, as he acknowledged, this is not a matter that has been authoritatively determined as yet.

**Fairness by Australian standards**

As noted above, if it is accepted that the ‘unjust exception’ requires the Attorney to consider whether a trial in another country would be fair the question follows: ‘fair’ by reference to the laws of the requesting country, international standards, or if they are different, Australian standards? On the basis of current authority, it is clear that the matter is to be assessed having regard to Australian standards.

In summarising the Australian doctrine on this matter Barker J in Adamas, after reviewing various decisions of the High Court (Foster) and the Full Federal Court, including Bannister v New Zealand (Bannister) and New Zealand v Moloney concluded that:

> What is common, however, to the decision of the Full Court in Bannister and the judgments of Gaudron and Hayne JJ and Kirby J in Foster, in my view, is that the question of what might be

---

43 For example, to subject a person of limited intellectual capacity to complex foreign proceedings in the country recognised as not having a competent judiciary and legal profession and where legal aid is not assured could be regarded as infringing this criterion.

44 Above, note 9.

45 There is some ground for concluding that the Department may consider that extradition for trial in a foreign country is sometimes preferable to domestic criminal proceedings due to more flexible fair trial standards in the requesting country. In the case of Mr Zentai, for example, in its submission to the Minister, the Department, after referring to the advice from the Commonwealth Director of Public Prosecutions that an Australian prosecution for war crime would face difficulty in the absence of living witnesses, advised, at [119] that:

> “In these circumstances, any potential difficulties that may be identified with prosecuting Zentai in Australia for an offence allegedly committed in Hungary may not be difficulties which arise in Hungary under its different criminal justice system and which would support refusal.” (Emphasis added)


47 Note 30 above.
considered “unjust, oppressive or too severe a punishment” if extradition of the requested person were to be permitted, is necessarily to be assessed by way of a value judgment, but a value judgment to be informed by reference to Australian standards.\textsuperscript{48}

This brings the analysis full circle. If \textit{Australian standards} are to prevail does that also include considerations set forth in Article 14 of the \textit{ICCPR}?\textsuperscript{49} It is submitted that in an appropriate case it may. This is primarily by virtue of the incorporation of that Article under the rubric of the ‘unjust exception’ although it may be assumed that it informs the \textit{common law concept of a fair trial} which should not be assumed to be inconsistent with it.

\textbf{Instances of Australian refusal of extradition on the basis of the ‘unjust exception’}

An appreciation of the potential impact of Article 14 on Australian extradition decision-making may be gleaned from examining several recent decisions of the High Court and the Full Federal Court where the ‘unjust exception’ was raised.

In \textit{Foster}, the United Kingdom requested Foster’s extradition for a number of fraud charges. He argued that having spent a substantial period of time in custody in Australia where he had fled after absconding on bail in England it was unlikely that he would be sentenced to any additional term if extradited. Hence it would unjust and oppressive to do so. The Minister decided he should be surrendered nevertheless. Foster then claimed that the Minister had fallen into jurisdictional error in failing to ascertain the maximum length of sentence he could receive if extradited as it was relevant to determining what would otherwise be an oppressive surrender. The majority held that the Minister was not bound to make detailed inquiries about the likely sentence which might be imposed in concluding that she was not satisfied that it would be unjust or oppressive or too severe a punishment to surrender him. There being no obligation to make such enquiries, the Court did not have to determine whether the possibility of having to serve further time rendered the surrender unjust or oppressive according to Australian standards.\textsuperscript{50}

In \textit{Bannister},\textsuperscript{51} New Zealand sought the extradition of a person on rape charges. Bannister had been charged in New Zealand in 1998 in relation to events alleged to have occurred many years earlier in 1975. The charges included four which were described as “representative”. In each case the matters alleged were not the subject of separate detailed charges. A magistrate refused extradition under s 34(2) on the basis that Bannister would suffer considerable hardship if he were surrendered to New Zealand, having regard to the lapse of time and his personal circumstances. That decision was reversed on review by the primary judge. On appeal, the Full Court took an adverse view about the fairness of representative charges, regarding them as discredited in Australian practice and no longer allowed in this country. This reflected a ruling

\textsuperscript{48} At [336]-[345]. He added at [403] that this required the Court to identify \textit{Australian law and practice} in relation to \textit{in absentia} convictions.

\textsuperscript{49} Or in a European matter, Article 6 of the \textit{ECHR}.

\textsuperscript{50} The duty to make enquiries of the requesting country is a vexed issue. In \textit{Zentai (No 3)} (at first instance) and in the Full Federal Court on Appeal, Mr Zentai submitted, relying on \textit{Minister for Immigration, Multicultural and Indigenous Affairs v SGLB} [2004] HCA 32; (2004) 78 ALJR 992 and \textit{Minister for Immigration & Citizenship v SZGUR} [2011] HCA 1; (2011) 241 CLR 594 that enquiries should be directed to Hungarian prosecution authorities regarding whether there were any living witnesses to give evidence at his trial, otherwise extradition would be unreasonable. The Court in each instance held there was no obligation. See further note 73 below.

\textsuperscript{51} Note 46 above.
of the High Court that that trial on representative charges presented a risk of a miscarriage of justice.\textsuperscript{52} As a result, the Full Court concluded that in circumstances it would be “unjust or oppressive” to return Bannister to New Zealand to answer the charges. In so doing, the Full Court held that it was permissible to have regard to the \emph{quality of the trial} which the accused person would receive in New Zealand.

In \textit{Moloney},\textsuperscript{53} New Zealand sought the extradition of a member of a religious order who were alleged to have committed various sexual offences against young boys between 1971 and 1980. The respondent claimed that it would be “unjust” to surrender him to New Zealand. It was accepted that the time that has elapsed since these offences were said to have occurred gave rise to difficulties with respect to the fairness of any trial that might take place. In proceedings before a magistrate to determine whether they were eligible for extradition they challenged their extradition on that ground that the lengthy period that had lapsed since the offences were allegedly committed meant that their surrender would be unjust. The magistrate did not uphold that objection.

On review, a single Federal Court judge reversed that finding and set aside the magistrate’s orders. The judge had particular regard to the fact that, unlike New Zealand law, in an Australian trial where a person was accused of sexual offences long after they were allegedly committed the jury had to be given a special warning (known as a \textit{Longman} warning) about the problem of a conviction after such a lapse of time. A \textit{Longman} caution was seen to be necessary to ensure a fair trial in Australia. The Full Court extensively considered the meaning of “unjust”\textsuperscript{54} and in turn overturned the primary judge’s decision, unanimously deciding that while there were differences between Australian and New Zealand law concerning the need for a special warning that did not warrant the conclusion that it would be unjust to return the respondent to New Zealand. In particular, the Full Court concluded that despite the long period that has elapsed since the offences were allegedly committed, it would not necessarily be unjust to surrender the respondent. Whether the long delay was unfair was a matter that \textit{could be left to the New Zealand trial court} to determine.

In \textit{Newman v New Zealand},\textsuperscript{55} the appellant was an 87-year-old man whose extradition was sought in relation to charges of indecent assault of his daughters in a period spanning 1957 to 1961 and 1966 to 1975. In the Full Federal Court he challenged a magistrate’s order that he be surrendered to New Zealand, and the subsequent first instance review confirming that order, on the basis that some of the New Zealand charges made against him were “representative charges”. Accordingly, it would be unjust or oppressive if he were surrendered to New Zealand. The Full Federal Court allowed the appeal on the basis that it would be possible, if he were surrendered, for him to face the charges specified in the warrant some of which were representative. In that case it would be unjust, oppressive to order his surrender at all. The Full

\textsuperscript{52} \textit{S v The Queen} [1989] HCA 66; (1989) 168 CLR 266.

\textsuperscript{53} Note 30 above.

\textsuperscript{54} \texttt{At [74]-[128].}

\textsuperscript{55} [2012] FCAFC 133. In \textit{Newman} at [22] the Full Federal Court, Siopis, Greenwood and Logan JJ queried whether the approach in \textit{Moloney} (note 30 above) was consistent with the views expressed by Gummow and Hayne J in \textit{Foster}. It is submitted that even if it was inconsistent the view of Barker J in \textit{Adamas} note 8 above correctly sums up the current situation.
Court followed *Bannister*, observing that there was no conflict between *Foster, Bannister* and *Moloney.*

In *New Zealand v Johnston* New Zealand sought the extradition of a 69 year old male Australian citizen to answer serious charges of sexual interference with a minor alleged to have occurred in the 1970s. Given the lapse of time, there were concerns that materials adduced in the original investigations and relevant testimony may no longer be accessible and capable of cross-examination.

The Full Federal Court held that the loss of such evidence did not render the respondent's surrender to New Zealand unjust. The Court first noted that allegations of sexual assault against a child are very serious matters and the nature of those allegations should weigh very heavily in favour of extradition. It also noted that in cases involving sexual misconduct towards children, delays, and hence the loss or unavailability of evidence, were very common. It could be expected, however, that any prejudice arising would be a matter that would be assessed by the New Zealand trial court. The loss of capacity to carry out necessary investigations did not constitute prejudice of such seriousness as to render the first respondent's trial in New Zealand unfair. It was not for Australian courts when determining whether surrender would be unjust to assess the strength of the prosecution case and whether the person was likely to be acquitted. The Court however distinguished that situation from a case where there was evidently some fatal flaw or where it was some reason the prosecution was clearly bound to fail.

