FEDERAL COURT OF AUSTRALIA

Marku v Minister for Justice

[2015] FCA 831

Kenny J

28 May, 13 August 2015

Extradition — Surrender determination — Whether there is a failure or refusal to perform the duty to exercise the power to make a surrender determination where no determination has been made but the decision-making process necessary to make such a determination is actively in progress — Extradition Act 1988 (Cth), ss 11, 22(2), (3)(e)(iii).

Administrative Law — Mandamus — Extradition — Duty to exercise the power to make a surrender determination — Where the duty required the Attorney-General to determine whether an eligible person was to be surrendered in relation to a qualifying extradition offence — Where the power to make a surrender determination applied to the extradition country subject to a limitation that had the effect that the surrender of the applicant had to be refused in certain circumstances — Where the applicant could therefore only be surrendered if the Attorney-General were satisfied that the relevant circumstances did not exist — Whether mandamus can compel the Attorney-General (or the Minister) to exercise the power to make a surrender determination in any particular way before the Attorney-General (or Minister) has reached any state of satisfaction as to the existence or non-existence of the relevant circumstances in which surrender has to be refused — Whether mandamus can compel the Attorney-General (or the Minister) to reach any particular state of satisfaction as to the existence or non-existence of the relevant circumstances — Extradition Act 1988 (Cth), s 22 — Judiciary Act 1903 (Cth), s 39B.

Section 22(2) of the *Extradition Act 1988* (Cth) provided that, as soon as was reasonably practicable, having regard to the circumstances, after a person became an eligible person, the Attorney-General had to determine whether the person was to be surrendered in relation to a qualifying extradition offence. Subsection (3) went on to provide that, for the purposes of subs (2), the eligible person was only to be surrendered in relation to a qualifying extradition offence if each of the requirements listed under paras (a) to (f) had been met. The requirement in para (e)(iii) was that, if the *Extradition Act* applied in relation to the extradition country subject to a limitation, condition, qualification or exception that had the effect that surrender of the person in relation to the offence had to be refused in certain circumstances, the Attorney-General had to be satisfied that the circumstances did not exist.

The applicant was an eligible person and the *Extradition Act* applied in relation to the extradition country subject to a limitation that had the effect that the surrender of the applicant in relation to the offences had to be refused in certain circumstances. The requirement in s 22(3)(e)(iii) therefore applied such that applicant could only be surrendered in relation to a qualifying extradition offence if the Attorney-General were satisfied that the circumstances in which surrender of the applicant in relation to the offence had to be refused did not, in fact, exist.

The applicant applied under s 39B of the *Judiciary Act 1903* (Cth) for a writ of mandamus compelling the Minister for Justice (as the Attorney-General's delegate) to determine, pursuant to s 22(2) of the *Extradition Act*, that he was not to be surrendered to the extradition country. At the time of his application for a writ of mandamus, no determination under s 22(2) had yet been made, but the decision-making process necessary to make a determination under that section was in progress. The Minister's Department was still in the process of gathering information necessary to enable the Minister to reach satisfaction of the kind required by s 22(3)(e)(iii).

The application raised a number of issues. One was whether there was a failure or refusal to exercise the power to make a surrender determination under s 22(2) that would found a writ of mandamus where no determination under that section had been made, but the decision-making process necessary to make such a determination was actively in progress. Another issue was whether mandamus could compel the Minister to exercise the power to make a surrender determination under s 22(2) in any particular way before the Minister had reached any state of satisfaction of the kind required by s 22(3)(e)(iii), or to reach any particular state of satisfaction under s 22(3)(e)(iii).

Held: (1) The fact that no determination under s 22(2) of the *Extradition Act* has been made does not amount to a failure or refusal to perform the duty to exercise the power to make a surrender determination under s 22(2) that would found a writ of mandamus if the decision-making process necessary to make a determination under that section is actively in progress. [60]-[61], [78]

Snedden v Minister for Justice (2014) 230 FCR 82; *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, applied.

Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd (1989) 167 CLR 513, considered.

Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic) [2015] VSC 179, not followed.

(2) The Court will not compel the Minister to exercise the power to make a surrender determination under s 22(2) of the *Extradition Act* in any particular way if the Minister has not yet reached any satisfaction of the kind required by s 22(3)(e)(iii) and whether or not the Minister will be satisfied that the relevant circumstances do not exist, as s 22(3)(e)(iii) contemplates, remains an open question. [70], [76]-[77]

Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, distinguished.

Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic) [2015] VSC 179, not followed.

(3) Whether or not the Minister is satisfied in the terms of s 22(3)(e)(iii) is a question of non-jurisdictional fact. [73], [76]-[77], [79]

Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331; *Peniche v Vanstone* (2000) 101 FCR 112; *Vasiljkovic v O'Connor (No 2)* [2011] FCAFC 125, considered.

Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, distinguished.

Cases Cited

Australian Bank Employees Union, Re; Ex parte Citicorp Australia Ltd (1989) 167 CLR 513.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd (2011) 277 ALR 388.

Bertran v Vanstone (2000) 114 A Crim R 158.

Comcare v John Holland Rail Pty Ltd (No 5) (2011) 195 FCR 43.

Cosco Holdings Pty Ltd v Federal Commissioner of Taxation (1997) 37 ATR 432.

Croatia, Republic of v Snedden (2010) 241 CLR 461.

Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vic) (1938) 60 CLR 741.

Hala v Minister for Justice (2015) 145 ALD 552.

Jones v Dunkel (1959) 101 CLR 298.

Marku v Minister for Home Affairs (2013) 212 FCR 471.

Marku v Minister for Home Affairs (No 2) (2013) 216 FCR 315.

Marku v Republic of Albania [2013] HCATrans 275.

Marku v Republic of Albania (2013) 212 FCR 50.

Marku v Republic of Albania (2012) 293 ALR 301.

Marku v Republic of Albania (No 2) [2012] FCA 1182.

Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331.

Peniche v Vanstone (2000) 101 FCR 112.

Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic) [2015] VSC 179.

R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228.

Rahardja v Governor, Long Bay Gaol [2002] NSWSC 1253.

RailPro Services Pty Ltd v Flavel [2015] FCA 504.

Santhirarajah v Attorney-General (Cth) (2012) 206 FCR 494.

Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121.

Seven Network Ltd v News Ltd (No 11) [2006] FCA 174.

Snedden v Minister for Justice (2014) 230 FCR 82.

Soliman v University of Technology, Sydney (2012) 207 FCR 277.

Sportsbet Pty Ltd v New South Wales (No 9) [2010] FCA 31.

State Revenue (Vic), Commissioner of v Royal Insurance Australia Ltd (1994) 182 CLR 51.

Trade Practices Commission v Arnotts Ltd (1989) 88 ALR 90.

Vasiljkovic v O'Connor (2010) 276 ALR 326.

Vasiljkovic v O'Connor (No 2) [2011] FCAFC 125.

Yao v Secretary, Department of Education, Employment and Workplace Relations [2010] FCA 18.

Application

L de Ferrari, for the applicant.

G Hill, for the respondent.

13 August 2015

Kenny J.

Introduction

1 Mr Valentin Marku has applied under s 39B of the *Judiciary Act 1903* (Cth) for a writ of mandamus compelling the respondent Minister:

(a) to determine, pursuant to s 22(2) of the *Extradition Act 1988* (Cth), that he is not to be surrendered to the Republic of Albania in relation to any qualifying extradition offences, and

(b) to direct, pursuant to s 22(5) of the *Extradition Act*, a magistrate or eligible Federal Circuit Court judge to order his release.

2 The applicant contended that he cannot lawfully be surrendered to Albania because the enforcement of the relevant Albanian prison sentence became proscribed by Albanian law on 5 April 2015; and that the Minister was bound to refuse his surrender under s 22(2) of the *Extradition Act*, having regard to s 22(3)(e), when read with Art 5 of the *Extradition Treaty between the United Kingdom of Great Britain and Northern Ireland and the Albanian Republic 1926*, done at Tirana on 22 July 1926, [1928] ATS 6 (Treaty).

