IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No: P56 of 2011

BETWEEN

THE HONOURABLE BRENDAN O'CONNOR
COMMONWEALTH MINISTER FOR HOME AFFAIRS
First Appellant

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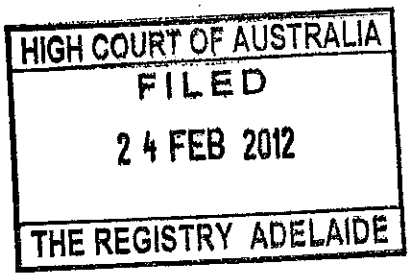
ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Appellant



THE HONOURABLE CHRISTOPHER MARTIN ELLISON
FORMER MINISTER FOR JUSTICE AND CUSTOMS
Third Appellant

and

CHARLES ZENTAI
First Respondent

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BARBARA LANE
Second Respondent

THE WESTERN AUSTRALIAN OFFICER IN CHARGE,
HAKEA PRISON
Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: INTERVENTION

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth). South Australia's intervention is limited to the question raised in the Notice of Contention, namely whether the Minister is obliged to
40 provide reasons to validly exercise his power under s22 of the *Extradition Act 1988* (Cth).

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PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

4. *The Constitution*, ss 75(iii) and (v)
Judiciary Act 1903 (Cth) s39B
Extradition Act 1988 (Cth)
Extradition (Republic of Hungary) Regulations 1997 (Cth)

PART V: ARGUMENT

A: Summary

5. In summary, South Australia contends that:

5.1. s75(v) of the *Constitution* is a grant of jurisdiction to this Court. It does not define the limits of any power possessed by, or conferred upon, an Officer of the Commonwealth. It does not admit of an implication requiring administrative decision makers to provide reasons.[1]

5.2. in 1986 it was settled by this Court in *Public Service Board of New South Wales v Osmond*[2] (***Osmond***) that there is no common law duty for administrative decision makers to provide reasons.[3] The First Respondent does not seek to overturn this case. To the extent that there may exist an exception to the rule,[4] the First Respondent does not seek to bring himself within it.

5.3. whilst it is always the case that a statute may either expressly or by necessary implication require an administrative decision maker to provide reasons for a decision, the First Respondent does not contend that the *Extradition Act 1988* (Cth) **(the Act)** does so.

5.4. accordingly, the Notice of Contention should be dismissed.

B: Argument

6. The First Respondent contends that the exercise of the power contained in s22 of the Act is conditioned by an obligation to give reasons when requested by reason of an implication to be drawn from the conferral of jurisdiction by ss75(iii) and 75(v) of the *Constitution* on this Court.[5] Put slightly differently, s75(iii) and (v) impliedly prohibit

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1 See paragraphs [7] to [18] below.
2 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
3 See paragraphs [19] to [22] below.
4 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ), 676-7 (Deane J).
5 First Respondent's Submissions, [43].

the Parliament of the Commonwealth from enacting a law conferring a power on an officer of the Commonwealth to make a decision amenable to the constitutional writs free of the requirement to provide reasons for that decision on request. South Australia contends that ss 75 (v) admits of no such implication.

Section 75(v) of the *Constitution* and an obligation to give reasons

7. The rule of law is an assumption upon which the *Constitution* is based.[6] Section 75(v) serves the high constitutional purpose of "secur[ing] a basic element of the rule of law."[7] It achieves this by:

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7.1. entrenching the jurisdiction of this Court to supervise excesses of jurisdiction by inferior federal courts, tribunals and administrative decision makers;[8] and,

7.2. conferring (or, acknowledging)[9] the discretionary authority on this Court to issue the constitutional writs of mandamus and prohibition, and injunction, to correct jurisdictional error.[10]

8. The high constitutional purpose has its origins in the control exercised by the English courts to prevent administrative authorities exceeding their authority or neglecting their duty.[11] In Australia it is informed by the separation of powers and the function of the judicial arm of government to declare and enforce the law which includes

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6 *Australian Communist Party v Commonwealth of Australia* (1951) 83 CLR 1, 193 (Dixon J); *Miller v TCN Nine* (1986) 161 CLR 556, 581 (Murphy J); *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ); *Abebe v Commonwealth of Australia* (1999) 197 CLR 510, 560 (Gummow and Hayne JJ); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513-4 [103]-[104] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

7 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513-4 [103]-[104] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ). See also, *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 363 (Dixon J); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 152-3 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 [21] (Gaudron & Gummow JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72] (McHugh & Gummow JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668-9 [44]-[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ).