It may be noted that each of the above cases entailed extradition with other Commonwealth countries, the UK and New Zealand, in which case the *Extradition Act 1988* and earlier legislation has made special provision for extradition to those countries. Necessarily, because they are common law jurisdictions, Australian courts accord a great deal of respect to the fairness of criminal procedures in those countries. Not surprisingly, given the similarity and traditions of criminal process in those instances, Australian courts are well able to evaluate the issues about whether subjecting someone to trial in those countries would be unjust, oppressive, contrary to humanitarian considerations. Invocation of the international standards of fair trial in the *ICCPR* and the *ECHR* in such cases is unlikely to be particularly informative. The latter standards may, however, have a more relevant application in regard to extradition requests from non-common law countries. Two recent decisions of the Full Federal Court illustrate that potential.

In *Adamas* Indonesia requested the extradition of the respondent who had been convicted *in absentia* on serious fraud involving corruption and the disappearance of a great amount of funds. He had been sentenced to imprisonment for life. Indonesian law did not provide an

---

56 Note 30 above, [26]-[28]; [40]-[44].
58 Ibid at [127]-[136].
59 It may be argued on the contrary that paragraph 3(a) of Article 14 of the *ICCPR*, requiring that persons be informed in detail of the nature of the charges against them could provide guidance in relation to the cases dealing with representative charges above, and that paragraph 3(c) requiring the person be tried without undue delay might inform cases in which there were large time gaps between the alleged conduct and the institution of charges (although the provision seems to be primarily concerned with ensuring promptness of trial after arrest rather than lapse of time issues).
60 Note 8 above.
automatic right of appeal or re-trial. Further, Indonesia had provided no evidence that he had been served with any process of a kind that would have made him aware of the charges. His leaving Indonesia would not amount to absconding if he had not been aware that he had been charged.

Barker J, with McKerracher J agreeing, found that while there was no bar on extraditing a person convicted in another country in absentia it was possible that the Minister had been misled by a Departmental submission that merely advised that it was open to him to be satisfied that surrender would not be unjust or oppressive, while failing to explain that the matter had to be evaluated according to Australian notions of fairness. Nor had his attention been drawn to salient facts about the respondent's lack of awareness which could be viewed as unjust by reference to those standards. The Court held that the Minister had constructively failed to take into account relevant considerations by assuming that the Departmental submission had correctly informed him as to his decision-making task when determining whether surrender would be unjust, oppressive or incompatible with humanitarian considerations. This was because the advice he received did not properly identify the question that he should ask himself, namely; whether the in absentia conviction of the respondent in Indonesia in all the circumstances would be considered unjust by Australian standards.

In his reasons, Barker J addressed at length the respondent's submission that the Minister had failed to take into account the operation of Article 14 of the ICCPR's general condemnation of in absentia trials, including reference to decisions of international courts such as the European Court of Human Rights.

His Honour was able independently to find that in the particular circumstances of the case the extradition of Mr Adamas would be unfair by Australian standards. Approaching the matter in that way made reference to specific requirements in Article 14 otiose and unnecessary. Further, to the extent that the Departmental submission disclosed the Department's advice regarding Australia's obligations relating to non-refoulement (not returning someone to a country where the person was likely to suffer prejudice or discrimination) his Honour found that there was nothing erroneous in that advice. Finally, in answer to the respondent's submission that the Minister might have been misled by other advice in the Departmental submission about Australia's obligation not to surrender a person contrary to standards consistent with Article 14, his Honour held that the respondent had not demonstrated that the Minister had failed to have regard to the international obligations Australia under the ICCPR since the Department's

---

61 Taking a broad view of the composite criteria in the 'unjust exception' and referring to Binge v Bennett (1988) 13 NSWLR 578.
62 As well, the respondent contended that the Indonesian conviction in his absence prevented him exercising his right to examine prosecution witnesses, contrary to Article 14(3)(e). This did not figure in the result.
63 The essential content of legal advice in the Departmental submission were redacted from the copy of the submission made available to the respondent and the Court on the basis of legal professional privilege, the Department's claim being upheld in Adamas v Honourable Brendan O'Connor [2011] FCA 948 (Gilmour J).
64 Non-refoulement obligations to refugees under the Migration Act 1958 (Cth) incorporating the Refugee Convention 1950 are frequently addressed by the High Court, a recent example being SZOQQ v Minister for Immigration and Citizenship [2013] HCA 12. Such cases arise in a specific asylum context and should not be too readily equated with sending a person to another country for a potentially unfair trial there.
advice had been redacted. Without knowing its contents the Court was unable to draw any conclusions about its accuracy.  

Significantly, while his Honour had found that the ICCPR was strictly not part of Australian municipal law he was prepared to have regard to comparative jurisprudence of the European Court of Human Rights in determining whether Mr Adamas had been convicted in Indonesia following a fair trial. He was not prepared, however, to conclude that Departmental advice regarding Australia’s international obligations under the Convention contained errors that might have misled the Minister.

In Zentai v Honourable Brendan O’Connor (No 3) (Zentai (No 3)) Hungary sought the extradition of Mr Zentai for interrogation regarding an offence of a ‘war crime’ contrary to s 165 of the Hungarian Criminal Code 1878. The offence entailed the killing of a Jewish student in Budapest.

---

65 See Adamas note 8 above at [448]-[478] (Barker J).

66 Redaction, as discussed below, is one of the factors that can render judicial review of such decisions ineffective.

67 [2010] FCA 691; (2010) 187 FCR 495 (McKerracher J). The author was counsel for Mr Zentai in the various Australian proceedings concerning his case including the Commonwealth’s appeals to the Full Federal Court and the High Court.

68 A separate issue was raised in the course of the litigation concerning Mr Zentai: whether a person merely wanted for interrogation, as against extradition for trial and possible conviction, could be said, as a jurisdictional fact, to be “accused” and hence an “extraditable person” within the meaning of s 5 of the Act. That distinction was drawn by Gummow J in Kainhofer note 14 above, 185 CLR 528, at [88] between proceedings which are “merely investigative or preliminary” in contrast to those where “one can suspect a person in a manner which is the product of a more advanced state of affairs, in particular, accusation by the laying of charges” (emphasis added). McKerracher J on this ground held that Zentai was not liable to extradition. The Full Federal Court reversed his decision on this aspect, holding that the issue of whether he was an “extraditable person” ceased to be relevant once the magistrate had made a decision under s 19 of the Act that he was “eligible” for extradition. This aspect was not pursued on appeal to the High Court. It remains a live issue, similar to that raised by Julian Assange in English proceedings resisting his extradition to Sweden for questioning about sexual offences. It is apparently a contention that may be raised in relation to the request for extradition to Peru of six Australians alleged to have been implicated in the killing of a hotel employee in Lima. In cases of this sort, given modern electronic media such as video conferencing, or interrogation in situ, questions of the unreasonableness of extraditing merely to be questioned can be posed.

69 The offence of war crime in Hungarian statutory criminal law was created retrospectively in 1945 after the relevant events were alleged to have occurred. In Minister for Home Affairs v Zentai note 17 above the High Court upheld the decisions of the judge at first instance and the Full Federal Court that the respondent was not liable to be extradited for the offence of ‘war crime’ as it did not exist as a Hungarian offence in November 1944. This was due to a bar upon retrospective offences in Article 3(2) of the Extradition Treaty between Australia and Hungary 1995. Significantly the prohibition in Article 3(2) did not contain the usual exception in the case of war crimes or crimes against humanity as established in international law, as is usually provided in instruments like the ICCPR, Article 15. The evolution of the international concept of war crimes is discussed in SYYY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 42; 147 FCR 1 (Merkel, Finkelstein and Weinberg JJ); see Peter Johnston and Claire Harris, ‘SYYY v Minister for Immigration and Multicultural and Indigenous Affairs: War Crimes and the Refugee Convention - Case Note’ (2007) 8 Melbourne Journal of International Law 104. Regarding the effect of retrospectivity in Australian law see Polyukhovich v Commonwealth (War Crimes Case) [1991] HCA 32; (1991) 172 CLR 501. The High Court did not find it necessary to determine issues of retrospectivity in Director of Public Prosecutions (Cth) v Keating [2013] HCA 20; see also Suri Ratnapala, ‘Reason and Reach of the Objection to Ex Post Facto Law’ (2007) 1 The Indian Journal of Constitutional Law 140. Retrospectivity was not a bar to prosecution for
by members of the Hungarian armed forces, including allegedly, junior officer Zentai. This was alleged to have occurred in November 1944. In making its extradition request Hungary relied on depositions taken before the notorious People’s Court in 1947-1948 in trials of the two principal officers involved in the killing. Those court documents implicated Zentai by recording that he had been present at the time the student was beaten and later when his body was thrown into the Danube. Questions of the reliability and voluntariness of statements in this documentary evidence were raised. This included, among several other objections, the fact that one of the officers charged tried unsuccessfully to retract a ‘confession’ allegedly procured under torture by the political police. Hungary also relied on indirect hearsay statements of other persons who were present in the military barracks but had not seen Zentai doing the alleged acts, relying on the statements of others that he had. There were grounds for believing (not contradicted by Hungary) that all relevant witnesses had died and would not be available, as required by Article 6 of the ECHR and Article 14(3)(e) of the ICCPR, to be produced for cross-examination by the defendant.