3 I interpolate that, in Australia before 1966, the law with respect to the extradition to and from foreign states was principally found in the *Extradition Act 1870* (UK) (1870 Act), which applied in Australia by operation of s 108 of the *Constitution of the Commonwealth*. Section 108 effectively meant that, after federation, laws that had been in force in the colonies continued in force as laws in the States unless and until provision was made by the Commonwealth Parliament. The Commonwealth Parliament did not enact national legislation relating to extradition until the *Extradition (Foreign States) Act 1966* (Cth) and the *Extradition (Commonwealth Countries) Act 1966* (Cth). These statutes were later replaced by the *Extradition Act* — the legislation with which this proceeding is concerned. Some extradition treaties that were adopted by the United Kingdom under the 1870 Act remain in force for Australia by virtue of s 9 of the *Extradition (Foreign States) Act* and ss 5 and 11(3) of the *Extradition Act* as it now stands. The Treaty with which this proceeding is concerned is one such extradition treaty. The Treaty became applicable to the Commonwealth of Australia on 8 March 1928. See generally *Republic of Croatia v Snedden* (2010) 241 CLR 461 at [13]-[18]; *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494 at [228]-[229]; and *Marku v Republic of Albania* (2013) 212 FCR 50 at [52].

4 For the reasons stated below, I would dismiss this application for mandamus.

Background

5 The background to this application can be stated briefly.

6 On 12 September 2008, Albania made a request for the extradition of "Agostin Lleshaj (Lleshi) alias Valentin Marku". The extradition process, which Albania initiated with this extradition request, has already been the subject of a number of applications attracting judicial consideration. See *Marku v Republic of Albania* (2012) 293 ALR 301; *Marku v Republic of Albania (No 2)* [2012] FCA 1182; *Marku v Republic of Albania* (2013) 212 FCR 50 (special leave refused: *Marku v Republic of Albania* [2013] HCATrans 275); *Marku v Minister for Home Affairs* (2013) 212 FCR 471; and *Marku v Minister for Home Affairs (No 2)* (2013) 216 FCR 315.

7 In *Marku v Republic of Albania* 212 FCR 50 at [3]-[14], a Full Court of this Court (Edmonds, Bromberg and Griffiths JJ) summarised the background facts relevantly as follows:

> On 16 December 1994, Agostin Lleshaj was convicted in the District Court of Mirdita in Albania of intentional homicide and attempted homicide. He was sentenced to life imprisonment. On 5 April 1995, his sentence was reduced on appeal to 25 years' imprisonment.
>
> In March 1997, Agostin Lleshaj escaped from prison in Albania. At that time he had served three years and one month of his sentence. On 18 April 1998, the appellant entered Australia travelling on a false passport in the name of "Bujar Hasani". He subsequently advised the relevant Commonwealth department that his name was "Valentin Marku". In due course he was granted a protection visa and later became an Australian citizen.
>
> On 12 September 2008, the Ministry of Justice of the Republic of Albania made an extradition request for the extradition from Australia to Albania of "Agostin Lleshaj (Lleshi) alias Valentin Marku". …
>
> On 8 January 2009, the Commonwealth Attorney-General's Department (the Department) prepared a briefing memorandum to the Minister for Home Affairs advising him as to the matters he was required to consider in the exercise of his discretion [to issue a notice to a magistrate or eligible Federal Circuit Court Judge] under s 16 of the [Extradition] Act. …
>
> On 14 January 2009, the Minister for Home Affairs signed a notice under s 16 of the Act. The notice records that an extradition request had been received from Albania in relation to Agostin Lleshaj. …
>
> …
>
> On 3 March 2009, Albania made an ex parte application for the issue of a provisional arrest warrant under s 12 of the [Extradition] Act. …
>
> At the conclusion of the ex parte application made on 3 March 2009, Magistrate Reynolds issued a provisional arrest warrant under s 12 of the [Extradition] Act. …
>
> On 11 March 2009 [Mr Marku] was arrested and brought before a magistrate who remanded him in custody pursuant to s 15 of the [Extradition] Act. At that hearing [Mr Marku] disputed that he was either Agostin Lleshaj or Agustin Lleshi but admitted that he was Valentin Marku.
>
> On 3 May 2010 [a Deputy Chief Magistrate, now the Chief Magistrate, of Victoria] commenced hearing Albania's application under s 19 of the [Extradition] Act to determine eligibility for surrender. As matters stood at that time:
>
> (a) the Minister had given notice under s 16(1) of the Act in relation to Agostin Lleshaj on 14 January 2009; and
>
> (b) on 11 March 2009, Valentin Marku (the physical person present in the Magistrates' Court) had been remanded under s 15 of the Act based on the magistrate's satisfaction under s 12 that Valentin Marku was an alias of Agostin Lleshaj.
>
> …
>
> On 28 May 2010, the Deputy Chief Magistrate issued a notice under s 19(9) of the [Extradition] Act determining that "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)" is eligible for surrender to the Republic of Albania and ordering that he be remanded in custody to await surrender or release under s 22(5) of the [Extradition] Act.

8 The circumstances leading to the institution of the present proceedings are set out in two affidavits of Ms Christine Willshire, which were respectively sworn

on 29 April 2015 and 13 May 2015. It is unnecessary to refer to them further at this point. (Ms Willshire made a third affidavit that is primarily concerned with a subpoena addressed to Mr Christopher Faris, discussed below.)

9 No successful challenge has been made to the Deputy Chief Magistrate's determination under s 19 that Mr Marku is eligible for surrender to Albania in relation to the relevant extradition offences. The applicant's challenge to his status as an eligible person in proceedings under s 21 of the *Extradition Act* was dismissed by consent on 29 May 2014. Mr Marku is therefore an "eligible person" within the meaning of s 22(1) of the *Extradition Act*, in relation to whom there is a "qualifying extradition offence" as defined in that subsection. In this circumstance, the *Extradition Act* requires that a determination be made "as soon as reasonably practicable, having regard to the circumstances, after a person becomes an eligible person … [as to] whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences". At the time of the hearing, this determination had not been made.

10 It is also convenient to note here that, whilst s 22 contemplates that the Attorney-General will make the relevant determination, the Court was informed by counsel for the Minister (and it was not disputed) that, having regard to various delegations, it in fact fell to the Minister to make the determination required by s 22 of the *Extradition Act*.

Notice of objection to competency

11 Prior to the hearing on 28 May 2015 and in response to matters raised in a case management hearing on 14 May 2015, the Minister filed a notice of objection to competency in which he contended that:

(a) the application for mandamus was premature, because there was no refusal or failure by the Minister (whether actual or constructive) to make a decision under s 22 of the *Extradition Act* that would attract mandamus; and

(b) mandamus could not compel the Minister to reach any particular state of satisfaction under s 22(3)(e) of the *Extradition Act* as to whether an exemption from punishment has been acquired by lapse of time, within the meaning of Art 5 of the Treaty.

12 Discussion at the commencement of the hearing on 28 May 2015 indicated that there might be a procedural difficulty with the Minister's notice of objection to competency because the *Federal Court Rules 2011* (Cth) (Rules) only provide for the filing of a notice of objection to competency where a judicial review application is filed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (see r 31.05) or under the *Migration Act 1958* (Cth) (see r 31.24). The Rules do not currently provide for the filing of such a notice in respect of an application under s 39B of the *Judiciary Act*. It may well be that it is not open to a respondent to file a notice of objection to competency in a s 39B proceeding because the Rules make no provision for it: compare *Yao v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 18 at [12]-[13]. In *Yao*, which was a case under the former *Federal Court Rules 1979* (Cth), Perram J held that reliance could not be placed on a notice of objection to competency in respect of an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), because there was no provision for such a notice in that part of the former Rules governing s 44 appeals (see O 53). His Honour dismissed the proceeding on the Court's own motion under

s 31A of the *Federal Court of Australia Act 1976* (Cth), on the basis that the applicant had no reasonable prospect of success. Whilst this omission has been rectified in the case of s 44 appeals (see now r 33.30), his Honour's reasoning indicates that it may not be open to a respondent to file and rely on a notice of objection to competency in a proceeding such as this, under s 39B of the *Judiciary Act*.

13 When matters mentioned in the preceding paragraph were raised at the hearing, the parties agreed that the Court should not proceed to hear and determine the competency questions separately, but should hear and determine the case in substance (including the Minister's arguments about competency). Accordingly, these reasons address Mr Marku's application for mandamus. It is unnecessary to consider further the notice of objection to competency as a separate matter.