8 This conferral of jurisdiction cannot be thwarted by legislative attempts to oust this Court's jurisdiction to review for jurisdictional error *(Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 512 [98] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ)) or by the imposition of unduly short and inflexible time limits in which applications for judicial review must be commenced (*Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671-2 [53]-[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ)).

9 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 [156]-[157] (Hayne J).

10 Certiorari may issue as ancillary to the constitutional writs: *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 507 [80] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-1 [14] (Gaudron & Gummow JJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 393-4 [19] (Gleeson CJ), 403 [55] (Gaudron & Gummow JJ), 440-1 [176] (Kirby J).

11 *Minister for Immigration v SZMDS* (2010) 240 CLR 611, 619 [18] (Gummow ACJ, Kiefel J).

determining limits of power conferred on administrative decision-makers.[12] In the States the rule of law is similarly protected by reason of the entrenched supervisory jurisdiction of the Supreme Courts.[13] It is in this context that the limits upon the power of the judiciary to correct an administrative decision for jurisdictional error is to be understood. That limit was identified by Brennan J in *Attorney-General (NSW) v Quin* as follows:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[14]

In the Australian constitutional context then, the power to review administrative decision making is confined to determining the limits of power.

9. Thus, whilst s75(v) confers jurisdiction upon this Court to require officers of the Commonwealth to act within their power, it does not define the limits of the powers conferred on, or jurisdiction to be exercised by, officers of the Commonwealth.[15] In this regard, in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, Deane and Gaudron JJ said:

> ... the right to invoke the jurisdiction [conferred by s 75(v)] is essentially an auxiliary or facultative one in the sense that the jurisdiction which the sub-section confers upon the Court is to hear and determine the designated matters in accordance with the independently existing substantive law. In other words, the right to invoke the jurisdiction will be unavailing unless the decision or conduct of the officer of the Commonwealth in respect of which the designated relief is sought is invalid or unlawful under that substantive law. The result of that is that, while the Parliament cannot withdraw or diminish the jurisdiction of the Court to hear and determine the matters which the sub-section designates including the jurisdiction to determine the critical issue of the validity or lawfulness of an impugned decision or conduct, it can, consistently with the sub-section and within the limits of the legislative powers conferred upon it by the Constitution, alter the substantive law to ensure that the impugned decision or conduct is in fact valid or lawful.[16]

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12 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152-4 [43]-[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 21 CLR 1, 23-5 [72]-[77] (McHugh and Gummow JJ).

13 *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

14 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6. See also *Minister for Immigration v SZJSS* (2010) 243 CLR 164, 174 [23] (The Court).

15 An analogous distinction can be drawn between a law that creates a norm of conduct, on one hand, and a law that confers jurisdiction on a court to determine whether a breach of such a norm has occurred and remedial power, on the other: *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590-1 [66]-[67] (Gleeson CJ, Gaudron & Gummow JJ). Section 75(v) is of the latter kind.

16 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 205; see also 178-9 (Mason CJ), 207 (Deane & Gaudron JJ), 221 (Dawson J); *Plaintiff S157/2002 v The Commonwealth*

10. This also is in keeping with the fact that the *Constitution* contains no general guarantee of due process of law. The framers preferred to place their faith in the democratic process and leave matters of individual rights in the hands of Parliament. The 1898 Constitutional Convention rejected a proposal to include an express guarantee of individual rights based largely upon the 14th Amendment to the United States Constitution and including a right to due process of law and the equal protection of laws.[17]

11. It follows that the constitutional jurisdiction under s75(v) does not exist for the purpose of enabling the judicial branch to ensure good administration by the executive.[18] The position is to be distinguished from that prevailing in England.[19]

12. Limits on the power or jurisdiction conferred on an officer of the Commonwealth are to be determined by reference to the source of the grant (statute, prerogative, non-statutory) of power. Further, any constraint on the manner of exercise of the power is to be determined by reference to statutory conditions, express or implied, and/or the common law.[20]

13. What is clear is that limits upon the exercise of executive or administrative power conferred upon an officer of the Commonwealth are not derived from the *Constitution*[21] and are subject to statutory modification or abrogation.[22] Hence the

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(2003) 211 CLR 476, 483 [5] (Gleeson CJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142 [166] (Hayne J).

