FEDERAL COURT OF AUSTRALIA

Snedden v Minister for Justice and Another

[2014] FCAFC 156

Middleton, Pagone and Wigney JJ

15, 16 May, 12 December 2014

Extradition — Surrender — Discretion to surrender — Where decision to be made "as soon as reasonably practicable" — Whether exercise of the power to surrender conditional or capable of loss by reason of delay — Extradition Act 1988 (Cth), s 22(2).

Administrative Law — Error of law — Relevant considerations — Where error alleged in consideration of obligations arising under international convention — Whether consideration of international obligations a mandatory consideration — Whether error in consideration of obligations an error of law — Whether any error within jurisdiction — Extradition Act 1988 (Cth), s 22(3)(f).

Administrative Law — Procedural fairness — Hearing rule — Where submissions received in response to contentions put by appellant — Where appellant not given opportunity to respond — Whether right to reply conditional on new information or new consideration.

The Republic of Croatia sought to extradite the appellant to face allegations of war crimes, which request was granted by the Minister for Justice (the Minister) pursuant to s 22(2) of the *Extradition Act 1988* (Cth) (the Act). Relevantly, s 22(3)(f) of the Act provided that the power to surrender was conditional on the Minister, in his or her discretion, considering that the person should be surrendered in relation to the offence.

The appellant sought judicial review before the primary judge, who quashed the decision on the basis that the appellant had been denied procedural fairness and remitted the matter to the Minister.

On appeal, the appellant alleged that the primary judged erred, inter alia, in remitting the matter and in failing to find that the Minister's discretion had miscarried on an alternative basis.

First, the appellant's contention that the matter could not be remitted was premised on construing s 22(2) of the Act as imposing a limitation on the time available to the Minister to make a decision to surrender a person for extradition. Section 22(2) relevantly provided that the determination whether or not to surrender a person was to be made "as soon as is reasonably practicable". As the appellant had argued before the primary judge that the Minister's decision was without power because the decision had not been made as soon was reasonably practicable, for the same reason, it was said that the matter could not be remitted.

Secondly, the appellant had also alleged before the primary judge that the Minister's discretion had miscarried in his consideration of Australia's obligations under the *Convention relative to the Treatment of Prisoners of War 1949*, done at Geneva on 12 August 1949 (the Third Geneva Convention). The Minister had received and relied upon advice from the Department's Office of International Law (the OIL advice), contrary to submissions put by the appellant, which was to the effect that Australia's obligations did not preclude it from extraditing the appellant unless Croatia established a prima facie case. The appellant's contention was that because the advice was erroneous, there was a failure by the Minister to consider a mandatory consideration in the exercise of the discretion, and an error of law in the decision as the consideration said to give rise to an error involved an *issue* of law. Both these matters required resolution before it was necessary to consider the correctness of the OIL advice.

The significance of the appellant's second contention was that the Minister cross-appealed against the finding that the appellant had been denied procedural fairness. During the process leading to the Minister's decision, the Department had written to Croatia to seek its response to a number of matters which had been raised by the appellant. Although the primary judge found that the Croatian response raised no new issue or considerations about which the appellant was not aware, she found that procedural fairness required that the appellant be given an opportunity to put such further submissions as he wished.

Held: Dismissing the appeal, by Middleton and Wigney JJ, Pagone J agreeing: (1) The words "as soon as reasonably practicable" in s 22(2) of the Act do not impose a time limitation which conditions the exercise of the power to surrender a person for extradition. [101], [107], [113], [242]

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

(2) Consideration of Australia's international obligations under the Third Geneva Convention is not mandatory in the Minister's exercise of the discretion under s 22(3)(f) of the Act. [152], [242]

Rivera v Minister for Justice and Customs (2007) 160 FCR 115, followed.

(3) Any error relating to the consideration of a matter which is not mandatory in the exercise of a discretion is an error within jurisdiction, even if the matter involves an issue of law. [153], [164], [242]

AB v Minister for Immigration and Citizenship (2007) 96 ALD 53, approved.

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651, considered.

Allowing the cross-appeal, by Middleton and Wigney JJ, Pagone J dissenting: (4) Whether the failure to provide the appellant with the Croatian response constituted a denial of procedural fairness depended upon whether the response raised any new issue, or contained any new piece of information, not previously known to the appellant, which was adverse to his interests and credible, reliable and significant to the decision. [200]-[201], [246]

Hala v Minister for Justice [2014] FCA 457, approved.

Appeal against decision of Davies J, (2013) 306 ALR 452, dismissed; cross-appeal allowed.

Cases Cited

AB v Minister for Immigration and Citizenship (2007) 96 ALD 53.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27.

Al-Kateb v Godwin (2004) 219 CLR 562.

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88.

Applicants M1015/2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1309.

Attorney-General (Cth) v Foster (1999) 84 FCR 582.

Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9) (2013) 212 FCR 406.

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651.

Brock v Minister for Home Affairs [2011] FCAFC 167.

Brock v Minister for Home Affairs [2010] FCA 1301.

Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384.

Condon, Assistant Commissioner v Pompano Pty Ltd (2013) 252 CLR 38.

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

Dagli v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 133 FCR 541.

Foster v Attorney-General (Cth) (1998) 158 ALR 394.

Griffiths v Rose (2010) 190 FCR 173.

Hala v Minister for Justice [2014] FCA 457.

Immigration and Citizenship, Minister for v Maman (2012) 200 FCR 30.