Evidentiary and procedural matters

14 Also at the hearing, the Minister applied to set aside a subpoena to give evidence at the hearing. The subpoena was addressed to Mr Christopher Faris, Acting Assistant Secretary, International Crime Cooperation Central Authority (ICCCA), the Attorney-General's Department, 3-5 National Circuit, Barton, ACT. In addition, the Minister sought orders that:

> The two Notices to Produce dated 22 May 2015 issued by the Applicant be set aside or, alternatively, compliance with r 30.28(3) be dispensed with in relation to those Notices to Produce.
>
> Compliance with r 22.04 be dispensed with in relation to the Notice to Admit dated 22 May 2015 issued by the Applicant.

Notice to admit

15 The contest about the notice to admit, which the applicant served on the Minister, was resolved when counsel for the Minister stated that the Minister disputed the matters asserted in paragraphs 10, 14, 17-20 and 22-25 but that, for the purpose of the proceeding, the Minister admitted the other facts asserted in the notice to admit. In this circumstance, the Court ruled that there was sufficient compliance on the Minister's part with rr 22.02 and 22.04 of the Rules and that, under r 1.34 of the Rules, it would dispense with further compliance with these rules.

Subpoena to give evidence

16 The applicant's decision to seek the subpoena was prompted by an emailed letter dated 24 April 2015 addressed to Ms Willshire, a solicitor at DLA Piper (see [35] below) and signed by Mr Faris as Acting Assistant Secretary, ICCCA, which responded to a letter of 22 April 2015 from DLA Piper, signed by Ms Willshire and a partner in the firm. In her 22 April 2015 letter, which was addressed to the Assistant Secretary, ICCCA, Ms Willshire wrote:

> Dear Ms Blanpain,
>
> EXTRADITION REQUEST FROM THE REPUBLIC OF ALBANIA
>
> We refer to our letter of 1 April 2015, attaching a copy of Decision No.7 dated 11 October 2002 in the Albanian language and an extract in English from the Albanian Jurisprudence Newsletter published by GAJUS, AJN Extra 2 of 2013, explaining this decision.
>
> In that letter, we said we were endeavouring to find a qualified translator, and would provide a translation of the decision as soon as we were able to do so.

Please find attached two copies of Decision No. 7 dated 11 October 2002 translated in English, and a copy of the certificate from the translating authority. In the second copy of the decision, we have highlighted those parts of the majority's reasons which, applied to our client's case (even assuming he were Agostin Lleshaj), mean that he cannot be extradited, as the prescription period expired on 5 April 2015.

Please confirm as a matter of urgency, and in any event by no later than 11 am, Friday 24 April 2015, that:

(a) the Minister will make a determination under s 22 of the [Extradition] Act that our client is not to be surrendered to the Republic of Albania in relation to any of the qualifying extradition offences;

(b) the Minister will direct a magistrate or an eligible Federal Circuit Court Judge to order the release of our client; and

(c) the Minister will do (a) and (b) above by no later than 11 am, Friday 1 May 2015.

Should we fail to receive confirmation in the above terms, we have instructions to immediately institute proceedings for mandamus to compel the Minister to make the determination that our client is not to be surrendered, and for habeas corpus. This letter, and our previous letter of 1 April 2015, will in that case be produced on the question of costs.

Please acknowledge receipt of this letter.

17 The emailed letter dated 24 April 2015 and signed by Mr Faris responded as follows:

Dear Ms Willshire

Extradition request from Albania — Agostin Lleshaj (also known as Valentin Marku)

I refer to your letter of 22 Apri1 2015 attaching a translation of Albanian Decision No.7 (11 October 2002).

Following receipt of your letter of 1 April 2015, to afford procedural fairness to the Republic of Albania, on 2 April 2015 and 8 April 2015 we sought any further views from Albanian authorities about the prescription period applicable in the case of Agostin Lleshaj. Copies of our correspondence are attached.

We received a response from the Albanian Ministry of Justice on 2 April 2015, and a further response on 22 April 2015 from the Albanian General Prosecutor's Office (received by officers in the Department on 23 April 2015). Copies of those responses are also attached. The Ministry of Justice overnight foreshadowed that it intends to provide further information to us tonight, and we will provide that to you when it becomes available.

In light of the information provided by Albanian authorities, we are not in a position to provide the confirmation that you have sought in your letter of 22 April 2015 in respect of the Minister for Justice's determination.

Instead, we consider it appropriate to offer your client a further opportunity to make representations for the Minister's consideration.

If, in light of the material contained in the correspondence from Albania, you would like to make additional representations on your client's behalf, please do so by close of business **23 May 2015**. If we have not heard from you by 23 May 2015, this matter may be submitted to the Minister for Justice for determination on the basis of the information presently available to the Department. Should your client not wish to make any additional representations, please inform us as soon as practicable.

…

We note the Minister's obligation to make a determination as soon as reasonably practicable having regard to the circumstances. Should you advise us

> that your client does not want to make further representations we will prepare briefing putting all representations to the Minister to enable him to fulfil that obligation. Should your client make additional representations that we consider require us to further afford procedural fairness to Albania, we will advise you of that.
>
> The case officer for this matter in the Attorney-General's Department remains Veronica Blanpain who can be contacted on 02 6141 2531 or at veronicablanpain@ag.gov.au.

(Original emphasis.)

18 Counsel for the applicant said that it was proposed to adduce evidence from Mr Faris about what officers in the Attorney-General's Department (Department) or the ICCCA proposed to do if the Minister did not receive any further representations on behalf of the applicant as to whether the sentence had become statute-barred. At the hearing, counsel for the applicant stated that she proposed to ask Mr Faris whether the use of the word "may" in the letter of 24 April 2015 meant that it was intended that, if no further representations were made on behalf of the applicant, the Department would brief the Minister on the issue of whether the applicant's sentence was statute-barred under Albanian law based on the then current materials. Counsel for the applicant also wanted to question Mr Faris on what stood in the way of briefing the Minister on the issue of whether the applicant's sentence was statute-barred under Albanian law at the time of Mr Faris's letter dated 24 April 2015.

19 The Minister sought to have the subpoena set aside on a number of bases outlined in written and oral submissions. The Minister's principal submission was that the applicant had not identified any legitimate forensic purpose for the subpoena. Relying on his written submissions, the Minister submitted that the evidence of Mr Faris was not reasonably likely to add to the relevant evidence in the case, particularly bearing in mind that Mr Faris had not been involved in the day-to-day management of the extradition request and that, in any event, the subjective intention of the author of the letter of 24 April 2015 was immaterial. The Minister's submissions were substantially adopted by Ms Curnow, who appeared for Mr Faris.

20 After considering the parties' respective submissions, the Court ordered that the subpoena to attend and give evidence to Mr Faris be set aside on the ground that the subpoena would serve no legitimate forensic purpose since the evidence sought from Mr Faris had no apparent relevance to the issues in the proceeding: see *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 90 at 102-103 per Beaumont J and *Comcare v John Holland Rail Pty Ltd (No 5)* (2011) 195 FCR 43 at [28]. The applicant's case was that from 5 April 2015 and no later than 29 April 2015 (the date on which this proceeding was sought to be instituted, further information having been received from Albania by the Department and conveyed to the applicant's lawyers), the Minister was under a duty to determine pursuant to s 22(2) of the *Extradition Act* that the applicant not be surrendered to Albania and to direct a magistrate or eligible judge to order his release. On the applicant's case the principal issue was whether, based on circumstances that, according to the applicant, existed from 5 April 2015, the Minister was under a duty to make a particular determination under s 22(2) of the *Extradition Act*, being a determination that the applicant not be surrendered to Albania. Whether or not the 24 April letter showed that at that point the Department proposed to brief the Minister on the basis of the material then in its possession if there were no further representations on behalf of the applicant

was immaterial to the applicant's case. Assuming the letter was relevant as claimed evidence of a refusal to perform the alleged duty to make a determination under s 22(2) of the *Extradition Act*, the letter was to be read in its own terms and Mr Faris's subjective intention was not relevant.