17 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43 (Brennan J); *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898, vol IV at 664-691; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 614-5; *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

18 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [32] (Gleeson CJ).

19 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [32] (Gleeson CJ).

20 For example, in *Kioa v West* (1985) CLR 550, at 584, Mason J identified the source of the duty to afford procedural fairness as the common law. In the same case, at 614-5, Brennan J by contrast, identified the source as being statutory. Recent authority appears to support the latter view: *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 258-9 [11]-[13] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 [4] (Gleeson CJ), 100-1 [39]-[40] (Gaudron & Gummow JJ), 131 [132] (Kirby J); *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 68-9 [29]-[30], 74-5 [50]-[53] (Gleeson CJ & Hayne J); Wade & Forsyth, Administrative Law (9th ed, 2004), 443-4. Cf *Annetts v McCann* (1990) 170 CLR 596, 598-600 (Mason CJ, Deane & McHugh JJ); *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 91 [50] (Spigelman CJ (dissenting)); *Plaintiff M61/2010 v The Commonwealth of Australia* (2010) 243 CLR 319, [74] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell).

21 Chapter III does not convert common law principle into constitutional right: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 [156], 142 [166] (Hayne J); Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 784; Zines, *The High Court & the Constitution* (5th ed, 2008), 588-595.

Commonwealth Parliament can, if it uses language that is free from ambiguity, exempt an officer of the Commonwealth from the obligation to provide procedural fairness.[23]

14. The First Respondent's submission that a duty to provide reasons is to be implied from s75(v) appears to be premised on the erroneous assumption that the reasoning process utilised by an administrative officer of the Commonwealth is controlled by constitutional considerations. As indicated s75(v) does not entrench a substantive law governing the reasoning process of Commonwealth officers. It is a grant of jurisdiction.

10 15. An alternative argument is to consider whether the provision of reasons is a necessary corollary of the availability of the constitutional writs to correct for jurisdictional error. Implications have a place in the interpretation of the *Constitution*,[24] and may be uncovered by judicial exegesis.[25] While pedantic and narrow constructions should be avoided,[26] "any implication must be securely based".[27] They should be based on considerations that are "compelling".[28] No implication can be drawn which is not based on the actual terms of the *Constitution* or on its structure.[29] Where structural implications are sought to be derived, they must be logically and practically necessary for the preservation of the integrity of that structure.[30]

20 16. History and the repeated exhortation of the courts that a failure on the part of an administrative decision maker to provide reasons will not immunise that decision from review indicates that an implication from s75(v) to the effect that reasons are a logical and practical necessity to the preservation of the constitutional structure or to the exercise of judicial power under s75(v) cannot be accepted.[31] Indeed, the absence of

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22 *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83-4 [90] (Gaudron J); *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 109 [60] (Gaudron & Gummow JJ), 142 [167] (Hayne J).

23 See, for example, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane & McHugh JJ); *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83-4 [90] (Gaudron J), 93 [126]-[127] (McHugh J); *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 259 [14]-[15] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ).

24 *Victoria v Commonwealth (the Payroll Tax Case)* (1971) 122 CLR 353, 401 (Windeyer J).

25 *Victoria v Commonwealth (the Payroll Tax Case)* (1971) 122 CLR 353, 402 (Windeyer J); *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ).

26 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 39, 85 (Dixon J).

27 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

28 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

29 *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ) citing *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (the Engineers' Case)* (1920) 28 CLR 129, 145, 155 (Knox CJ, Isaacs, Rich and Starke JJ); *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 83 (Dixon J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ), 209-210 (Gaudron J).

