IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

ANNOTATED

NO P 50 OF 2013

BETWEEN: **COMMONWEALTH MINISTER FOR JUSTICE**
Appellant

AND: **ADRIAN ADAMAS**
First Respondent

AND: **COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES**
Second Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant by:

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PART I FORM OF SUBMISSION

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY TO RESPONDENT'S ARGUMENT

The appeal – construction of Article 9(2)(b)

2. The first respondent submits that the question as to how Australian standards are to be assessed does not arise in this matter as "*'[i]t is obvious*" and "*patent*" that a "*conviction*" in the circumstances of the first respondent is unjust, oppressive or incompatible with humanitarian considerations assessed by Australian standards (First Respondent's submissions (**RS**) [19], [59]-[61]).

10 3. This focus on conviction misconceives the question posed by Article 9(2)(b). Moreover, it replicates the error of the majority in making the value judgment which is reposed in the Minister (Appellant's Submissions (**AS**) [70]-[71]). Aside from the question of reasonableness, which is addressed below, it is not for the Court on judicial review to determine that the first respondent's conviction and sentence are "*so profoundly offensive*" that "*no interest of Indonesia or consideration of the nature of the offence **could** countervail them*" (emphasis added) (RS [61]).

4. Accordingly, how Australian standards factor into the statutory exercise, and whether they are reduced solely to compliance with Australian criminal law and practice, remains a central issue in the appeal.

Circumstances of the first respondent's case: material before the Minister

20 5. On the basis of a selection of "*relevant*" factors (RS [25]-[37]), the first respondent submits that, if returned to Indonesia, he will spend the rest of his life in gaol for offences for which he was tried in absentia; where there is no proof, and he denies, that he was aware of the prosecution of his case by Indonesia authorities prior to the extradition request; where he cannot now appeal his conviction and sentence (RS [38]).

6. This submission is an overstatement of the material that was before the Minister, which brought to his attention the relevant underlying facts (AS [25]). There is no evidence that the first respondent will spend the rest of his life in gaol, in circumstances where he cannot seek review of his conviction and sentence. This statement ignores the critical passages in the Departmental Submission, (referred to by Lander J, but not the majority) that indicate that a review procedure is
30 available that addresses both conviction and sentence, albeit falling short of an appeal under Australian law, in addition to the possibility of remission from life imprisonment to a fixed sentence (AS at [25.6], [25.8]). Furthermore, while the Departmental Submission acknowledges that there is no positive proof that the first respondent was aware of the proceedings in Indonesia, it explains that there is a basis upon which the Minister could infer that the first respondent was aware of the law enforcement interest in him, including the commencement of media reports in 1998 prior to the first respondent's departure from Indonesia (AS [25.2]).

7. The first respondent contends that the relevant consideration, to which the Minister failed to have regard was "*the manifest injustice by Australian standards*" of the extradition of the first respondent in circumstances identified at paragraph 4 above (RS [39]).[1] By this submission, the first respondent identifies the ultimate positive conclusion (namely that the circumstances outlined in Article 9(2)(b) do exist) as the relevant consideration that the Minister failed to take into account. This is nothing more than disagreement with the value judgment reached by the Minister, which does not demonstrate jurisdictional error.

8. Like the majority below, the first respondent infers that the Minister did not understand that the circumstances of the first respondent's conviction did not accord with Australian law from the fact that the Departmental Submission did not describe matters precisely in this way (RS [46]-[48], [53]; cf. AS [76]). The first respondent has not demonstrated that the Minister could only have reached his conclusion on the basis of a misconception that conviction in the circumstances of the first respondent could have occurred in Australia.[2]

9. The contention that the Departmental Submission in certain parts is irrelevant (including the advice that the first respondent's trial was conducted "*according to law in Indonesia*"), incomplete, confusing or wrong (RS [50]-[58]) does not take the matter further. Even if such deficiencies were substantiated, which they are not, the first respondent fails to demonstrate that they constitute reviewable error or that, relying upon such deficiencies, the Minister fell into jurisdictional error (AS [72]). The first respondent propagates the error of the majority by viewing the question in Article 9(2)(b) as viewing the "circumstances of the case" solely against compliance with Australian law (RS [53], [59]), and, in any event, ignores the evidence of possible review of conviction and remission of sentence.