In Zentai, the applicant relied on a number of overlapping grounds. These included a combination of factors claimed to found a finding of manifest Wednesbury unreasonableness of surrendering a national who was old and ill and could, as an Australian national resident in Australia be prosecuted under Australian war crimes legislation, or, to satisfy the Hungarian request to interrogate him, easily be interviewed in Australia. He also contended that the Minister’s determination was flawed by illogical and irrational conclusions to such a degree and was so manifestly unreasonable that it could stand as a proper and genuine discharge of his responsibilities under the Act. This challenge was directed both to the process by which the Minister made his determination (based principally on misleading observations) and in its result was so unreasonable, that his exercise of discretion should be found to have miscarried.

A further ground was predicated on the Minister’s refusal to make inquiries about the availability of witnesses in Hungary which might have revealed that the person could not be prosecuted if the Military Tribunal, applying Article 6 of the ECHR, was not prepared to admit documentary hearsay evidence. In particular, Mr Zentai claimed that the Minister had not

---

70 The unredacted version of the Departmental submission to the Minister revealed that on advice from the Commonwealth DPP the Australian Federal Police decided in the absence of living witnesses not to proceed to a war crimes prosecution in Australia; see Zentai (No 3) note 67 above at [234]-[238] (McKerracher J).

71 This could be conducted either by investigating Hungarian police or prosecution officers in Australia or by video interview under international mutual assistance arrangements.


73 This contention was founded on Minister for Immigration and Citizenship v SZIAI [2009] HCA 39 at [19]-[25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273 at 321 (McHugh J); Minister for Immigration, Multicultural and Indigenous Affairs v SGLB [2004] HCA 32 and Minister for Immigration & Citizenship v SZGUR [2011] HCA 1 that in a significant matter, Commonwealth
properly considered whether his extradition would be *unjust, oppressive, and incompatible with humanitarian considerations*. Alternatively, he claimed, in the face of assurances that Hungary, being a party to both the *ECHR* and the *ICCPR* was bound to provide a fair trial, the Minister was under a duty to make direct enquiries of Hungary as to whether it could produce the key prosecution witnesses for examination. Finally, he claimed that it would be unfair for him to be prosecuted given the great lapse of time since 1944 during which essential military documents that could substantiate his alibi that he was not in Budapest at the time had been destroyed.

At first instance, McKerracher J accepted a Commonwealth submission that in considering whether he was satisfied that surrender would not be contrary to the conditions set forth in the 'unjust exception' in the treaty, the Minister was required to make value judgements about which reasonable minds might differ. Given the comprehensive nature of the Departmental submissions presented to him it was therefore open to him to be satisfied that extradition would not be unjust, oppressive or contrary to humanitarian considerations. He also held that, particularly for reasons of international comity, the Minister was not obliged to seek further information or documentation about the way that Hungary would seek to comply with its obligations under the various international instruments if Mr Zentai was prosecuted.

The Full Federal Court upheld his Honour on this ground of appeal. It held that, particularly given the details submissions in the Departmental submissions, the Minister could not be said to have failed to take into account a relevant consideration regarding whether Hungary, in the absence of relevant living witnesses, would be able to provide a fair trial in accordance with Article 6 of the *ECHR*. In any event, the Act did not require him to do so in the sense of it being an essential precondition to the valid exercise of the power arising under s 22.

Ironically, shortly after the Full Federal Court gave its decision in *Zentai* and before the High Court considered the Commonwealth's appeal on another ground, the Military Division of the Budapest Municipal Court on 19 July 2011 acquitted a Hungarian citizen, Sandor Kepiro, of war crime charges alleged to have been committed in World War II while a member of the decision-makers were obliged to make enquiries about matters that could be readily ascertained and which were central to the subject matter of the decision.

Within the meaning of Article 3(2)(f) of the *Extradition Treaty between Australia and the Republic of Hungary 1995*.

See notes 50 and 73 above.

*Zentai (No 3)* note 67 above at [260]-[291]. There the applicant argued that comity should not preclude making further enquiries about issues central to whether a person will receive a fair trial in the requesting country. The contrary view expressed by McKerracher J seems to be inconsistent with that taken by the Full Court in *Habib v Commonwealth* [2010] FCAFC 12; [2009] 175 FCR 411 (Black CJ at [6]-[12]; Perram J at [23]-[37] and [46] and Jagot J at [51]-[56] and [72]-[135]). There the Court rejected an argument that comity and the "act of state" doctrine precluded making embarrassing enquiries of the conduct of officials of the foreign state.


Ibid, at [192]-[197] (Jessup J, with whom North and Besanko agreed).

The same tribunal before which Mr Zentai would be interrogated if extradited. Its presiding judicial officer, Brigadier General Dr Bela Varga, exhibiting his independence from Hungarian prosecuting authorities had earlier provided representatives of Mr Zentai in Hungary with a statement (accepted as correct by the Hungarian Government) that his extradition was sought only for the purpose of preliminary investigation regarding his involvement in the alleged war crime and he was not charged with any offence; see *Zentai (No 3)* note 67 above at [129] (McKerracher)
Hungarian Gendarmerie. Kepiro was tried for offences involving the deaths in 1942 in Southern Hungary of 30 Jews. This was two years before the alleged murder of the student who was the subject of the proceedings against Mr Zentai. The basis for dismissing the charges against Kepiro was that another Hungarian officer, a Lieutenant Janos Nagy, said to be implicated in the killings as a principal, and whose written testimony was crucial to the case mounted by the Hungarian prosecution, had died in 1985. He could not be produced for examination about his recorded statements in compliance with Article 6 of the ECHR. Ironically, this vindicated the Hungarian assurances given in the Zentai proceedings about the independence of its judiciary and the fact that it would have regard to the fair trial requirements under the Convention.

Assuming the Military Division applied the same reasoning in the case of Mr Zentai it is likely that if he had been summoned before the military tribunal in Budapest for interrogation, he would have been released to return to Australia. Whether that course could be justified as reasonable is another question.

What is evident from a consideration of each of the two above cases is that persons challenging extradition to jurisdictions with continental criminal trial systems were able to invoke specific matters based on contravention of fair trial standards in the ICCPR in the context of deciding whether the Minister had properly understood and applied the 'unjust exception'. In neither case, however, did the Full Federal Court accept that the persons whose extradition was sought was able to establish jurisdictional error or an error of law based on the likely contravention of those international standards. In Adamas the court was able to determine the issue of whether it would be unjust to surrender the person in regard to his in absentia convictions in Indonesia solely by reference to how Australian courts would regard a prosecution in circumstances where the accused had no knowledge of the criminal proceedings against him. It is notable on the other hand that Barker J was prepared to take into account comparative international jurisprudence as not inconsistent with Australian Commonwealth standards. In Zentai also, neither McKerracher J nor the Full Federal Court went so far as to say that consideration of Article 14 of the ICCPR was irrelevant in determining injustice or oppression; rather, that Mr Zentai had not been able to demonstrate on the basis of inference that the Minister had erred.

If now directly part of Australian extradition law, does the incorporation of Article 14 form a basis for arguments invoking proportionality?

Whether proportionality is a ground of judicial review in Australian law or an adjunct of reasonableness standards, including both Wednesbury unreasonableness and jurisdictional error founded on irrationality, is a vexed question. Even the relationship between the latter two (Wednesbury unreasonableness measured by absurdity of outcome, irrationality based on deficiencies or errors in the reasoning process, including not addressing a crucial and relevant

---

80 The testimony of a Lt Nagy was claimed to be unreliable and needing to be tested in cross-examination because it had arguably been obtained under the customary torture administered during interrogation by the pro-Russian political police. This was similar to allegations made about one of the convicted officers (remarkably also called Nagy) in Zentai.

81 On the other hand there were concerns that a six year delay in prosecuting Kepiro violated his right to a fair trial under Article 6 ECHR.

82 Barker J in Adamas note 8 above at [344] accepted that the consequences of sending an eligible person to the requesting country, including what is likely to happen once in situ, could be taken into account in assessing injustice.

83 The notion of unreasonableness may also elide into jurisdictional error where a decision lacks a reasoned basis.
consideration) is still unsettled in administrative law theory. Arguably the two are porous concepts that do not allow of 'bright-line' distinctions. The case law on the topic is to this point inconclusive. In *Minister for Immigration and Citizenship v Li* some members of the High Court appeared to contemplate that proportionality may enter the lexicon of judicial review but again backed away from a definite endorsement. In this relatively fluid and plastic state it is hard to predict how these theoretical conundrums will be resolved. One possibility is development along the lines of Canadian authority, including judicial recognition of institutional integrity as an aspect of executive decision-making. It is submitted that if proportionality analysis finds a place in or among the grounds of review it will be located in the field of human rights adjudication. In that event if as postulated Article 14 is now entrenched in evaluations about whether a surrender would be legally and factually unjust it may permit recourse to arguments based on proportionality in the European and international law sense.

---


85 [2013] HCA 18 at [23] (French CJ; [63]-[78] (Hayne, Kiefel and Bell JJ)). The role of proportionality was also extensively considered in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3. That was in the context of the constitutional validity of municipal by-laws and not discretionary executive powers; it was discussed without reference to international conceptions of proportionality.