30 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

31 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 663-664 (Gibbs CJ), referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. This passage from *Osmond* was referred to, with apparent approval, in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 224-6 (Gleeson CJ, Gummow & Heydon JJ). See also, *Avon*

reasons may pique the attention of the reviewing court.[32] Further, absent reasons, and upon conducting an independent review of the material before the decision-maker, a court may more easily conclude that satisfaction of the existence of a jurisdictional fact was irrational, illogical and not based on findings or inferences of fact supported by logical grounds,[33] or may more easily conclude that the exercise of a discretion was so unreasonable that no reasonable decision-maker could have made it,[34] or may more easily conclude that the decision-maker did not give to the matter proper, genuine and realistic consideration.[35] This is because such decisions may on the consideration of the supporting material display defects the existence of which a court cannot be disabused without the benefit of the decision-maker's reasons. It is a question of inference.[36] Further no presumption of regularity could be relied upon where the inference is that the administrative decision-maker has trespassed "into a field the gates of which are locked against it".[37] The inference that error has occurred rebuts the presumption.

17. In contrast to the position of administrators, it has long been accepted that a court is generally obliged to provide reasons for its decisions.[38] However, no analogy can be drawn between the duty that courts owe in this regard and administrative decision makers.[39] For the reasons given above, there is no constitutional necessity that

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Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, 360 (Dixon J); *Minister for Immigration v SZMDS* (2010) 240 CLR 611, 623 [34] (Gummow ACJ and Kiefel J); *R v Secretary for Trade and Industry ex parte Lonrho plc* [1989] 1 WLR 525, 540 (Lord Keith): "if all the other known facts and circumstances appear to point overwhelmingly in favour of a different decision the decision-maker, who has given on reasons, cannot complain if the court draws the inference that he had no rational reason for his decision."; *Repatriation Commission v O'Brien* (1985) 155 CLR 422, 446 (Brennan J): "If a failure to give adequate reasons for making an administrative decision warrants an inference that the tribunal has failed in some respect to exercise its powers according to law ... the court may act upon the inference and set the decision aside... [Otherwise] a decision ... is not invalidated by a mere failure to expose fully the reasons for making it."

32 *Wainohu v State of New South Wales* (2011) 243 CLR 181, 239 [149] (Heydon J).

33 *Minister for Immigration v SZMDS* (2010) 240 CLR 611.

34 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233; *R v Connell; Ex Parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

35 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164.

36 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119-120 (Dixon CJ, Williams, Webb and Fullagar JJ).

37 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 262-3 (Fullagar J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

38 *Deakin v Webb* (1904) 1 CLR 585, 604-5 (Griffith CJ); *Jacobs v London County Council* [1950] AC 361, 369 (Lord Simonds); *De Iacovo v Lacanale* [1957] VR 553, 558-9 (Monahan J); *Carlson v King* (1947) 64 WN (NSW) 65, 66 (Jordan CJ on behalf of the Court); *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382 (Asprey JA), 384 (Manning JA), 387-390 (Moffitt JA); *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385-6 (Mahoney JA); *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666-7 (Gibbs CJ); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 257-8 (Kirby P), 268-273 (Mahoney JA), 277-281 (McHugh J); *Fox v Percy* (2003) 214 CLR 118, 126 [24] (Gleeson CJ, Gummow & Kirby JJ).

39 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666-7 (Gibbs CJ).

administrators provide reasons for their decisions. Courts, however, occupy a different position. In the exercise of judicial power, courts make decisions that are final and binding. Moreover, they are independent of the political branches and do not draw their legitimacy from the processes of representative and responsible government. It follows that, although generally courts are accorded a greater ambit within which to err without falling into jurisdictional error,[40] there are certain errors, that can be identified by reference to judicial process, that will always be characterised as jurisdictional when committed by a court.

10 18. This distinction between administrators and courts was recognised by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala*, who after referring to the possibility that statutes might extinguish obligations of procedural fairness that administrators would otherwise owe, noted that:

> Different considerations arise where the Commonwealth officer is a member of a federal court. There, procedural fairness is a concomitant of the vesting of the judicial power of the Commonwealth in that federal court and s 75(v) operates to maintain s 71 of the Constitution.[41]

The maintenance of independence[42] and the adherence to the open court principle
20 may similarly be regarded as concomitants of the exercise of judicial power.[43] The duty of courts to provide reasons should, by similar reasoning, be considered to be "a necessary [but not immutable] incident of the judicial process".[44] It is not an obligation that is owed by administrators and courts alike.