Notices to produce

21 One of the notices to produce that the Minister applied to have set aside sought:

> 1. Copies, not redacted, of all emails exchanged since 4 May 2015 between any officer of the Attorney-General's Department (**the Department**) and the undisclosed recipient of the email sent by Mr Jack Williams, of the Department, on Wednesday 20 May 2015 at 6:50pm. [This email, in redacted form, appears at the top of page 3, annexure "DR4" to the affidavit affirmed by David Reed on 21 May 2015.]
> 2. …
> 3. Copy, not redacted, of the Curriculum Vitae provided to the Department by the undisclosed sender of the email received by Mr Jack Williams, of the Department, on Monday 18 May 2015 at 6:03pm. [The email, in redacted form, appears in the middle of page 3, annexure "DR4" to the affidavit affirmed by David Reed on 21 May 2015.]
> 4. …

(Original emphasis.)

22 The applicant did not press paragraphs 2 and 4 of this notice to produce (first notice to produce).

23 The first notice to produce sought unredacted versions of documents that were attached to Mr Reed's affidavit of 21 May 2015, being an email of 20 May 2015 from Mr Williams attaching a letter of instructions and an email to Mr Williams attaching a potential expert's curriculum vitae. The documents were provided to the applicant, after the name of the expert and certain other matters such as the terms and conditions of any retainer had been redacted. The Minister submitted that the documents sought in the first notice to produce could serve no legitimate forensic purpose because: (1) the Minister did not propose to read the affidavit of Mr Reed of 21 May 2015; and (2) the identity of the expert and the terms and conditions applicable to him were not reasonably likely to add to the relevant evidence, having regard to the issues in dispute. The Minister also submitted that the expert's name and the terms and conditions were privileged.

24 Counsel for the applicant submitted that there was no need for the Department to obtain an expert report on Albanian law because the applicant's representatives had already provided the Department with such an expert report, which showed that the applicant's sentence was statute-barred. Counsel for the applicant submitted that the documents sought in paragraphs 1 and 3 of the first notice to produce would show that the Minister proposed to obtain a further expert opinion on the operation of Albanian law only because "the Minister is seeking to find another basis upon which … to find against the applicant". Counsel added that the material sought would establish:

> The fact that the record was absolutely closed … but the Minister, on 2 April, is still trying to find a way and then, after 2 April, not having had any luck with Albania, is trying to find a way with some other independent expert …

25 The applicant's counsel also suggested that the proposed expert's curriculum

vitae was relevant to assess "the independence and … the expertise of this person over and above the expertise of the [Albanian] Ministry of Justice".

26 The other notice to produce (second notice to produce) relevantly sought:

> 1. The submission of the Attorney-General's Department (**the Department**) to the Minister, not redacted, in the form in which it was on Monday 4 May 2015. [Monday 4 May 2015 being the date of receipt of service, by the Minister, of the Applicant's originating motion dated 29 April 2015 and supporting affidavit sworn by Christine Willshire on 29 April 2015) [sic].
> 2. Copies of any documents of the Department, in existence before Monday 4 May 2015, evidencing consideration by any officer of the Department of whether the Department should obtain the opinion of an independent expert on Albanian law on the issue of whether, under Albanian law, the execution of the sentence imposed on Agostin Lleshaj became statute-barred on 5 April 2015.
> 3. …
> 4. Copies of all letters from officers of the Department to OIL [Office of International Law], not redacted as to the date on which the request was made and the date by when OIL was asked to provide the advice, requesting advice in respect of international law issues that may be relevant to the Minister's determination under s 22 of the *Extradition Act 1988* (Cth).

(Original emphasis.)

27 The applicant did not press paragraph 3 of the second notice to produce.

28 As the Minister observed, the second notice to produce sought the briefing to the Minister at a certain date; documents created prior to 4 May 2015 about obtaining an expert opinion on Albanian law as to whether the relevant sentence had become statute-barred; and letters seeking advice from the Office of International Law (OIL) indicating the date when that request was made and the date by which OIL was to provide its advice. The Minister not only submitted that these matters were privileged but also that there was no legitimate forensic purpose to be served because none of these matters were relevant to the issues in dispute. The Minister again referred to the fact that the 21 May 2015 affidavit of Mr Reed was not to be read and submitted that the form a submission took at any particular date was not relevant to any issue in the case and, in any event, the submission that the applicant sought post-dated the date by which the applicant argued the Minister was bound to have made a decision favourable to him.

29 At the hearing, counsel for the applicant submitted that her submissions on the first notice to produce covered her submissions on the second notice to produce, "given that the issue is … in light of the letter of 1 or 2 April … were they doing that at any point in time before 4 May, trying to find someone that would … come up with a different view as to how Albanian law operated that would sustain a finding against the applicant". The applicant submitted that this was relevant to the applicant's contention that from 5 April 2015 there was no basis for the applicant to remain in detention.

30 The principles set out in *Arnotts* have been applied with respect not only to a subpoena but also a notice to produce served under r 30.28 of the Rules and its equivalent in the former *Federal Court Rules 1979* (Cth): see, for example, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd* (2011) 277 ALR 388 at [13]-[14],

citing *Seven Network Ltd v News Ltd (No 11)* [2006] FCA 174 at [6] where Sackville J said that the test of apparent relevance is whether the documents are "reasonably likely to add, in the end, in some way or other, to the relevant evidence in the case". In *Sportsbet Pty Ltd v New South Wales (No 9)* [2010] FCA 31 at [4] Perram J stated that "[r]easonable likelihood is a different concept to reasonable possibility and, to my mind, connotes a degree of certainty as to the material's potential relevance that travels beyond the merely conjectural". See further *Cosco Holdings Pty Ltd v Federal Commissioner of Taxation* (1997) 37 ATR 432 at 439-440 per Spender J. Accordingly, in determining the Minister's application to set aside the notices to produce, the Court must consider whether what is sought is reasonably likely to add to the evidence relevant in the case, having regard to the issues in dispute.

31 Having considered the parties' submissions, the Court concluded that what was sought in the first notice to produce was not reasonably likely to add to the evidence relevant in the case. As noted, the applicant's substantive contention was that from 5 April 2015 and no later than 29 April 2015 the Minister was under a duty to make a determination under s 22(2) of the *Extradition Act* that the relevant sentence was statute-barred and to refuse the applicant's surrender to Albania. What was sought in the first notice to produce had no apparent relevance, in that this material was not reasonably likely to result in further relevant evidence. Neither the identity and curriculum vitae of any putative expert nor the potential terms of retainer as disclosed in emails of 4, 18 and 20 May 2015 were reasonably likely to add to the evidence as to whether the Minister was under a duty of the kind the applicant alleged from 5 (or 29) April 2015. The first notice to produce could therefore serve no legitimate forensic purpose. I note too that the Minister did not propose to read the affidavit of Mr Reed of 21 May 2015, to which redacted forms of the documents sought were attached.

32 For much the same reasons, the Court determined that what was sought in the first and fourth paragraphs of the second notice to produce could also serve no legitimate forensic purpose. Neither the departmental submission of 4 May 2015 nor the dates relating to any OIL advice had any apparent relevance to the question whether the Minister was under a duty of the kind the applicant alleged from 5 (or 29) April 2015.

33 The Court took a different view of paragraph 2 of the second notice to produce, which it considered could serve a legitimate forensic purpose, insofar as it sought departmental documents created before 4 May 2015, evidencing departmental consideration of whether the Department should obtain an expert opinion as to whether, under Albanian law, the relevant sentence became statute-barred on 5 April 2015.

34 Accordingly, the Court ordered that both notices to produce be set aside, save for paragraph 2 of the second notice to produce. Counsel for the Minister subsequently informed the Court that he was instructed that there were no documents as described in paragraph 2 of the second notice to produce. In accordance with an order of the Court made on 28 May 2015, the Minister later filed an affidavit confirming that there were indeed no such documents. As will be seen, counsel for the applicant relied on the fact that there were no such documents in her submissions in support of the originating application.

The substantive case

The evidence

35 At the hearing, the applicant relied on the affidavits of Ms Christine Willshire sworn on 29 April 2015, 13 May 2015 and 28 May 2015 and their annexures. Ms Willshire is a solicitor employed by DLA Piper Australia, which has been acting for Mr Marku on a pro bono basis since July 2011. The respondent relied on the affidavit of Mr David John Reed affirmed on 26 May 2015 and its annexures. Mr Reed is employed by the Attorney-General's Department and is responsible for litigation and court-related matters relating to the work of the ICCCA, including on behalf of the Attorney-General and the respondent Minister. Neither party sought to cross-examine these witnesses.