86 Arguably *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 laid the foundation in Canada for a duty of reasonableness owed by public officials in their discretionary determinations; see Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law' (2003) 66 Saskatchewan Law Review 129. Since *Baker*, Canadian administrative law has developed principles of reasonableness review, parallel with a notion of correctness review, which differ from the classical Australian model: see *Dunsmuir v New Brunswick (Board of Management)* [2008] SCC 9; [2008] 1 SCR 190. In a flurry of recent cases, *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2010] 1 SCR 364; *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals* 2011 SCC 59, [2011] 3 SCR 616; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654 and *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 the Supreme Court seems to have arrested this development and allowed greater scope for judicial deference to administrative expertise. There may be room for convergence between the Canadian approach and that adopted recently by the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 embracing a standard of legal reasonableness applicable to failures in the exercise of discretion; see [22]-[30] (French CJ) discussing the relationship between reasonableness and irrationality; [63]-[76] (Hayne, Kiefel and Bell JJ); c.f. Gageler J at [107]-[113] adhering to the *Wednesbury* standard.

87 In the case of *Zentai* the fact that Hungary was a party to the *ECHR* arguably introduced an element of proportionality according to European notions. Could a failure to comply with Article 6 because of inability to produce key prosecution witnesses for examination be offset by a need to pursue World War II war crimes before the perpetrators are all dead, giving greater leeway to admitting documentary hearsay testimony? Could the request by Hungary to interrogate Mr Zentai be proportionately satisfied by the alternative of an interview in Australia, given his age, health and infirmity? In *Leask v Commonwealth* [1996] HCA 29; [1996] 187 CLR 579 various members discussed the European concept of proportionality holding that it had no application to questions of constitutional validity of Commonwealth laws but not foreclosing its application in administrative law.
Breach of Article 14 of the ICCPR as a relevant consideration even if not directly incorporated into Australian extradition law

A further question was posed at the outset of this article about the extent to which standards stipulated in Article 14 of the ICCPR are otherwise implicitly required to be addressed by the Attorney General in responding to extradition requests from other countries. Irrespective of whether Article 14 has been given a statutory status in Australian extradition law, is the fact that Australia is under an obligation in international law to observe that Convention the fact that Australia may breach its fair trial standard a relevant consideration to be taken into account when making an extradition decision?88

This issue was raised in the first two levels of the Zentai challenges and in varied form also advanced in Adamas. In Zentai, it was claimed that Australia had a duty under the ICCPR to consider whether surrender in circumstances where it was likely, in the absence of information about the existence of witnesses, that the Applicant could not be afforded a fair trial contrary to international human rights law. This was predicated on the premise that there was a real risk89 that the person’s human rights would be violated by the requesting state.90 The European court’s decision in Soering v United Kingdom91 was cited in support.

These contentions were not accepted in either case.92 Hence it would require a High Court decision to settle the matter.

88 In AB v Minister for Immigration and Citizenship [2007] FCA 910 at [27] Tracey J observed that Australia’s unenacted international treaty obligations relating to refoulement of persons within the jurisdiction are matters to which decision-makers are entitled, but not bound, to have regard when exercising powers under s 501 of the Migration Act 1958 (Cth). In the absence of legislative requirement they are not bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will therefore occur. If they choose to have regard to treaty obligations but, in some way misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. If, however, as this article contends Article 14 of the ICCPR, by reason of s 11 of the Extradition Act, is enacted the opposite result arguably follows.

89 The analogy here is drawn with “real chance” under the Refugee Convention 1950: see Chan Yee Kin v Minister for Immigration & Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379.

90 Roda Mushkat, “Fair Trial” as a Precondition to Rendition: An International Legal Perspective’ Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Occasional Paper No 5 (July 2002).

91 In Soering v United Kingdom, ECtHR, 1989 the European Court of Human Rights held that the fact or even the risk that an actual human rights violation would take place outside the territory of the requested state does not absolve that state from responsibility for any foreseeable consequence of extradition suffered beyond its jurisdiction. See also the ruling of the UN Human Rights Committee in Ng v Canada [(1993) 98 ILR 479. In Regina v Secretary of State for the Home Department; ex parte Bagdanavicius [2005] UKHL 38 the House of Lords, considering Soering recognised that the expulsion of a person by a state party to the ECHR (read also the ICCPR) may engage the responsibility of that state under the Convention where substantial grounds exist for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to a provision of the Convention in the receiving country.

92 See Zentai (No 3), note 67 above, McKerracher J at [261]-[291], finding that it was not open on the materials before the Minister to infer that he failed to seriously consider the fair trial question; affirmed on appeal O’Connor v Zentai, note 77 above, see [291] Jessup J finding similarly that it was not open to infer that he failed to seriously consider the fair trial question. Regarding Adamas, note 8 above, see Barker J at [445]-[479]. The significance of Soering was however specifically considered in Adamas.
Conclusion regarding the relevance of the ICCPR in extradition decisions

Notwithstanding that it has not yet been authoritatively established that the international ramifications of a breach of the ICCPR is a relevant matter that the Minister is obliged to consider, it is evident from cases such as Zentai (No 3)93 and Adamas that Australian courts have seen the international fair trial standards in the ICCPR, and attendant European jurisprudence, as informing the notions implicit in the 'unjust exception'. As such, arguably, the first part of the thesis propounded above has been sustained. This sets the scene for Part II of this article.

Given that there are sound reasons to claim that possible departures from the fair trial standards in the ICCPR and the ECHR can be invoked to judge whether surrender would be unjust, oppressive or contrary to humanitarian considerations, does it matter in the end? The better view appears to be that it does not.

PART II: ARE SURRENDER DECISIONS BASED ON NON-SATISFACTION OF THE 'UNJUST EXCEPTION' SUSCEPTIBLE OF EFFECTIVE JUDICIAL REVIEW?

Even assuming that decisions relating to surrender are open to objection on the basis that surrender would entail contravention of international fair trial standards incorporated by regulation into the Act’s operation, the question then is: Can the likelihood of such a contravention form the basis of successful judicial review challenging or restraining a surrender decision?

Inhibitions to effective review

Eight significant matters qualify the extent to which a court can effectively review extradition decisions of that kind. They are:

1. The principle of comity and respect for foreign judicial process in requesting countries;
2. The "double layered" nature of the extradition determination under s 22 whereby even if the Attorney is satisfied that it would be unjust to surrender a person because a fair trial in the requesting country is impossible or unlikely, the Attorney may nevertheless within the scope of a residual discretion conclude for other reasons that extradition should not be refused;
3. The coupling of the criteria in the ‘unjust exception’ of the need for the Attorney to take into account the nature of the extradition offence and the interests of the requesting country;
4. The virtual inviolability of the Minister’s exercise of the general discretion under s 22, conceived as a "balancing" process on which minds may differ on the merits, and its effect in insulating the decision from review;
5. The effect of the "no evidence" principle and the negative object that extradition proceedings do not entail any judgments about a requested person’s guilt;

93 Note 59 above.
6. The Department’s resort to legal professional privilege preventing an applicant for review and the reviewing court from knowing legal advice upon which an extradition decision was based;

7. Application of the principle of non-justiciability and other discretionary reasons for not granting relief; and

8. The consequence of there being no (as yet recognised) constitutional, statutory or common law requirement to provide reasons or otherwise explain the basis of the Attorney’s decision, leaving a reviewing court unable to identify how the decision was made, effectively immunising it from effective judicial review.

The first difficulty listed above (comity) represents a general restraint on the review of extradition cases. Difficulties 2 to 4 constitute structural obstacles that stand in the way of a court determining that the Minister has fallen in error on a particular matter. Difficulties 5 to 8 represent evidentiary or procedural restrictions impeding review.

1. Deference to foreign judicial process based on considerations of comity

It is a virtual truism of extradition law that an Australian court reviewing an extradition decision is obliged under the principle of comity not to impugn the criminal law system of a requesting country. Respect for comity requires that an Australian Minister is obliged to assume that a trial in a foreign country will be properly conducted. This is considered necessary to accommodate the fact that there are often major differences between the criminal trial process in other countries and that in Australia. Respect for the fairness of process in other common law jurisdictions such as the UK, New Zealand and Canada, as discussed above, is not surprising. Adversarial criminal procedures such as in continental Europe (particularly in Eastern Europe) vary considerably in quality and are, accordingly, more problematic.

The significance of comity in extradition law was expressed by Gordon J in *Mokbel v Attorney-General (Commonwealth)*:

> The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another.  

In *Mokbel* her Honour was commenting in the specific context where a judicial decision of a Greek court had already been made but it is apparently presumed that the injunction to respect the decisions of foreign courts extends to include future criminal process post-extradition. This represents a considerable constraint on the extent to which Ministers and Australian courts are prepared to pass judgment on prospective investigative proceedings or trials in requesting countries. The question is, nevertheless: does comity constitute an absolute bar against questioning foreign proceedings?