The errors of the majority approach

10. The first respondent claims that the majority did not commit the errors identified by the appellant: namely, that of adopting a tiered and hierarchical approach, where the consideration of what is "*unjust*" is equated with compliance with Australian law (RS [66]; cf. AS [46]ff; [55]ff). The first respondent refers to the judgment of Barker J at [326] and [428] [**AB 412, 451**]. However, these paragraphs instance those errors. The first respondent does not find any reprieve in the reasoning of McKerracher J (FFC [133]) [**AB 358**], which does not posit a process of construction different from Barker J, with whose reasons his Honour agreed (FFC [127]) [**AB 357**]. Moreover, the first respondent replicates these errors at RS [15], [19], and [59]-[61].

11. In another place, the first respondent accepts that such an approach would be erroneous (RS [69]). Yet, the first respondent propagates that error by stating that, while there are variations in criminal law and practice in every Australian State and Territory, the "*circumstances of this case*" (which the first respondent overstates, as identified at paragraph 4 above) must be

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1 This is alternatively expressed as taking into account the wrong consideration of "*mere rarity*" of *in absentia* convictions in Australia (RS [40]).

2 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.2 (Dixon J).

considered unjust, oppressive and incompatible with humanitarian standards (RS at [70]). This is not the statutory question, which, in any event, is to be answered by the administrative decision-maker.

12. Contrary to the submission of the first respondent (RS [74]), Lander J did not commit the error of viewing the "*circumstances of the case*" for the purposes of Article 9(2)(b) as limited to trial *in absentia* (see FFC [75]) [**AB 347**]. Nor did Lander J treat s 10(1) of the *Extradition Act* (which contemplates extradition of persons tried *in absentia*) as determinative of the question of what is unjust according to Australian standards, but rather as a response to the proposition that it would be inconsistent with Australian law to allow for the extradition of an eligible person to a State in which that person has been convicted in their absence (FFC [76] [**AB 347**]; AS [64]). The relevance of s 10(1) is not gainsaid by Barker J, who stated that the provision was not a basis for inferring that the fact of such a conviction *requires* surrender without more (FFC [366]) [**AB 428**].

13. The first respondent propagates an objective and singular notion of "*Australian standards*" of what is unjust, oppressive or incompatible with humanitarian consideration (RS [77]). This misconceives the role of the court on judicial review (AS [65]-[71]). The question posed by Barker J (FFC [332]) [**AB 415**] reveals that error (cf RS [78]-[79]). The question is not whether to apply "*Australian standards*", on the one hand, or other, international and personal standards, on the other. This is a false dichotomy. The Minister is entitled to consider both Australian law and practice, as well as foreign and international law and practice in determining what "*the Requesting State considers*" to be unjust.

14. The first respondent at RS [21]-[23] seeks to inject the content of international law into the appeal. That step should be rejected. The majority placed no reliance on international law, and indeed on its approach, international law is irrelevant. There is no notice of contention seeking any finding about the content of international law, or seeking to establish jurisdictional error on that basis. In any event, the first respondent has misstated that content. The international law to which the first respondent now adverts provides that an accused has a right to be present at trial, but is not a prohibition on trial *in absentia*. All due steps must be taken to inform the accused of the charges and to notify them of the proceedings.[3] Here, the Minister was advised that a total of eight summons were issued over almost a two year period (Attachment B at [212] [**AB 71**]; AS at [13]). Furthermore, the Minister was advised that available information suggests that the first respondent will be afforded the opportunity to appear before the District Court Judges appointed to his case to seek review of his conviction,[4] and that there is no information to suggest that that

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3 Human Rights Committee, *General Comment No. 32 – Article 14: right to equality before courts and tribunals and to a fair trial*, CCPR/CC/GC/32 (23 August 2007), [31].

4 See *Sejdovic v Italy* (Application no. 56581/00, 1 March 2006) at [82], recently affirmed in *Izet Haxhia v Albania* (Application no. 34783/06, 5 November 2013) at [61]. The English authority cited by the first respondent concerns the requirements of a specific provision of the 2003 UK Extradition Act (s 85), which requires the judge to decide whether a convicted person who has not deliberately absented himself from his trial would be "*entitled*" to a retrial or review in which he would have the right to defend himself and examine witnesses (in accordance with Article 6 of the European Convention on Human Rights). Such a provision is not replicated in the Commonwealth Extradition Act, nor the Treaty.

review would not accord with fair trial rights under Article 14 of the International Covenant on Civil and Political Rights, to which Australia is a party (Attachment B at [239]) **[AB 76]**.