36 The applicant also tendered without objection a letter dated 20 May 2015 from Veronica Blanpain, Acting Senior Legal Officer, ICCC, headed "Request for advice — application of statute of limitations — Agostin Lleshaj (aka Valentin Marku)".

The legislative context

37 The applicant is currently detained in prison pursuant to an order made under s 19(9) of the *Extradition Act*. The lawfulness of his detention is not in issue: see *Snedden v Minister for Justice* (2014) 230 FCR 82 at [103] and *Rahardja v Governor, Long Bay Gaol* [2002] NSWSC 1253 at [8]. Section 19(9)(a)(i) relevantly provides for an order that the "person be committed to prison … to await … surrender under a surrender warrant or temporary surrender warrant". Section 22, which deals with a surrender determination, is the key legislative provision in this case.

38 For present purposes, it is enough to note that s 22 relevantly provides:

> Surrender determination by Attorney-General
>
> …
>
> (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:
>
> …
>
> (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.

…

(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 must, by notice in writing:

(a) if the person has been committed to prison — direct a magistrate or eligible Federal Circuit Court Judge to order the release of the person …

39 The Minister did not dispute that because of s 11, the *Extradition Act* applied in relation to Albania "subject to a limitation, condition, qualification or exception that has the effect that surrender of the applicant" in relation to the qualifying extradition offences "shall be refused … in certain circumstances".

Mr Marku's submissions

40 In written submissions, the applicant postulated that the "simple facts" were that:

(a) On 11 October 2002, the Albanian Supreme Court gave its unifying decision on article 68 of the Criminal Code. In its certified English translation, reference will be made to this decision as **Decision No.7 of 2002**.

(b) From at least 12 September 2008, the Minister (by his Department) knew that article 68(a) of the Criminal Code provided for a 20-year prescription on the execution of the 25 years' imprisonment sentence imposed on Agostin Lleshaj (**Lleshaj**), and that the critical date for calculation of the prescription was 5 April 1995, when that sentence became final. The Department knew, because it was so informed by the Republic of Albania's Ministry of Justice (**Ministry of Justice**).

(c) The person charged with the primary responsibility in respect of a brief to the Minister for the purpose of s 22 of the Act, Ms Veronica Blanpain, knew, by 18 December 2014 at the latest, the following:

> According to the judgment handed down by the Republic of Albania Court of Cassation, Mr Lleshaj's sentence became final on 5 April 1995. Accordingly, under Article 68 of the Criminal Code, Mr Lleshaj's sentence cannot be enforced after 5 April 2015.

(d) By 2 April 2015 at the latest (the date of the Ministry of Justice's response to a letter of the same date from the Department), Ms Blanpain knew full well the respective positions of the Applicant and the Ministry of Justice:

i. the Applicant was relying on article 68 of the Criminal Code, the existence and effect of Decision No. 7 of 2002 as explained in the English extract from the Albanian Jurisprudence Newsletter, the expert opinion of Dr Rain Levoja, and further submissions from Counsel that analysed in some detail the proper construction of the Criminal Code and Criminal Procedure Code, also making very specific reference to important articles in those two Codes;

ii. in response, the Ministry of Justice could only point to article 504/4 of the Criminal Procedure Code, but no judicial decision of an Albanian or foreign court in support of its position.

Further, Ms Blanpain was in possession of an English translation of the entire Criminal Code and Criminal Procedure Code.

(e) Although there was a flurry of activity by the Department after 1 April 2015, including "*urgent*" requests by it to the Ministry of Justice, in truth Ms Blanpain had had, by then, a period of some months to

consider this issue. … It does not take long for an informed reader to realise that the Ministry of Justice's response dated 24 April 2015 adds exactly "nil" to the information previously provided by it.

(f) Finally … the Minister has carefully avoided giving any evidence as to when it was, precisely, that a bright spark within ICCCA decided that "*it would be of great assistance to the Minister to obtain an independent expert opinion on the relevant operation of Albanian law*".

(Footnotes omitted; original emphasis.)

41 In the context of these asserted facts, Mr Marku's primary submission was that since 5 April this year he could not be lawfully surrendered to Albania; and therefore the Minister had a duty (which arose on or after that date and no later than 29 April 2015) to refuse to surrender him to Albania. The applicant reasoned as follows:

(a) Section 22(2) of the *Extradition Act* imposes a duty on the Minister to make a determination not to surrender the applicant to Albania where for the purposes of s 22(3)(e)(i) and (iii) a limitation exists that has the effect that the extradition request must be refused.

(b) Article 5 of the Treaty contains such a limitation in that it provides that "[t]he extradition shall not take place if, subsequently to … the conviction thereon, exemption from … punishment has been acquired by lapse of time, according to the laws of the State applying".

(c) Leaving aside the contested question as to whether Mr Marku was in fact Agostin Lleshaj, the limitation in Art 5 is applicable in this case by reason of Art 68 of the Criminal Code of the Republic of Albania (Albanian Criminal Code) which provides that a sentence of between 15 to 25 years is not to be executed if 20 years have elapsed from the day on which the sentence became final. The applicant's sentence of 25 years imprisonment for murder and attempted murder in Albania became final on 5 April 1995. Accordingly, the enforcement of his sentence became statute-barred from 5 April 2015.

(d) A decision of the Supreme Court of Albania dated 11 October 2002 (Decision No 7 of 2002) confirms this since it held that neither the Albanian Criminal Code nor the Criminal Procedure Code of the Republic of Albania (Albanian Criminal Procedure Code) provided for the extension or interruption of the period within which a sentence must be executed.

(e) The contention of Albanian authorities that the applicant's arrest in Australia following Albania's extradition request amounts to an interruption of the prescription period in Art 68, based upon Art 504/4 of Albanian Criminal Procedure Code (which provides that detention abroad as a consequence of an extradition request is calculated as part of the overall detention term) is incorrect and should not be accepted in light of Decision No 7 of 2002 — and in any event Art 504/4 only applies to pre-trial detention.

(f) For the purposes of s 22(3)(e)(i) of the *Extradition Act*, Art 5 of the Treaty is an absolute limitation in the circumstances that apply and, in consequence, surrender to Albania in respect of the qualifying extradition offences must now be refused.

(g) Section 22(2) of the *Extradition Act* "mandated a course of action whereby, soon after 5 April 2015 and certainly well before 29 April 2015, the Minister was briefed by the Department on that sole issue".

(h) The Department's "'independent expert on Albanian law' idea [was] a litigation strategy devised after the Minister was served with the Applicant's Originating [Application] dated 29 April 2015 for the sole purpose of attempting to resist the issue of the writ of mandamus".

42 Citing *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 and *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179, the applicant contended that this was a case in which a writ of mandamus should issue to compel the exercise of the duty that had arisen under s 22(2) of the *Extradition Act* in a particular way — in this case to refuse his surrender to Albania.

43 At the hearing, counsel for the applicant submitted that the applicant's case depended on the following three issues: (1) whether there was a duty to exercise the power in s 22(2) of the *Extradition Act*; (2) whether there had been a failure or refusal by the Minister to perform the duty; and (3) whether the duty could only be performed by refusing to surrender the applicant and directing a magistrate or eligible judge to order his release. Since the Minister did not dispute that s 22(2) gave rise to a duty, the focus of the applicant's submissions was on issues (2) and (3). These two issues overlapped because the applicant's case that there had been a failure or refusal to perform the duty in s 22(2) depended on the further proposition that, in the particular circumstances, the duty had to be performed in a particular way. In substance, the fact that the Minister had failed to refuse the applicant's surrender to Albania (by 29 April 2015) meant, on the applicant's argument, that the Minister had failed to perform his duty — which was to refuse to surrender him.

44 As part of the applicant's case that there had been a failure or refusal to perform the s 22(2) duty, the applicant also relied on items of correspondence (the Department's letter of 2 April 2015 to the Minister of Justice of the Republic of Albania signed by Mr Faris, the Department's letter of 24 April 2015 to Ms Willshire signed by Mr Faris and the Department's letter of 20 May 2015 to a recipient in Albania signed "for" Ms Blanpain) and the Minister's statement (confirmed by Mr Reed's 29 May 2015 affidavit) that there were no documents in existence before 4 May 2015 evidencing a departmental officer's consideration of whether to obtain the opinion of an independent expert on the operation of Albanian law. Counsel for the applicant submitted that this evidence showed that the decision-making process of the Minister should not be treated as ongoing, there being nothing to indicate that the Department gave any thought to obtaining an expert's opinion prior to 4 May 2015, bearing in mind the institution of this proceeding on 29 April 2015.