---

By way of qualification it may be noted that in *Cabal v United Mexican States (No 3)*95 French J made the following observation on the application of non-adjudication to extradition cases: "[I]t is important to bear in mind that the *general functioning* of the judicial system of an extradition country is not a matter for this court." (Emphasis added.) In dealing with the matter as one of the *general* functioning of a foreign judicial system his Honour appears not to have ruled out the possibility that in a *particular* and perhaps egregious and objectively ascertainable instance, an Australian court may reflect on the adequacy and fairness of foreign proceedings. That was certainly the effect of the decision in *Adamas*.96

The conclusion can be drawn therefore that while not entirely preclusive of judicial review considerations of comity will inhibit it by ensuring that future prospective proceedings in foreign courts are likely to receive fairly low-level scrutiny calculated to avoid embarrassment.97

2. **The "double layered" nature of the Attorney’s function under s 22 and the possible exercise of the residual discretion to override a conclusion that surrender would be unjust in the circumstances**

The structure of the discretion exercised by the Minister when considering claims based on the 'unjust exception' is governed by ss 22(3)(e) and (f) of the Act. They operate, in cases where because of s 11, the Act applies in relation to an extradition subject to a condition or qualification that has the effect that surrender of the person in relation to the offence *shall or may* be refused. The effect of these provisions is that first, if in such a case the Minister is satisfied that circumstances that would attract the operation of a condition or qualification *mandating refusal* do exist the Minister is bound not to surrender the requested person. If, secondly, the Minister is satisfied that circumstances that would attract the operation of a condition or qualification *permitting but not requiring refusal* exist the Minister may, in the exercise of discretion, refuse surrender. But even if the Minister is satisfied in the latter circumstances that it is open for her or him to refuse surrender on that basis the Minister may nevertheless conclude that surrender of the person in relation to the offence *should not be refused*.

Regarding the nature of the Minister’s task when addressing a claim that surrender would be unjust or oppressive Gleeson CJ and McHugh J in *Foster*98 summarised the situation as follows:

There is a *double layer of satisfaction* involved in s 22(3)(e) and [the regulation incorporating the 'unjust exception']. The section provides that the eligible person is only to be surrendered if the Attorney-General (or Minister) is satisfied that circumstances engaging a limitation, condition, qualification or exception to surrender contained in the Regulations do not exist. [The regulation] provides for such a limitation. It prohibits surrender if the Attorney-General (or Minister) is satisfied that it would be unjust, oppressive or too severe a punishment. Therefore, in order to surrender a person the Attorney-General (or Minister) must be satisfied that he or she is not satisfied that it would be unjust, oppressive or too severe a punishment. Since what is involved is

---

95 [2000] FCA 1204; 186 ALR 188, at [104 ].
96 Note 9 above.
97 In *Adamas*, note 8 above Barker J at [427] observed that doctrines of international reciprocity cannot be relied upon to undermine the requirement to address concerns about possible injustice resulting from an *in absentia* conviction by reference to Australian standards under Australian law.
98 Note 31 above, 200 CLR 442 at [7]. The Court was dealing with extradition to the UK where under the regulations a finding that extradition would be unjust required the Attorney to refuse.
the state of satisfaction, or lack of satisfaction, of the one decision-maker, what is critical is whether the decision-maker is satisfied of a matter referred to in [the regulation]. Applying the Act and Regulations to the present case, the Minister was obliged to ask whether she was satisfied that it would... be unjust or oppressive or too severe a punishment to surrender the eligible person. If the answer to that question were in the negative, then she would be satisfied that the circumstances referred to in s 22(3)(e)(ii) did not exist, and the qualification imposed by s 22(3)(e) upon the extent of her powers under ss 22 and 23 would not operate to inhibit their exercise. (Emphasis added)

In the result, where regulations provide that by reason of the ‘unjust exception’ surrender is discretionary, the Minister may come to a conclusion that in fact surrender would be unjust, oppressive or incompatible with humanitarian considerations yet still decide for reasons that may not even be disclosed to exercise the general discretion not to refuse extradition. The problem posed by the existence of this double layer is that notwithstanding a conclusion that extradition could contravene the ‘unjust exception’ the Attorney is free to determine that a request should not be refused if there are strong countervailing reasons to the contrary. Even a conclusion that the Minister may, in exercising the first discretion refuse extradition therefore does not mandate that he must.

3. The coupling of the criteria in the ‘unjust exception’ with the need for the Attorney to take into account the nature of the extradition offence and the interests of the requesting country

The addition of these two extra criteria has the consequence that that the value judgment required in the case of treaties incorporating them is different from the alternative decision-making process where the ‘unjust’ criteria are to be considered solely by reference to themselves.

This consequence was recognised by Barker J in Adamas where he said:

What might be said ... about the operation of s 22(3)(e) and Art 9(2)(b) [of the extradition treaty between Australia and Indonesia] is that the Minister at all material times was possessed of a broad function to achieve a certain level of satisfaction. He could, even if he were to consider, by reference to the circumstances of the case, that extradition of the first respondent to Indonesia would be unjust, on the basis of the first respondent's conviction in that country in absentia, nonetheless ultimately not be satisfied that it would be unjust to surrender him to Indonesia taking into account the nature of the offence and the interests of Indonesia.99

In his view, this requires the decision-makers to balance and weigh these various factors when forming the relevant value judgement about whether extradition would be unjust.100 In the next section whether this balancing process is susceptible to review will be examined.

4. The virtual inviolability of the Minister’s exercise of the general discretion under s 22 conceived as a “balancing” process on which minds may as a matter of the merits differ, insulating the decision from review.

A formidable and arguably intractable barrier to review is presented by the problem that the balancing process involved both in exercising their residual discretion in s 22 and the ‘weighing’ of an unjust surrender against the countervailing factors of the nature of the offence and the

---

99 Ibid, at [331] (Barker J).
100 Ibid, at [325]-[328].
interests of the requesting country is that these divergent cluster of factors constitute a somewhat elusive and unmanageable test (in the sense of providing no clear guidelines).

The indeterminate nature of the process is reflected in a formulaic way in which the Department often couches recommendations in its submission to the Minister. These often take a form along the following lines:

"While you may give some weight to the (applicant’s assertion) ... it is open to you to conclude that extradition in the circumstances would not be unjust, oppressive or incompatible with humanitarian considerations." (or to similar effect): "that having regard to the nature of the offence/interests of the [requesting state] it is open to you not to refuse extradition." (Emphasis added)

How can a court determine whether the Minister has "failed to accord sufficient weight" to a particular factor? Taken to its logical limits, it would mean that in the case of extremely serious crimes involving homicide, terrorism or massive defalcations of money the nature of the offence will, as a matter of proportion, virtually outweigh any other mitigating circumstance. Commit an offence against the US Patriot Act and off you go, even if you will be tried before a military commission in Guantanamo Bay (assuming it is still open)!101 The seriousness of the offence could virtually become the sole and exclusive consideration. Even more elusively the ambiguous character of "interests of a requesting state" comes close to Australia (and arguably the court) having to make political judgments about foreign regimes.

This is compounded by the initial problem that in an extradition challenge the applicant must be able to establish that the Minister had regard to one of other of these factors. In the absence of a clear evidentiary basis for so concluding, any decision resulting from the balancing process is virtually immune from review.

That may be an acceptable outcome so far as it insulates courts from engaging, impermissibly, in a political assessment on the merits entailed in the balancing process itself102 but arguably goes too far where that process has been contaminated by substantial errors of law and misunderstandings that go to the heart of the process. The need for a means of identifying aberrations of the latter kind in the absence of reasons remains for consideration below.

5. The inhibiting effect of the "no evidence" principle and the negative object that extradition proceedings do not entail any judgments about a requested person's guilt

While not in terms precluding production of relevant material evidence, the "no evidence" rule arguably tends to create a context of expeditious extradition that tips the scale against a court scrutinising evidentiary material too closely lest the court infringes the injunction against not

---

101 The matter is not quite that simple. In the case of US extradition requests, for constitutional reasons ironically, the decision is subject to a prima facie case test.
102 Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature and require curial judgments about the reasonableness of governmental action. Decisions about the latter involve competing public interests in the absence of any criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to another; see Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540 at [6] (Gleeson CJ) citing Lord Diplock in Dorset Yacht Co v Home Office [1970] AC 1004 at 1067.
arbitrating on issues of guilt. This has a limiting effect on the kind of documentary material that may be produced on judicial review and aggravates the consequential difficulties of relying on inference from Departmental submissions.\textsuperscript{103}

This objection is based on the premise that in the absence of a statement of the Minister’s reasons there can be no direct evidence of the basis on which the Minister did not disallow extradition. Given that the Minister in her or his discretion may decline to refuse extradition notwithstanding that extradition would be unjust, oppressive or incompatible with humanitarian considerations this opens the possibility that the Minister may have had regard to other possible reasons which may remain undisclosed. In those circumstances it is appropriate to ask: to what extent can a court draw inferences from the Departmental submission to identify the underlying considerations and reasons on which the extradition decision was based? This requires an appreciation of the function of Departmental submissions as part of the decision-making process.

In extradition cases the main document before the reviewing court will be the Departmental submission to the Minister setting out the facts, law, applicants’ submissions, the Department’s comments and legal advice, and recommendations of the Department regarding the same. Invariably in those cases that are reported, the Department recommends that the Minister should not refuse extradition. This is accompanied by a box giving the Minister three options: "approved", "not approved" and "discuss". Given that the Minister normally does not provide any statement of his or her reasons the question arises: What inferences, if any, can be drawn from the contents of the Departmental submission concerning the basis of the Minister’s decision?