The common law and an obligation to give reasons

19. In *Osmond* this Court determined that there is "no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative

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40 *Craig v South Australia* (1995) 184 CLR 163, 179-180 (the Court); *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 140-1 [162] (Hayne J); *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 572-3 [67]-[68] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

41 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [42]. See also *Wainohu v State of New South Wales* (2011) 243 CLR 181, 208-9 [44] (French CJ & Kiefel J), citing *Leeth v The Commonwealth* (1992) 174 CLR 455, 469-470 (Mason CJ, Dawson and McHugh JJ). A similar conclusion was reached by a different route in relation to state courts in *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354-5 [55] (French CJ), 379-380 [141] (Heydon J).

42 *Wainohu v State of New South Wales* (2011) 243 CLR 181, 208-9 [44] (French CJ & Kiefel J), citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ).

43 *Wainohu v State of New South Wales* (2011) 243 CLR 181, 208-9 [44] (French CJ & Kiefel J), citing *Dickason v Dickason* (1913) 17 CLR 50 and *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

44 *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385-6 (Mahoney JA); *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666-7 (Gibbs CJ); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 261 (Kirby P), 273 (Mahoney JA), 278-9 (McHugh J); *Wainohu v State of New South Wales* (2011) 243 CLR 181, 208-9 [44] (French CJ & Kiefel J), [92] (Gummow, Hayne, Crennan & Bell JJ).

decisions".[45] There was no divergence in the reasoning of the five members of the Court in *Osmond*.[46] The judgment implicitly rejected as a reason to develop the common law the contention that without reasons detection of jurisdictional error was difficult.

20. The First Respondent has not referred to *Osmond* and there is no application to reopen or overrule that decision.

21. *Osmond* has been followed and applied widely throughout Australia.[47] There is no evidence to suggest that the application of *Osmond* has worked injustice in terms of grounding a conclusion that administrative decision-makers regularly exceed the limits of their power immune from detection because they are not obliged to provide reasons. In *Osmond* Gibbs CJ explained why the principles of procedural fairness do not entail an obligation on the part of administrators to give reasons:

> Where the rules of natural justice require that a body making a decision should give the person affected an opportunity to be heard before the decision is made, the circumstances of the case will often be such that the hearing will be a fair one only if the person affected is told the case made against him. That is quite a different thing from saying that once a decision has been fairly reached the reasons for the decision must be communicated to the party affected.[48]

With respect, this approach is correct. It is a reflection of the concern of Australian administrative law with "practical injustice"[49] in contrast to the development of divergent principles in the United Kingdom by reference to a more abstract notion of fairness.[50]

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45 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ), 671 (Wilson J), 675 (Brennan J), 676 (Deane J), 678 (Dawson J).

46 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ), 671 (Wilson J), 675 (Brennan J), 676 (Deane J), 678 (Dawson J).

47 See the authorities collected in *Watson v South Australia* (2010) 208 A Crim R 1, [123] (Doyle CJ) and [131] (Peek J).

48 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 663. To similar effect, in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, at 227 [55] McHugh J said: "It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision." See also, *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 219-220 [21]-[26] (Gleeson CJ, Gummow & Heydon JJ), citing with approval *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-2 (Northrop, Miles and French JJ).

49 *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ).

50 Whilst the general rule in the United Kingdom is the same as that which applies in Australia by virtue of *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 , namely there is no general common law duty owed by administrators to provide reasons, the English courts have shown a greater willingness to develop categories of decisions that are exceptions to the general rule. See, for example, *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531; *R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 263 (Sedley J); T

22. It is arguable that *Osmond* left open an exception to the general rule that there is no common law duty to give reasons.[51] However, the First Respondent does not seek to bring this case within the exception.

The *Extradition Act 1988* and an obligation to give reasons

23. A statute can expressly or implicitly require a decision-maker to give reasons.

24. In this case, there is no express statutory requirement to give reasons. Further, Parliament has specifically excluded the *Extradition Act 1988* from the operation of the *Administrative Decisions (Judicial Review) Act 1977*[52] effectively relieving the decision maker from the obligation to give reasons under s13 of that Act.

25. The First Respondent does not submit that it is implicit in the *Extradition Act 1988* that the Minister is beyond power if he fails to give reasons.