45 The Department's letter of 2 April 2015 to the Minister of Justice of the Republic of Albania signed by Mr Faris relevantly read as follows:

> URGENT
>
> Extradition request to Australia for Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)
>
> Thank you for your letter dated 17 February 2015 concerning Albania's extradition request to Australia for Agostin Lleshaj. That letter, and Albania's

> letter dated 3 February 2015, have now been provided to Mr Lleshaj to afford him procedural fairness, which requires that he be given an opportunity to be heard on new and unfavourable information.
>
> In response to the information contained in Albania's letters, Mr Lleshaj has made further representations to the Australian Minister for Justice, including about the application of the limitation period on the enforcement of Mr Lleshaj's sentence pursuant to Article 68 of the Albanian Criminal Code. In light of Mr Lleshaj's further representations, we now require **urgent advice** from Albania.
>
> In his representations, Mr Lleshaj refers to a decision of the Supreme Court of Albania (No.7 dated 11 October 2002), which he asserts establishes that there can be no extension of the limitation period for enforcement of a sentence for any reason. A copy of the Supreme Court's decision in Albanian, as well as a summary of the case in English from the Albanian Jurisprudence Newsletter published by GAJUS, provided to this Department by Mr Lleshaj, are **enclosed**.
>
> Given that, if there had been no interruption of the limitation period, Mr Lleshaj's sentence could not be enforced after 5 April 2015, it may be open to Mr Lleshaj to apply to an Australian court on 5 April asserting that he is being held in detention unlawfully in Australia. We would respond to any such application on behalf of Albania. Accordingly, **we require urgent advice by tomorrow (3 April 2015)** about the basis on which the decision of the Supreme Court of Albania (No.7 dated 11 October 2002) does not apply to Mr Lleshaj.
>
> We will shortly send a further letter requesting a more detailed response from Albania on Mr Lleshaj's additional representations.

(Original emphasis.)

46 The letter of 24 April 2015 is set out at [17] above.

47 The Department's letter of 20 May 2015 was addressed to a recipient in Albania and commenced:

> Thank you for agreeing to prepare an expert report about the interpretation of Albanian law as it applies to the circumstances of Mr Agostin Lleshaj (also known as Valentin Marku) who is currently in extradition custody in Australia and is sought for extradition by the Government of the Republic of Albania …
>
> Your report will be used to assist the Australian Minister for Justice … to assess whether Mr Lleshaj should be surrendered to Albania pursuant to the extradition request. Australian law may require us to disclose a copy of your report to both Mr Lleshaj and Albania for consideration.

The letter addressed other matters under the headings "Your role as an expert — form and content of the report", "Background", "Different positions about the interpretation of Albanian law", "Questions", "Timing", "Confidentiality" and "Terms of your engagement".

48 Counsel for the applicant submitted that various considerations — (1) the correspondence to which she referred; (2) the lack of documents in existence before 4 May 2015 evidencing a departmental officer's consideration of whether to obtain the opinion of an expert on the operation of Albanian law; and (3) the adverse inference to be drawn from the Minister's failure to call Ms Blanpain (citing *Jones v Dunkel* (1959) 101 CLR 298) — should lead the Court to make findings (in terms of paragraphs 22-25 of the notice to admit) that:

> At no time prior to 29 April 2015, the date when the Applicant commenced this proceeding under s 39B of the [Judiciary Act], did either the Minister or Ms Blanpain form the view that it would be of assistance to the Minister to obtain an independent expert opinion on the relevant operation of Albanian law.
>
> Prior to 29 April 2015, Ms Blanpain intended to brief the Minister on the content and effect of Albanian law, relevant to the issue of whether enforcement of

> the sentence imposed on Agostin Lleshaj had become statute-barred, without first seeking an independent expert opinion on the relevant operation of Albanian law.
>
> At no time prior to 4 May 2015, the date when the Minister was served with the originating motion and supporting affidavit in this proceeding, did either the Minister or Ms Blanpain form the view that it would be of assistance to the Minister to obtain an independent expert opinion on the relevant operation of Albanian law.
>
> Prior to 4 May, Ms Blanpain intended to brief the Minister on the content and effect of Albanian law, relevant to the issue of whether enforcement of the sentence imposed on Agostin Lleshaj had become statute-barred, without first seeking an independent expert opinion the relevant operation of Albanian law.

49 The applicant did not contend that there had been a failure or refusal to perform the duty in s 22(2) on any other basis. As explained by counsel for the applicant, the failure to perform the duty "must follow" from the fact of the matters adverted to by the applicant, which required that the duty be performed in a particular way.

50 As already noted, the applicant submitted that the Minister's duty under s 22(2) of the *Extradition Act* to refuse his surrender to Albania arose by 5 April 2015 or no later than 29 April 2015. The applicant's contention that the sentence imposed on Agostin Lleshaj became statute-barred under Albanian law from 5 April 2015 was critical to this submission. It was also critical to this submission that the bar was a limitation under s 22(3)(e)(i) of the *Extradition Act* and, in the circumstances, the duty could in consequence only be performed in one way — by refusing his surrender to Albania.

51 To make out his case, the applicant made detailed written submissions on the operation of Albanian law and at the hearing placed particular reliance on ss 174(1)(b) and 175(1) of the *Evidence Act 1995* (Cth) in seeking to prove Albanian law. Relying on s 174(1)(b) of the *Evidence Act* and admitted paragraphs in the notice to admit, counsel for the applicant invited the Court to find as facts the matters pertaining to Albanian law set out in disputed paragraphs of the notice to admit. For example, the Court was asked to accept the truth of disputed paragraphs 10 and 14, asserting that:

> The 2013 Albanian Criminal Code in the English language is an adequate translation in English of the Criminal Code of the Republic of Albania (Law No. 7895 dated 27 January 1995), consolidated as at 2013.
>
> The 2013 Albanian Criminal Procedure Code in the English language is an adequate translation in English of the Criminal Procedure Code of the Republic of Albania (Law No. 7905 dated 21 March 1995), consolidated as at 2013.

52 The 2013 Albanian Criminal Code in the English language and the 2013 Albanian Criminal Procedure Code in the English language were annexures to Ms Willshire's affidavit of 29 April 2015. Albanian Supreme Court Decision No 7 (11 October 2002) also formed an annexure to her affidavit. The Decision was in the Albanian language and in an English translation. A report by Dr Rain Livoja dated 26 March 2015, obtained by the applicant's representatives, on the application of Albanian law was also annexed to Ms Willshire's affidavit sworn on 29 April 2015.

The Minister's submissions

53 Citing *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [52], the Minister contended that mandamus was not available to the applicant because there had been no failure or refusal by the Minister to make a

decision under s 22 of the *Extradition Act*. Rather, referring to *Snedden* 230 FCR 82 at [128] and [131], the Minister submitted that the evidence showed that the decision-making process was still ongoing. The Minister contended that the correspondence on which the applicant relied, including the Department's letter of 24 April 2015, could not amount to a refusal to make a decision that would attract mandamus. Counsel for the Minister pointed out that the 24 April 2015 letter referred to the need to obtain further information from Albania and to prepare a briefing for the Minister. In this context, the Minister emphasised that the applicant and Albania were advancing opposing opinions about the operation of Albanian law (as illustrated in the emailed communications from Albania in annexures CW 26 and CW 27 to Ms Willshire's affidavit of 29 April 2015). The Minister submitted further that the 2 April 2015 letter should be read as requesting Albania to justify its position, given Decision No 7 of 2002.

54 Referring to *Snedden* 230 FCR 82 at [100] and *Rahardja v Governor, Long Bay Gaol* at [8], the Minister submitted that, under s 22(3) of the *Extradition Act*, the Minister was bound to consider a number of matters before making a determination under s 22(2), including the contested issue of identity, and could not consider and make a determination on the basis of one consideration alone.