Case law clearly establishes that the submission prepared by the Department does not constitute a statement of, or substitute for, the Minister’s reasons: in particular, it cannot be taken to indicate the Minister’s decision-making process.\textsuperscript{104} This is particularly so where material in the submission has been redacted. This does not preclude, however, the drawing of inferences from statements or omissions in the Departmental submission\textsuperscript{105} although there are numerous judicial comments indicating that a court should be cautious and slow to draw any adverse inference about the Minister’s reasons.

\textsuperscript{103} Arguably, the trend towards streamlining the extradition process has been at the expense of individual rights. \textit{Report 40: Extradition: A review of Australian Law and Policy}, Australian Parliament, Joint Committee on Treaties, 2001, para 3.24 citing the submission of Professor Aughterson.

\textsuperscript{104} \textit{Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (Palme)} [2003] HCA 56; (2003) 216 CLR 212 at 224 [40]; \textit{Brock v Minister for Home Affairs (Brock)} [2010] FCA 1301 at [68]-[75]; \textit{Adamas}, note 8 above at [235]-[248] (Barker J). Although the task of a court is to review the decision and not the decision-maker’s reasons the grounds of review can only be effectively formulated if the reasons are known.

\textsuperscript{105} In \textit{R v Connell; Ex parte The Hetton Bellbird Collieries Ltd} [1944] HCA 42 (1944) 69 CLR 407 at 430, 432 (Latham CJ) said that where the exercise of statutory power is conditional upon the existence of a particular opinion, an inquiry for the Court may be whether the opinion has really been formed. This could be established by inference from materials before the decision maker to see if he or she has excluded from consideration some factor which should affect the determination; see too \textit{Avon Downs Pty Ltd v Federal Commissioner of Taxation} [1949] HCA 26; (1949) 78 CLR 353 at 360 (Dixon J); discussed in \textit{Saeed v Minister for Immigration and Citizenship} [2010] HCA 23; (2010) 241 CLR 252 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
A Court should accept that where, for example, the Departmental submission is fulsome and
detailed inferences should not be made concerning whether the Minister fairly turned his mind
to the material before him. The assumption is that the Minister has read the same in their
entirety together with any submissions made by the applicant. Different considerations may
apply where the court is able to deduce from the material put before the Minister that on a
specific matter the Minister was erroneously or inadequately advised on a matter of law,
including its application to the particular circumstances.

Thus in Adamas, Barker J, for the majority, found that absence of reasons did not necessarily
preclude review regarding whether the Minister was adequately advised about the requirement
that potential injustice should be assessed by reference to Australian standards. In his view,
having regard to the principles of good public administration it is not only open to a judge to
draw an inference about whether the Minister took into account a relevant consideration or
could have been misled by the Departmental submission; it may also be reasonable in all of
circumstances to conclude that the Minister had done so. Thus, if it can be demonstrated that
any particular guidance provided in the Departmental submission “was relevant and apparently
significant to the recommendation made, but wrong, or a relevant matter was not addressed,
then plainly there would be a case for considering that the exercise of the Minister’s power
miscarried by reason of jurisdictional error.”

The majority of the Full Federal Court held that the deficiency in the advice to the Minister
amounted to a jurisdictional error, particularly since it failed to advert to how as a matter of
fairness it would be viewed in an Australian context if a person not aware of charges against
him or her was convicted in absentia. That conclusion was summarised by Barker J as follows:

In the event, the Minister was not unequivocally advised that in the course of forming a value
judgment as to whether the first respondent’s extradition to Indonesia would be unjust he may
regard the various factors listed in Art 9(2)(b), but that when considering the in absentia
conviction circumstance he needed to ask if it would be considered unjust by Australian
standards. ... What is clear ... however, is that the failure to address these factors clearly in [the
Departmental submission] carries with it the real risk that the Minister was constructively misled
about the decision-making process required of him under s 22(3) and Art 9(2)(b). ... The first step
of the decisional process concerning Australian standards was compromised. (Emphasis
added)

Thus, even allowing for the fact that there was no direct evidence about what regard the Minister
actually had to the Departmental submission and how he had understood them, an egregious
failure to properly indicate the legal significance of a matter central to the Act’s operation was

---

106 See for example O’Connor v Zentai note 77 above at [182] (Jessup J).
107 A freedom of information enquiry seeking disclosure of the Minister’s diary and time
commitments could be very illuminating as to the amount of time spent on reading the
submission.
108 At [249]-[252].
109 Barker J at [249]-252. In Adamas v The Honourable Brendan O’Connor (No 3) [2012] FCA 365
Gilmour J at first instance found that he could properly draw the inference that the Minister did
not judge the question of injustice, oppression or incompatibility according to Australian
standards. The Full Court majority in effect endorsed the primary judge’s view. This assumes that
where erroneous legal advice in a Department brief causes a Minister to take into account a
prejudicial consideration adverse to the applicant that could in some instances ground
jurisdictional error: Re Patterson [2001] HCA 51; 207 CLR 39.
110 Adamas, ibid, at [407], [413], [415], [423]-[428].
111 Ibid, at [425]-426
capable of founding a basis for review. Hence while the Minister's reasoning may not be _generally accessible_ to a court of review, a patent error in the departmental advice can apparently provide a ground for review.\footnote{This can be compared with _Zentai (No 3)_ note 67 above, where McKerracher J at [234]-[259] concluded that the Departmental submission revealed a misleading description of the Minister's function in determining whether, under Article 3(2)(b) of the Extradition Treaty between Australia and Hungary, the Australian Federal Police had decided to "refrain" from prosecuting Mr Zentai for the alleged offence. He held that notwithstanding what he described as an accumulation of errors (including that advice), while it was possible that he might have been misled on this point and taken it into account, he may still have decided that there was another adequate discretionary basis for refusing surrender. The Full Court in _O'Connor v Zentai_ note 77 above dismissed an appeal on this point.} This was so in _Adamas_ even though it was possible that, even if misled, it was open to the Minister to have decided the matter on some other overbearing consideration not accessible to the court. Hence the 'no-evidence' rule does not necessarily work to prevent a judicial finding adverse to the Minister.

The approach of the Full Court's majority in _Adamas_ must be taken with a qualification, namely that it may be subject to further scrutiny if the High Court gives the Commonwealth special leave to appeal the decision.

6. **The resort to legal professional privilege preventing an applicant for review and the reviewing court from knowing the content of legal advice upon which an extradition decision was based**

The fact that the reviewing court has limited scope to infer the Minister's process of reasoning from the Departmental submission is aggravated by the practice whereby the Department usually provides a copy of its submission to a person seeking to challenge in redacted form. Legal advice given to the Minister is therefore excluded from scrutiny by both the challenger and a reviewing court. In _Zentai v Honourable Brendan O'Connor (No 2)_\footnote{Even then, in the case of _Zentai_ when possible erroneous legal advice was disclosed it could not be found to support of finding a jurisdictional error for the reasons discussed in note 112.} McKerracher J held that references to conclusions made in legal advice given by Australian prosecuting authorities and provided to the Minister by the Department sufficiently indicated the nature of that advice to amount to a _waiver_ of legal professional privilege. The full text of the various advices was then provided to the applicant in unredacted form.\footnote{[2010] FCA 252.} In _Adamas v Honourable Brendan O'Connor_ (first instance),\footnote{[2011] FCA 948.} however, the primary judge had regard to the comprehensive reductions in the Departmental submission and distinguished _Zentai_ as turning on its own facts. He held that there was no basis for finding that legal professional privilege had been waived.

In future cases it may be assumed that care will be taken in redacting the submission to ensure that privilege is not waived. The resort to legal professional privilege will probably continue to be a substantial obstacle to applications for review shielding the reviewing court from knowing and judging the soundness of any legal advice upon which an extradition decision is based.

7. **Principle of non-justiciability and exercise of discretion not to grant relief**
While it is not a doctrinal bar, considerations of justiciability often work to preclude certain politically contentious administrative decisions from review. In other common law jurisdictions, such as England and Canada, issues of justiciability and deference are often mingled, both operating to create zones of executive non-accountability. They have been criticised as doctrines of abstention, allowing an abdication of the judicial responsibility to protect legal rights. Avoidance of issues as non-justiciable is compounded by the fact that even if prepared to enter upon consideration of a matter a court can, in the exercise of discretion, decline to grant any relief.

So far, in Australia the High Court has set its face against allowing deference to institutional expertise to emerge as a factor for not intervening to review some decisions. Justiciability and its correlative standing to sue on the other hand can still pose problems where issues such as national security, global economic crises, or international relations are concerned.

---


120 "Matter" is here used in its commonly-used sense. Justiciability on the other hand may turn on whether judicial proceedings engage a real controversy, and hence a "matter" under Chapter III of the Constitution.

121 Regarding the discretionary factors that influence granting relief by way of declaratory orders and certiorari see Re McBain [2002] HCA 16; 209 CLR 372 at [1]-[5] (Gleeson CJ); [92]-[114] (McHugh J) and [242-249]; [268]-[290] (Hayne J) (in the context of whether there is a “matter” within the meaning of ss 75 and 76 of the Constitution); Truth About Motorways v Macquarie [2000] HCA 11; 200 CLR 591 at [47]-[52] (Gaudron J); [95] (Gummow J) and [217] (Callinan J); Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49; (1998) 194 CLR 247 at 263-264 and Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; 204 CLR 82 at [42]-[59] (Gaudron and Gummow J).