The notice of contention

15. The first respondent submits that no Minister, "*who understood the requirement to apply Australian standards*" and who was "*advised of all the relevant considerations*" concerning the first respondent's case, could reasonably have reached the conclusion that his extradition would not be unjust, oppressive or incompatible with humanitarian considerations, even taking into account Indonesia's interests and the seriousness of the case (RS [86]). The first respondent contends that the relevant circumstances of his conviction and sentence "*are so unjust, oppressive or incompatible with humanitarian considerations that no interest of Indonesia or consideration of the nature of the offence could countervail them*" (RS [87]).[5]

16. The first respondent's contention is infected by a misconception as to: (a) the application of "*Australian standards*", which is understood by the majority below and the first respondent to be solely a matter of compliance with Australian law; and (b) what constitutes a mandatory relevant consideration, which the majority below and the first respondent take to be the ultimate conclusion that the circumstances of the first respondent's conviction and sentence is "*manifestly unjust*" (RS [39], [59]-[61], [87]). The circularity of this argument is patent.

17. The first respondent's submission is said to be supported by the view that "*the circumstances of injustice and oppression are ... extreme*" in the present case (RS [95]). This view ignores large parts of the Departmental Submission (see paragraph 5 above). It also reveals the true legal point advanced by the first respondent, that the Court should endorse the construction of the Treaty and Act which appealed to the trial judge: namely, that the Minister has lost the ability to make the evaluative judgment called for under the Treaty once the Court makes its own findings on the operation of the legal rules in the Requesting State, and discerns a significant variance from Australian law. As French CJ stated in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 at [30]: "*The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker ... has made an evaluative judgment with which a court disagrees even though the judgment is rationally open to the decision-maker*".[6]

18. The construction of the Act (and the Treaty) and the question of the reasonableness of the exercise of the discretion in Article 9(2)(b) are inextricably bound.[7] The subject matter, scope and purpose of the statutory regime by which the discretion is conferred (see AS [61]-[64]) clearly demonstrate that the Requested State is to be given a further *opportunity* to refuse extradition, that is, beyond the exceptions to extradition and mandatory bases of refusal provided in the Act and the Treaty, but not in circumstances where that opportunity becomes a *requirement* to sit in

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5 This is where the first respondent departs from the majority below (see Barker J FFC [438]-[439]) [AB 453].

6 See also *Li* at [66] (Hayne, Kiefel and Bell JJ); [90] (Gageler J).

7 *Li* at [23] (French CJ); [67] (Hayne, Kiefel and Bell JJ); [90] (Gageler J).

judgment on the criminal justice system of its partner State and refuse extradition in the face of any significant variance.

19. Accordingly, it was open to the Minister to decide that the extradition of the first respondent would not be unjust, taking into account:

    19.1. the serious offence of corruption resulting in a significant loss to State finances (Attachment B at [165]) [**AB 63**];

    19.2. the interests of Indonesia in: (i) having a person convicted of such an offence extradited in order to serve the sentence imposed; and (ii) being seen to be addressing corruption in the context of its ongoing efforts to eradicate corruption (Attachment B at [166]-[167]) [**AB 63**]; and

    19.3. the circumstances of the case, which included a form of service and conviction *in absentia* in accordance with Indonesian law, with the possibility of review of conviction and sentence, as well as the possibility of reduction of the life imprisonment to a fixed 20 year sentence (although in circumstances that did not accord with Australian law).

20. The statutory discretion lies within an "*area of decisional freedom*" within which "*reasonable minds may differ*".[8] There is an evident and intelligible justification, which is defensible in respect of the facts and law, which includes an express recognition in the Act and the Treaty that surrender can occur for *in absentia* convictions. The test is stringent, especially in a context where the limits of the discretion are informed by considerations of policy (here, as a matter of bilateral extradition relations) and the weighing of incommensurable considerations.[9] This is not that "*rare*" case in which the exercise of the discretion is outside the bounds of legal reasonableness.[10]

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8 *Li* at [28] (French CJ); [76] (Hayne, Kiefel and Bell JJ); [105] (Gageler J).

9 *Li* at [108] (Gageler J).

10 *Li* at [113] (Gageler J).