55 The Minister noted that the Department was in the process of obtaining an expert opinion on Albanian law and submitted that the Court should infer that the Department was seeking to resolve issues about the operation of Albanian law that it considered were not sufficiently answered by the material that it then had. The Minister submitted that there was no justification to draw the inferences that the applicant invited the Court to draw; and that it did not follow from the fact that there were no documents falling within paragraph 2 of the second notice to produce that, prior to 4 May 2015, officers of the Department had given no consideration to obtaining an expert opinion on Albanian law.

56 The Minister further submitted that mandamus could not compel the Minister to reach any particular state of satisfaction under s 22(3)(e) of the *Extradition Act* as to whether the circumstances in Art 5 of the Treaty were satisfied. The Minister contended that mandamus did not lie to compel the exercise of a discretionary power such as that in s 22(2) of the Act in a particular way when more than one way of exercising the discretion was open. The Minister added that more than one way of exercising the discretion in s 22(2) was presently open because Albania and the applicant put forward inconsistent views about the operation of Albanian law. The Minister noted that, whilst the applicant maintained the relevant sentence was statute-barred, Albania maintained that it was not (on the basis that the detention of a person overseas under an arrest warrant following an extradition request formed part of the execution of a sentence). Referring to *Bertran v Vanstone* (2000) 114 A Crim R 158; 173 ALR 63 at [18]-[19], [70]-[81], the Minister contended that whether the extradition request is barred by a limitation period turned on the Minister's satisfaction as to the operation of Albanian law in the circumstances of the case. The Minister submitted that issues as to the meaning of Albanian law and the Minister's satisfaction were both questions of fact for the Minister to determine; and it was not for a court to decide these matters, although the Minister's decision, when made, might be subject to judicial review.

57 The Minister contended that *CSR v Royal Insurance* and *Port Phillip Scallops*

v Minister for Agriculture should be distinguished from this case, noting, however, the latter case was directly contrary to the relief sought by the applicant here.

Consideration

58 As stated above, the applicant's case was that there had been a failure or refusal to perform the duty to make a decision under s 22(2) because in the circumstances the only decision that could be made was to determine to refuse to surrender him to Albania. The applicant did not contend that, for some other reason, the Minister had failed to perform his duty to make a decision under s 22(2) of the *Extradition Act* "as soon as is reasonably practicable": compare *Snedden* 230 FCR 82 at [107], [128], [131]; also *Hala v Minister for Justice* (2015) 145 ALD 552 at [36]. The applicant's case was that the Minister's duty under s 22(2) to refuse the applicant's surrender to Albania arose no later than 29 April 2015 (when he sought to file these proceedings as foreshadowed in the letter of 22 April 2015). This was confirmed by counsel for the applicant at the hearing. For example, at page 23 of the transcript, the following appears:

> HER HONOUR: … You say as at 29 April, if not earlier, there was only one decision the Minister could make.
>
> MS DE FERRARI: Yes.
>
> HER HONOUR: And that's the heart of your application.
>
> MS DE FERRARI: Yes.

59 The applicant's case fails in limine. A writ of mandamus issues only to command the performance of a public duty of a public nature, which should have but has not been performed: see *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ. As the High Court (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) said in *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 515, "[m]andamus will issue to compel the performance of a public duty when there has been a refusal or failure to perform that duty": see also *Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vic)* (1938) 60 CLR 741 at 749 per Latham CJ and *Soliman v University of Technology, Sydney* at [52]. This is not such a case.

60 Rather, this was a case in which the process of making a decision was being actively undertaken through-out the relevant period. The Department was clearly seeking to gather sufficient reliable information in order to prepare a briefing for the Minister, on the basis of which the Minister would make the decision that he was called upon to make under s 22(2) of the *Extradition Act*, having regard to s 22(3).

61 The circumstances of the case, particularly the Department's correspondence with the applicant's legal representatives and with Albania, clearly showed that, although no determination under s 22(2) of the *Extradition Act* had yet been made, the decision-making process was in progress and that the Department was actively endeavouring to gather sufficient information to enable the Minister to make a determination under s 22(2), after considering the matters in s 22(3) as required, including, relevantly here, in s 22(3)(e).

62 The three letters on which the applicant particularly relied do not support a finding that the Minister had failed or refused to perform the duty arising under s 22(2) of the *Extradition Act*.

63 The Department's letter of 2 April 2015 to the Albanian Minister for Justice was essentially a request for Albania to justify its position in light of Decision No 7 of 2002 of the Albanian Supreme Court. As counsel for the Minister noted, the Department's statement in the penultimate paragraph that it "would respond … on behalf of Albania" to an application for the applicant's release from detention reflected the common practice in extradition cases in this country, whereby Australia, as the requested country, had its lawyers represent the requesting country in court, at least at the early stages of the extradition process. I would draw no inference of the kind for which the applicant argued from this letter or this particular statement.

64 The Department's letter of 24 April 2015 to the applicant's lawyers informed them of the steps taken to inform Albania of their representations on Albanian law and of Albania's responses. It advised that, in light of Albania's responses, the Department was unable to confirm that the Minister would refuse to surrender him; and instead sought further information from the applicant's representatives. I would draw no inference of the kind for which the applicant contended from this letter. The Department's inability to provide the confirmation that the applicant sought and its request for further information was a consequence of the fact that the applicant's legal representatives and Albania were advancing different views about the operation of Albanian law. The letter showed that as at 24 April 2015 the decision-making process was still on-going, since the letter itself referred to the fact that further information was expected from Albania and invited from the applicant. Further, it may be inferred from the penultimate paragraph that no briefing for the purpose of making a s 22(2) determination had been prepared for the Minister at that stage. Plainly enough, the Department did not then consider that it had sufficient information to form a view as to which opinion should be preferred.

65 The Department's letter of 20 May 2015 apparently addressed to a proposed expert on Albanian law regarding the preparation of an expert opinion evidenced that the Department had taken steps to identify and consult someone whom it considered to be appropriately knowledgeable on the relevant Albanian law, with a view to providing further reliable information about the operation of that law in the circumstances that had arisen. This was clearly a reasonable course to take in circumstances where the Department was otherwise unable to determine rationally whether the opinion of Albania or that of the applicant's lawyers should be preferred.

66 Contrary to the applicant's submission, I would not infer that the Department gave no consideration to retaining a person expert in the relevant Albanian law prior to 4 May 2015 merely from the fact that there were no documents in existence before 4 May 2015 evidencing such consideration. The matter may have been considered, without such consideration having been recorded in a contemporaneous document. Even if the Department did not consider obtaining an expert opinion until after the applicant sought to institute these proceedings on 29 April 2015, I would not infer from that fact alone that the Department's retention of an expert on Albanian law was "a litigation strategy" devised after the Minister was served with the applicant's originating application, for the sole purpose of attempting to resist the issue of the writ of mandamus.

67 Read as a whole and in the context of the surrounding circumstances, the correspondence (including the three letters to which the applicant specifically referred) evidenced that the decision-making process was on-going during the

whole of the relevant period. I would infer from the correspondence in evidence that the Department sought to retain an expert as part of its attempt to resolve critical issues about the operation of Albanian law because relevant departmental officers did not consider that these issues could be adequately answered by the information then available to them. Further, the letter of 20 May 2015 confirmed that well after 29 April 2015, when the applicant sought to commence these proceedings, the relevant decision-making process remained on-going, since, as at 20 May 2015, the Department was seeking an expert report on the operation of Albanian law.

68 I would not, moreover, draw the adverse inferences against the Minister from the failure to call Ms Blanpain, as the applicant sought, to support findings in the terms of paragraphs 22-25 of the notice to admit. There is no evidence of these matters before the Court; and nor is there any evidence from which these matters might be inferred. The principle in *Jones v Dunkel* is well-known: an unexplained failure by a party to call a witness may, in appropriate circumstances, found an inference that the evidence of that witness would not have assisted that party's case: *Jones v Dunkel* at 308 per Kitto J, 312 per Menzies J and 320-321 per Windeyer J. While the principle may operate to make evidence or inferences that may be drawn from admissible evidence more probable, the principle does not permit a failure to call a witness (here, Ms Blanpain) to fill gaps in the evidence or transform conjecture into inference: *Jones v Dunkel* at 308, 312, 320-321; *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at [53] per Gleeson CJ and McHugh J; and *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 at [95] per Perry J. The evidentiary gap in this case is significant and the principle in *Jones v Dunkel* cannot fill it.