Extradition proceedings can entail each of the latter. Allied with claims of comity these factors can represent significant barriers to judicial intervention in surrender decisions.

8. The consequence of there being no statutory or common law requirement to provide reasons, or otherwise explain the basis of the Attorney’s decision leaving a reviewing court unable to identify how the decision was made, thereby effectively immunising the decision from effective judicial review

Each of the above difficulties entailing procedural and evidentiary limitations confronts an applicant who seeks review of an extradition decision. They substantially diminish the capacity of a court to exercise judicial review effectively. Where the matter is one where the Minister might have exercised his or her general discretion it is particularly difficult to mount a challenge solely by reference to the objects and purposes of the Act authorising the exercise of power. Even where resort to inference is permissible it largely is deficient in the absence of a requirement for the Minister to particularise the basis for his or her decision. For the most part their reasoning process will remain inaccessibly in the domain of the unknown.

The problems that confront a person challenging extradition can be gleaned from considering the Department’s grounds of appeal in Adamas (FFC). In elaborating on its grounds the Minister submitted that, in the first place, in the absence of direct evidence of the Minister’s reasons for not disallowing extradition no inference could be drawn that the Minister had adopted the contents of that the Departmental document as his own reasoning, especially given that the Minister may have had other possible reasons for deciding to extradite; nor whether the Minister had concluded that extradition would not be unjust, oppressive or incompatible with humanitarian considerations, or if he was wrong in that respect, nevertheless, for reasons not disclosed in the Departmental submission, he was prepared to extradite the person anyway and would not refuse extradition notwithstanding. Acceptance of submissions of that kind would normally almost totally negative any possibility of judicial review.

124 See Swan Hill Corporation v Bradbury [1937] HCA 15; (1937) 56 CLR 746 757-758 (Dixon J); Flick J in Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 at [384]. In the case of Zentai, after refusing to provide reasons for his decision Home Affairs Minister Brendan O’Connor announced his decision in a release dated 12 November 2009. After stating that it was not one of determining Mr Zentai’s guilt or innocence he observed that it was about deciding whether or not Mr Zentai should be surrendered to Hungary in accordance with Australia’s extradition legislation and its international obligations, adding that Australia “takes war crimes seriously” and the methodical application of the Extradition Act “ensures that Australia is not a haven for alleged criminals” (emphasis added). It might well be the case that while his statement cannot officially be taken to represent his reasons, it discloses the overriding consideration that could have motivated his decision; namely, concern about the criticisms made about Australia never having extradited an alleged war criminal, to the damaging Australia’s international reputation. Arguably, this could well constitute a legitimate, if questionable, basis for the exercise of his residual discretion under s 22 of the Act.


126 In Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 at [373 and [387] Flick J held that when faced with virtually inscrutable reasons a court may conclude that the Minister’s decision can properly be regarded either as “arbitrary” or a decision which is not made in accordance with a proper consideration of the objects and purposes of (in that instance) the Migration Act 1958 (Cth). While stating at [382] that: “It must be recognised that an exercise of statutory discretion or power conferred by a Commonwealth legislative provision cannot generally be conferred free from all judicial scrutiny” his Honour appears from qualification “generally” to conceive that some decisions may be unreviewable.
submitted that there were sound reasons for the executive to retain specific and general
discretions that were not open to a court to review. In the result, the court is left in the
situation of either impotence or impermissibly engaging in an unguided exercise of judicial ‘Pin
the Tail on the Donkey’.

This dilemma is not so much a case of: What is not known cannot be explained; rather of: What
is not explained cannot be known. Without a secure basis in published reasons an applicant
and a reviewing court is left to face the Kafkaesque problem that “The right understanding of
any matter and misunderstanding the same matter do not wholly exclude each other.”

Necessarily, this intractability of access to the Minister’s basis for decision opens the way for the
executive to shield a significant field of the administrative decisions from effective review and
does nothing to enhance transparency and the accountability of government.

The question can then be posed: as an element of the Rule of Law, is the lack of an obligation
upon the Minister to explain and justify his or her decision in an intelligible way consistent with
the requirements of Chapter III of the Constitution? The question is framed in terms of
explanation and justification to avoid it being too readily and simplistically identified with the
cognate but distinct question about whether there is a common law duty to provide reasons
for administrative decision.

Arguments for implying a principle of justification

In the first place, it is necessary to appreciate that neither the Act nor any other Act such as the
Administrative Decisions (Judicial Review) Act 1977 (Cth) expressly requires the Minister to
provide a statement of reasons. Moreover, there is no general common law duty to do so.

---

127 See Adams note 8 above at [276] (Barker J).

128 Gummow ACJ and Kiefel J in Minister for Immigration and Citizenship v SZMDS (SZMDS) [2010]
HCA 1; (2010) 240 CLR 611 refer to the practical importance of providing reasons and the
difficulties inherent in relying on inferences of the kind that were discussed in Avon Downs Pty
Ltd v Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353, note 104 above.

129 Borrowing a bit from Ludwig Wittgenstein, Tractatus Logico-Philosophicus: “Whereof one cannot
speak, thereof one must be silent.”

130 Franz Kafka, The Trial.

131 This requirement of justification has become more evident in Canadian and some English
authorities. It is the basis of suggestions by the late Michael Taggart and Professor Dyzenhuis that
Australian courts should adopt a similar principle; see ‘Reasoned Decisions in Legal Theory’
David Dyzenhaus and Mike Taggart, in D Edlin, (ed) Common Law Theory (Cambridge University
Press, 2007) 134-167 and see David Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s
Court of Canada has recognised the importance of reasons depending, contextually, upon the
adjudicative setting. This is justified on the basis that reasons allow the parties to the public to
see that justice is done and maintains confidence in the judicial process while facilitating judicial
review; Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817; R v Sheppard
Lorne Sossin, ‘The Rule of Policy: The Impact of Judicial Review on Administrative Discretion’ in
David Dyzenhaus, The Unity of Public Law (Hart Publishing, 2004) 87; also Mary Liston, “Alert,
alive and sensitive’: the duty to give reasons, and the Ethos of Justification in Canadian Public
Law’ ibid, 113.

132 Decisions under the Extradition Act 1988 are excluded from the Administrative Decisions (Judicial

133 In Commissioner of Police v Eaton [2013] HCA 2 Gageler J commented that the intended legal
effect of the Commissioner not being required to give reasons was that the Commissioner’s
is also doubtful, although arguable, that an obligation can be derived by way of necessary implication from s 22 of the Act compelling the Minister to provide a statement of relevant findings and reasons in light of the drastic consequences of an adverse decision. The same difficulty of establishing an implication as necessary is faced in arguing that it is incidental to the purpose implicit in s 39B of the Judiciary Act 1903 to effectuate judicial review.

Unless the Minister records findings with respect to the same a reviewing court will generally not be able to judge whether his or her actions are lawful or not. Notionally, it is be possible to scrutinise the decision, having regard to the materials before the Minister and infer error, excess of authority identifying a wrong issue or asking a wrong question, ignoring relevant material or relying on irrelevant material. However, as demonstrated by some of the cases cited above, there are substantial limitations on that logical process. Another obstacle is that the obligation to provide reasons is not inherently an aspect of the requirement to provide natural justice or procedural fairness.

Is there a constitutional requirement to disclose reasons?

Is there then a constitutional basis for asserting that some justification and explanation of an extradition decision is required in order to ensure that the High Court's jurisdiction under Chapter III, particularly 75(v) of the Constitution is not rendered nugatory?

In Plaintiff M61/2010E v The Commonwealth (The Offshore Processing Case) the High Court referred to the purpose of Chapter III in constraining arbitrary executive power. It said:

According to Public Service Board of New South Wales v Osmond [1986] HCA 7; (1986) 159 CLR 656 there is generally no common law requirement to give reasons. Osmond does not exclude the possibility in an appropriate case of an implied statutory requirement to that effect. See International Finance Trust Company Limited v New South Wales Crime Commission [2008] NSWCA 291, at [41], [47], [50] and [56] (Allsop P); at Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW [2007] NSWCA 149 at [113] and Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 at [382]. It certainly does not deny a constitutional basis applying to Commonwealth officers including Ministers.

According to Dixon J in Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353 at 360:

"His decision... is not unexamimable. ... Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception."

Regarding the extent to which inferences about unlawfulness can permissibly be inferred from materials before a decision-maker see R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 at 120. However it is questionable whether the guidance provided by Avon Downs and Melbourne Stevedoring is susceptible of ready application.

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme [2003] HCA 56; (2003) 216 CLR 212 at 221 [30] (Gleeson CJ, Gummow and Heydon JJ). The problem with relying on compliance with the rules of natural justice is that in the event of non-compliance the court at best might grant mandamus to require consideration without testing whether the Minister's decision was based on a correct understanding of law.
It is an essential characteristic of the judicature established by Ch III that it declares and determines the limits of power conferred by statute upon decision-makers. The various legislative powers for which the Constitution provides are expressed as being "subject to" the Constitution and thus to the operation of Ch III, in particular to the exercise of jurisdiction conferred by s 75. The reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the rule of law under the Constitution.