Conclusion

26. The First Respondent's Notice of Contention (being limited to an implication to be drawn from s75(v)) should, for the reasons advanced above, be dismissed.

Date: 24 February 2012

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Allan, "Requiring Reasons for Reasons of Fairness and Reasonableness" (1994) 53 *Cambridge Law Journal* 207, 207. Other examples are collected in Wade & Forsyth, *Administrative Law* (2004, 9th ed), 524.

51 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ), 676 (Deane J).

52 *Administrative Decisions (Judicial Review) Act 1977* Schedule 1 clause (r).

The Honourable Brendan O'Connor Commonwealth Minister for Home Affairs & Ors v. Charles Zentai

P56/2011

Annexure to Part IV of the Written Submissions of the Attorney-General for South Australia (Intervening)

Extract from the *Constitution*

75 Original jurisdiction of the High Court

In all matters:

...

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a Party;

...

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

Extract from the *Judiciary Act 1903* (Cth)

39B Original jurisdiction of Federal Court of Australia

Scope of original jurisdiction

(1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Note: Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.

Jurisdiction for certain writs that relate to criminal prosecutions etc.

(1B) If a decision to prosecute a person for an offence against a law of the Commonwealth, a State or a Territory has been made by an officer or officers of the Commonwealth and the prosecution is proposed to be commenced in a court of a State or Territory:

(a) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against the officer or officers in relation to that decision; and

(b) the Supreme Court of the State or Territory in which the prosecution is proposed to be commenced is invested with, or has conferred on it, jurisdiction with respect to any such matter.

(1C) Subject to subsection (1D), at any time when:

(a) a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before a court of a State or Territory; or

(b) an appeal arising out of such a prosecution is before a court of a State or Territory;

the following apply:

(c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related criminal justice process decision;

(d) the Supreme Court of the State or Territory in which the prosecution or appeal is before a court is invested with, or has conferred on it, jurisdiction with respect to any such matter.

(1D) Subsection (1C) does not apply where a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.

(1E) Where subsection (1D) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection, and the court may grant such a stay if the court determines that:

(a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and

(b) a stay of proceedings will not substantially prejudice the person.

Jurisdiction for certain writs that relate to civil proceedings

(1EA) If:

(a) a civil proceeding is before the Family Court of Australia, the Federal Magistrates Court or a court of a State or Territory; or

(b) an appeal arising out of such a proceeding is before the Family Court of Australia or a court of a State or Territory;

the following apply:

(c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision;

(d) the following court is invested with, or has conferred on it, jurisdiction with respect to any such matter:

(i) if the civil proceeding or appeal is before the Family Court of Australia—that court; or

(ii) if the civil proceeding is before the Federal Magistrates Court—that court; or

(iii) if the civil proceeding or appeal is before a court of a State or Territory—the Supreme Court of the State or Territory.

Jurisdictional rules to apply despite any other law

(1F) Subsections (1B), (1C), (1D), (1E) and (1EA) have effect despite anything in any other law. In particular:

(a) neither the *Jurisdiction of Courts (Cross-vesting) Act 1987*, nor any other law, has the effect of giving the Federal Court of Australia jurisdiction contrary to subsection (1B), (1C) or (1EA); and

(b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that Court by subsection (1B), (1C) or (1EA).

References to officer or officers of the Commonwealth

(2) The reference in subsection (1), (1B), (1C) or (1D) to an officer or officers of the Commonwealth does not include a reference to a Judge or Judges of the Family Court of Australia.

Definitions

(3) In this section:

civil proceeding has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

related civil proceeding decision, in relation to a civil proceeding, means:

(a) a decision of the Attorney-General to give:

(i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in relation to the proceeding; or

(ii) a certificate under section 38F or 38H of that Act in relation to the proceeding; or

(b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:

(i) notice under section 6A of that Act in relation to the proceeding; or

(ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

related criminal justice process decision, in relation to an offence, means:

(a) a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:

(i) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and

(ii) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and

(iii) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and

(iv) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and

(v) a decision in connection with an appeal arising out of the prosecution; or

(b) a decision of the Attorney-General to give a certificate under section 26 or 28 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before or during a federal criminal proceeding (within the meaning of that Act) in relation to the offence.