69 Accordingly, I reject the applicant's submission that there had been a failure or refusal on the Minister's part that would found a writ of mandamus.

70 There is a further reason why this application for mandamus must fail. This is not a case in which the Court would compel the Minister to make a particular decision.

71 As already indicated, before the Minister could make a determination under s 22(2) of the *Extradition Act*, the Minister was bound to comply with s 22(3). Section 22(3)(e)(i) and (iii) turns on the Minister's, not the Court's, satisfaction as to the non-existence of the circumstances attracting the relevant limitation. Section 22(3)(e)(i) and (iii) relevantly provides that "the eligible person is only to be surrendered … if … a limitation, condition, qualification or exception … has the effect that … surrender of the person … shall be refused … in certain circumstances"; **and the Minister is** "**satisfied** … **that the circumstances do not exist**" (emphasis added).

72 I accept, for present purposes, that Art 5 of the Treaty contains a limitation within the meaning of s 22(3)(e), namely, that "[t]he extradition shall not take place if, subsequently to … the conviction thereon, exemption from … punishment has been acquired by lapse of time, **according to the laws of the State applying**" (emphasis added). The Minister did not dispute this part of the applicant's argument. Before the Minister can reach any satisfaction of the kind required by s 22(3)(e)(iii), however, the Minister needs information about the circumstances in which the limitation "had the effect" that the surrender must be refused. In this case, therefore, the Minister needs information about the meaning and operation of Albanian law (Albania being "the State applying"). In

particular, the Minister needs to be informed as to the circumstances subsequent to conviction in which an offender acquires an exemption from punishment by reason of lapse of time under Albanian law.

73 The applicant's lawyers have provided the Minister with a substantial amount of material referable to this last-mentioned issue, relying amongst other things on Art 68 of the Albanian Criminal Code, Decision No 7 of 2002 of the Albanian Supreme Court and Dr Livoja's report. On the basis of this material, they contend that the Minister cannot reach the satisfaction on which s 22(3)(e)(iii) turns. That is, the applicants' lawyers contend that here the limitation under Albanian law has effect and, by reason of the lapse of time, Mr Lleshaj is exempt from punishment; and in consequence the Minister cannot be satisfied that the circumstances in which the limitation has effect "do not exist".

74 As the correspondence in evidence shows, Albania has advanced a different and inconsistent account of the operation of Albanian law, amongst other things relying on Art 504/4 of the Albanian Criminal Procedure Code and contending the Mr Lleshaj is not exempt from punishment under Albanian law by reason of the lapse of time, because the effluxion of time was interrupted by the arrest of Mr Lleshaj under an extradition warrant as part of the extradition process.

75 I note too that as at the date of the hearing the Department had not concluded its task of gathering information about the meaning and operation of the relevant Albanian law and had sought its own expert report on the meaning and operation of that law.

76 The existence of the two different and competing views about Albanian law (and the possibility that the Department will obtain its own expert report and further relevant information) demonstrates that whether or not the Minister will be satisfied that the relevant circumstances do not exist, as s 22(3)(e)(iii) contemplates, remains an open question. The meaning and operation of Albanian law is, moreover, a question of fact for the Minister to determine: compare *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [115] per Gummow and Hayne JJ, [185] per Kirby J and [261] per Callinan J. Much may depend on the further information that becomes available to the Department and is subsequently conveyed in a briefing to the Minister, including the expert report that the Department has sought to obtain. In these circumstances, whether or not the Minister will refuse the applicant's surrender to Albania on the basis contemplated in s 22(3)(e)(iii) or on some other basis is a matter for conjecture. Accordingly, I reject the applicant's submission that, at least from 29 April 2015, there was only one way in which the Minister could perform his duty under s 22(2) and that was to refuse the applicant's surrender.

77 As Latham CJ said in *Cuming Campbell* at 749-750, "[w]hen it is the duty of a public officer to exercise a discretion, the court may order the officer to perform his duty by exercising his discretion, but it will not control the exercise of the discretion by directing that it be exercised in a particular manner not expressly required by law". In some cases, as the applicant said, the law may require that a discretion be exercised in a particular way: see, for example, *CSR v Royal Insurance*, where the majority of the High Court held that since the Commissioner had already found that tax had been overpaid (at 84) and there was a legal liability to refund the amount found to have been overpaid, the only lawful exercise of the Commissioner's statutory discretion was to refund that overpayment: at 88 per Brennan J, with whom Toohey and McHugh JJ agreed.

The present case is not like *CSR v Royal Insurance*, because, as already stated, in the circumstances of the case as they currently exist, the law does not require that the Minister make a decision having a particular outcome.

78 *Port Phillip Scallops v Minister for Agriculture*, on which the applicant also relied, is distinguishable too. First, the statutory context was very different to the present context. The plaintiff in that case sought an order in the nature of mandamus requiring the Minister to make a Further Quota Order under s 64A of the *Fisheries Act 1995* (Vic). Rush J held (at [29]-[30]) that "the statutory regime [did] not contemplate management of the fishery by not making a further quota order" and that, in view of the Minister's delay, there had been "an abdication or abandonment of the statutory function". His Honour's reasons for making an order in the nature of mandamus cannot be applied by analogy to this case, however. This is because, amongst other reasons, there has been no "abandonment of the statutory function" since, on the evidence, the decision-making process is actively in train. Further, as counsel for the Minister noted, his Honour's discussion of the relief sought in that case does not support the applicant in this case. Citing *Cuming Campbell* at 749 (see [77] above), his Honour observed that "it has long been recognised that while courts may order a public officer to exercise a discretionary power, courts will not direct how that power is to be discharged" and his Honour's orders did not refer to any particular quota. That is, *Port Phillip Scallops v Minister for Agriculture* does not support the proposition that the applicant is here entitled to mandamus to compel the Minister to make a particular decision.

79 It is implicit in what I have said that I do not consider that it is open to this Court to determine whether or not the Court is satisfied as to the non-existence (or existence) of the circumstances in which, under Albanian law, the "limitation" referred to in s 22(3)(e) has effect. This is because the Parliament has not conferred this function on the Court. Rather the Parliament has conferred this function on a Minister of the Crown. Whether or not the Minister is satisfied in the terms of s 22(3)(e)(iii) is a question of non-jurisdictional fact. In this regard, the Minister's satisfaction under s 22(3)(e) of the *Extradition Act* is analytically the same as a magistrate's satisfaction under s 12(1) and the Attorney-General's opinion under s 16(2). See, in this regard, *Bertran v Vanstone* at [79], [81] per Kenny J, appeal dismissed in *Peniche v Vanstone* (2000) 101 FCR 112 at [66], see esp at [61]; *Vasiljkovic v O'Connor* (2010) 276 ALR 326 at [66] per Edmonds J, appeal dismissed in *Vasiljkovic v O'Connor (No 2)* [2011] FCAFC 125 at [31], see esp [18]. If an application were made for judicial review of the Minister's satisfaction under s 22(3)(e), the Court would not determine for itself the non-existence of the relevant circumstances. Rather, the Court would examine the Minister's satisfaction to determine whether that satisfaction was **formed** according to law.

80 It is unnecessary and inappropriate to consider further the applicant's submissions about the content of Albanian law. It is simply not open to the Court to determine any aspect of this application on the basis of its own understanding of the meaning and operation of Albanian law: compare *Bertran v Vanstone* at [81].

81 Accordingly, I reject the applicant's submission that a writ of mandamus should issue to require the Minister to determine, pursuant to s 22(2) of the

Extradition Act, that he is not to be surrendered to Albania in relation to any of the qualifying extradition offences and to direct, pursuant to s 22(5), a magistrate or eligible Federal Circuit Court Judge to order his release.

Disposition

82 For the reasons stated, I would dismiss the application. I would further order that, unless a party notifies the Court in writing by 4 pm on 19 August 2015, indicating opposition to this order as to costs, the applicant pay the Minister's costs of the application, to be taxed in default of agreement. In all the circumstances, it would not be appropriate to make any further order.

Orders accordingly

Solicitors for the applicant: *DLA Piper*.

Solicitors for the respondent: *Commonwealth Attorney-General's Department*.

CHARLES MARTIN