Section 75(v) is central to the maintenance of the rule of law under the Constitution. It ensures that those who exercise public powers are bound by the law authorising their actions. The importance role of s 75(v) in maintaining governmental accountability and preventing the executive going outside the bounds of its lawful powers was emphasised by Flick J in Minister for Immigration and Citizenship v SZQRB. Regarding the significance of the s 75(v) in the scheme of review he said:

It is one thing for the Commonwealth legislature to pass a law to restrict or even exclude – or attempt to restrict or exclude – the scope of judicial review of administrative decision-making. So long as any such restriction or exclusion of judicial review is consistent with the Commonwealth Constitution – and, in particular, s 75(v) – such laws are within the legislative competence of the Commonwealth Parliament. It is thereafter the duty of the courts to apply the law to the matters that come before it.

It is an entirely a different thing for a Minister of the Crown to attempt to administer legislative powers entrusted to him in a manner which further attempts to exclude from judicial scrutiny the decisions he has made. (Emphasis added)

In order to determine both the limits on power and the facts which bring the decision within power the High Court must be able to ascertain the basis of the Commonwealth executive decisions. Otherwise the stream is free to rise above its source. To be deprived of access to the Minister's reasons arguably renders judicial review ineffective and would leave many questions of validity incontestable if the exercise of Commonwealth executive or statutory power is unexaminable. At the least a refusal to give reasons, if not constitutionally mandated, should attract a heightened intensity of review.

138 Ibid, at [87]-[91].
140 [2013] FCAFC 33 at [349]-[362]
141 Ibid, at [359]-[360].
142 To use the metaphor adopted by Leslie Zines, The High Court in the Constitution, Chapter 11, 300 drawing on the doctrine in the Communist Party Case [1951] HCA 5; (1951) 83 CLR 1.
143 The argument is therefore one based on a principle of effectiveness.
144 The contention that the Minister is constitutionally or statutorily required to provide an adequate and intelligible explanation of his decision also relies on an extrapolation from recent High Court cases such as Plaintiff S157 and Bodruddaza v Minister for Immigration and Multicultural Affairs [2007] HCA 14; (2007) 228 CLR 651 and draws upon notions of the efficacy and effectiveness of the judicial review process. It also has received some force from the High Court's decision in Wainohu v New South Wales [2011] HCA 24; (2011) 243 CLR 181.
The argument for a constitutional obligation of justification is rooted not only in the rule of law as encapsulated in s 75(v) of the Constitution but also the principle of responsible government which forms part of the basic fabric of Chapters I and II of the Constitution. Not only does non-disclosure of a Minister’s reasons thwart the exercise of judicial review, it prevents the Parliament from adequately scrutinising decisions of the executive arm of government. This is irrespective of whether the Minister’s failure to explain her or his decision is a result of a deliberate refusal or simply the product of an executive default. In both cases non-compliance constitutes an arbitrary defeasance of the constitutional scheme to ensure accountability of the executive.

The effect of failing or declining to furnish reasons can be approached by way of analogy. The inability of applicants for review to access the jurisdiction of the Federal Court due to executive default was raised in a series of refugee cases concerned with non-compliance with the time limit specified in s 478 of the Migration Act 1958. Under that provision an applicant who sought review of a Refugee Review Tribunal decision had to lodge the application with the Federal Court within 28 days of being notified of the decision. The section then provided that the Federal Court must not make any order allowing an applicant to lodge an application outside the 28 day period. Asylum-seeking applicants in detention centres such as Port Hedland, even if they completed their applications a couple of days before the period expired were totally reliant on departmental officers to fax applications to the Federal Court in time. Not infrequently their applications were not received by the Court Registry until a day or two after the relevant date, preventing the lodging of the application within the specified time limit. No suggestion was made that this was deliberate. It appears to have occurred largely because of systemic factors such as when the outward mail-box was cleared.

The direction to the Federal Court not to extend time words was challenged as derogating from the essential character of the Federal Court as a Chapter III court and was incompatible with the standards of fairness appropriate for such a court. In effect, it would allow the executive government, by inaction, to dispense with an applicant’s right to have a decision of the Tribunal reviewed. The Full Federal Court rejected these submissions on several occasions holding s 478 constitutionally valid. It held that s 478 defined the jurisdiction of the Federal Court and did not constitute an impermissible direction to the Court.

In one of these cases, WAFE v Minister for Immigration & Multicultural & Indigenous Affairs application was made for special leave to appeal to the High Court. Special leave was granted but before the High Court considered the constitutional objection to officers having a capacity to frustrate access to the Court’s jurisdiction the Commonwealth granted asylum to the appellants.

---

145 See Williams v Commonwealth of Australia [2012] HCA 23;
146 Of course in the case of Parliament the Minister or officials may be subject to questioning; query how effective that might be in a case involving a complex extradition matter.
147 The term ‘default’ is used in a neutral sense without any necessary implication of culpability on the part of the Attorney or the relevant Departments. It could cover accidental failure to complete lodgement as well as negligent or deliberate conduct.
The appeal accordingly lapsed so that the constitutional issue was left undetermined. It might be drawing a long bow to argue that the kind of executive default entailed in preventing asylum-seekers in cases like WAFE having their matters reviewed is analogous with Ministers maintaining silence about their extradition decisions but the inhibitive effect of inaction or silence is similar in each case. Both represent instances of substantially interference with or limiting access to the constitutional remedies provided under s 75(v).

Significantly, in Bodruddaza v Minister for Immigration and Multicultural Affairs the High Court subsequently held that a provision in the Migration Act which purported to impose a 35 day limit on seeking a constitutional writ against an officer of the Commonwealth under section 75(v) of the Constitution was invalid. In the Court's view the time limit subverted the constitutional purpose of the remedy provided by s 75(v) particularly where the failure to comply is not due to any fault on the part of the applicant. Bodruddaza was concerned with the constitutional jurisdiction under s 75(v) whereas WAFE was dealing with a statutory jurisdiction that could be abolished at any time. In the end, if a constitutional requirement to provide reasons were confined to s 75(v) matters and not those arising under s 39B of the Judiciary Act it might prompt applicants to challenge extradition decisions directly in the High Court.

In Minister for Home Affairs of the Commonwealth v Zentai the respondent raised by way of a ground of contention whether there was a constitutional requirement for the Minister, as an "officer of the Commonwealth" to provide some explanation regarding the basis for his decision. In the event, the High Court apart from Heydon J did not find it necessary to address the issue and it remains currently undetermined at that level.

Heydon J dissented on the major ground of appeal concerning the existence of the offence of war-crime. He therefore had to address the 'reasons' contention. He held that it is not possible to derive from s 75(v) an implication that all decision-making powers subject to s 75(v) review carried with them a duty to provide reasons. In rejecting the respondent's submissions, he made the observation that extradition decisions were not necessarily unexaminable for failure to provide reasons. This was because the decision-maker could, in his opinion, be compelled by subpoena to produce documents revealing the reasons for a given decision, or to reveal those reasons in response to interrogatories or under examination in the witness box. In future extradition challenges, therefore, we may well see Commonwealth Ministers floundering under cross-examination for days on end attempting to explain why they decided not to refuse extradition. Doubtless his Honour's observations have been viewed chillingly in the Canberra corridors of power.

Conclusion

150 It could be argued, on the contrary, that non-compliance with s 478 prevented review absolutely whereas a failure to give reasons in extradition cases, though somewhat crippling, is not so extreme.
151 Note 144 above.
152 Note 17 above.
153 The issue had been raised and decided against the respondent in the earlier rounds of the Zentai litigation.
154 Note 17 above [94]-[95].
155 Whether this would go so far as allowing a court to make an adverse finding against the Commonwealth on the basis of the rule in Browne v Dunn (1893) 6 R 67 if the Minister is not called to give evidence is probably a different matter.
The thesis that has been propounded is that incorporation of the ‘unjust exception’ into extradition treaties opens the way for courts to measure whether extradition would be unjust, oppressive or incompatible with humanitarian considerations by reference to a fair trial requirements in Article 14 of the ICCPR and Article 6 of the ECHR. In fact, as the recent case of Adamas illustrates a reviewing court can access the jurisprudence of international courts to inform its judgment about whether the Minister correctly understood when surrender would be unjust. This is irrespective of whether directly or indirectly the ICCPR has become part of Australian statutory law.

What the second part of this article makes clear, however, is that if it is not possible because of the structure of the Act, lack of evidence, procedural difficulties of having materials produced to the court, and especially the fact that the Minister is not required to justify a decision, it will be extremely difficult, if not impossible, to isolate the basis of the Minister’s decision regarding the fairness of an overseas trial, and hence subject the decision to judicial review. Only in an exceptional case, therefore, such as Adamas will it be possible to draw an inference from the failure of the Departmental submission to address an important point of interpretation and application of the ‘unjust exception’ to establish jurisdictional error.\textsuperscript{156}

In the end the problem may not be whether international human rights standards governing a fair trial are incorporated into the Act. It is whether they are capable of realisation in judicial proceedings as protections against executive incursion.

\textsuperscript{156} This assumes Adamas will be not overturned on appeal to the High Court.