Extract from the *Extradition Act 1988* (Cth)

22 Surrender determination by Attorney-General

(1) In this section:

eligible person means a person who has been committed to prison:

(a) by order of a magistrate made under section 18; or

(b) by order of a magistrate made under subsection 19(9) or required to be made under subparagraph 21(2)(b)(ii) (including by virtue of an appeal referred to in section 21), being an order in relation to which no proceedings under section 21 are being conducted or available.

qualifying extradition offence, in relation to an eligible person, means any extradition offence:

(a) if paragraph (a) of the definition of ***eligible person*** applies—in relation to which the person consented in accordance with section 18; or

(b) if paragraph (b) of the definition of ***eligible person*** applies—in relation to which the magistrate referred to in that paragraph or the court that conducted final proceedings under section 21, as the case requires, determined that the person was eligible for surrender within the meaning of subsection 19(2).

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;

(b) the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;

(c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out;

(d) the extradition country concerned has given a speciality assurance in relation to the person;

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances—the Attorney-General is satisfied:

(iii) where subparagraph (i) applies—that the circumstances do not exist; or

(iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

(4) For the purposes of paragraph (3)(d), the extradition country shall be taken to have given a speciality assurance in relation to the eligible person if, by virtue of:

(a) a provision of the law of the country;

(b) a provision of an extradition treaty in relation to the country; or

(c) an undertaking given by the country to Australia;

the eligible person, after being surrendered to the country, will not, unless the eligible person has left or had the opportunity of leaving the country:

(d) be detained or tried in the country for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender other than:

(i) any surrender offence;

(ii) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the eligible person could be convicted on proof of the conduct constituting any surrender offence;

(iii) any extradition offence in relation to the country (not being an offence for which the country sought the surrender of the eligible person in proceedings under section 19) in respect of which the Attorney-General consents to the eligible person being so detained or tried; or

(e) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender to the first-mentioned country, other than any offence in respect of which the Attorney-General consents to the eligible person being so detained and surrendered.

(5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any qualifying extradition offence, the Attorney-General shall order, in writing, the release of the person.

Extract from the *Extradition (Republic of Hungary) Regulations 1997* (Cth)

4. The *Extradition Act 1988* applies in relation to the Republic of Hungary subject to the Treaty on Extradition between Australia and the Republic of Hungary (a copy of which is set out in the Schedule).

SCHEDULE Regulation 4

TREATY ON EXTRADITION BETWEEN AUSTRALIA AND THE REPUBLIC OF HUNGARY

Australia and the Republic of Hungary

DESIRING to make more effective the co-operation of the two countries in the suppresion of crime by concluding a treaty on extradition,

HAVE AGREED as follows:

ARTICLE 1

OBLIGATION TO EXTRADITE

The Contracting States undertake to extradite to each other, subject to the provisions of this Treaty, any person found in the territory of one of the Contracting States who is wanted for prosecution by a competent authority for, or has been convicted of, an extraditable offence against the law of the other Contracting State.

ARTICLE 2

EXTRADITABLE OFFENCES

1. For the purposes of this Treaty, extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty. Where the request for extradition relates to a person convicted of such an offence who is wanted for the enforcement of a sentence of imprisonment, extradition shall be granted only if a period of at least six months of such penalty remains to be served.

2. For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:

(a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.

...

5. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:

(a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and

(b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State.

ARTICLE 3

EXCEPTIONS TO EXTRADITION

1. Extradition shall not be granted in any of the following circumstances:

...

(d) if final judgement has been passed in the Requested State or in a third state in respect of the offence for which the person's extradition is sought;

...

2. Extradition may be refused in any of the following circumstances:

...

(b) if the competent authorities of the Requested State have decided to refrain from prosecuting the person for the offence in respect of which extradition is sought;

...

(d) if the offence for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part within that State;

(e) if a prosecution in respect of the offence for which extradition is sought is pending in the Requested State against the person whose extradition is sought;

...

ARTICLE 12

RULE OF SPECIALITY

1. Subject to paragraph 3, a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of his personal liberty, in the territory of the Requesting State for any offence committed before his extradition other than:

(a) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that that offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition was granted;

...