Immigration and Citizenship, Minister for v SZQHH (2012) 200 FCR 223.

Immigration and Multicultural Affairs, Minister for v Bhardwaj (2002) 209 CLR 597.

Immigration and Multicultural Affairs, Minister for v Yusuf (2001) 206 CLR 323.

Immigration and Multicultural Affairs, Re Minister for; Ex parte Miah (2001) 206 CLR 57.

Immigration and Multicultural and Indigenous Affairs, Re Minister for; Ex parte Lam (2003) 214 CLR 1.

Joffe v The Queen (2012) 82 NSWLR 510.

John v Rees [1970] Ch 345.

Kioa v West (1985) 159 CLR 550.

Le v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 875.

M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 146.

Mokbel v Attorney-General (Cth) (2007) 162 FCR 296.

Mokbel v The Queen (2013) 40 VR 625.

NATB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 133 FCR 506.

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 218 CLR 273.

New South Wales Council for Civil Liberties Inc v Classification Review Board (2006) 236 ALR 313.

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85.

Nikac v Minister for Immigration and Ethnic Affairs (1988) 20 FCR 65.

O'Connor v Zentai (2011) 195 FCR 515.

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319.

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship (2013) 251 CLR 322.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd (2014) 222 FCR 13.

R v University of Cambridge (Dr Bentley's Case) (1722) 93 ER 698.

Railways, Commissioner for (NSW) v Agalianos (1955) 92 CLR 390.

Revenue, Commissioner for Australian Capital Territory v Alphaone Pty Ltd (1994) 49 FCR 576.

Rivera v Minister for Justice and Customs (2007) 160 FCR 115.

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252.

Salemi v MacKellar (No 2) (1977) 137 CLR 396.

Sales v Minister for Immigration and Citizenship (2007) 99 ALD 523.

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

Snedden v Minister for Justice (2013) 306 ALR 452.

Snedden v Republic of Croatia (2009) 178 FCR 546.

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152.

SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190.

Taxation, Federal Commissioner of v Consolidated Media Holdings Ltd (2012) 250 CLR 503.

TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd (2014) 311 ALR 387.

Vasiljkovic v Commonwealth (2006) 227 CLR 614.

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

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

VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 559.

Waterford v Commonwealth (1987) 163 CLR 54.

Williams v The Queen (1986) 161 CLR 278.

Wilson v State Rail Authority (NSW) (2010) 78 NSWLR 704.

Zentai v O'Connor (No 4) [2010] FCA 1385.

Appeal

R Knowles, *L De Ferrari* and *J Fetter*, for the appellant.

N Williams SC and *G Hill*, for the first respondent.

Cur adv vult

12 December 2014

Middleton and Wigney JJ.

1 Daniel Snedden, who is also known as Dragan Vasiljkovic, is an Australian Citizen. He is wanted for prosecution in the Republic of Croatia (Croatia) in respect of alleged war crimes. These offences were allegedly committed in 1991 and 1993 when it is said Mr Snedden was in command of a unit of Serbian paramilitary troops who were involved in an armed conflict with Croatia's armed forces.

2 These appeal proceedings relate to Croatia's attempts to have Mr Snedden extradited to face trial in Croatia for these alleged offences. The extradition process has been lengthy and complex. That has been in no small way due to Mr Snedden's challenges to various stages of the process. This appeal concerns a challenge to the fourth, and effectively final, stage of the process; the determination by the Minister for Justice of the Commonwealth (the Minister) pursuant to s 22(2) of the *Extradition Act 1988* (Cth) (the Act) that Mr Snedden is to be surrendered to Croatia in relation to the alleged war crimes offences. The Minister made that determination on 15 November 2012. This resulted in the issue of a warrant for the surrender of Mr Snedden pursuant to s 23 of the Act.

3 On 22 November 2013, the primary judge set aside the Minister's determination under s 22(2) and the resulting surrender warrant: *Snedden v Minister for Justice* (2013) 306 ALR 452 (Judgment). Her Honour remitted the matter to the Minister for determination according to law.

4 Mr Snedden appeals from the order remitting the matter to the Minister. The Minister cross-appeals against the orders setting aside the surrender determination and warrant.

5 For the reasons that follow, Mr Snedden's appeal should be dismissed and the Minister's cross-appeal should be allowed.

Statutory scheme

6 The Act codifies the law relating to the extradition of persons from Australia to other countries. It establishes a detailed and tightly structured scheme or process pursuant to which a person may be surrendered to another country. The process involves a number of distinct stages. Each stage involves a decision of a binary nature based on stated criteria. If the relevant criteria are satisfied, the extradition process continues. If they are not, the process comes to an end.

7 The first stage involves the decision to issue a warrant for the arrest of a person. Section 12 of the Act provides that where an application is made on behalf of an extradition country to a magistrate for the issue of a warrant for the arrest of a person, the magistrate shall issue a warrant if satisfied that the person is "an extraditable person in relation to the extradition country".

8 An extradition country is any country (or colony, territory or protectorate of a country) that is declared by the regulations to be an extradition country (s 5). An extraditable person is a person who has been convicted of an offence in another country, or who is the subject of an arrest warrant in respect of an offence in another country, the offence is an extraditable offence in relation to that country and the person is outside that country (s 6). An extradition offence in relation to another country is, in general terms, an offence against a law of the country which either carries a serious penalty (death or imprisonment for more than

12 months) or is otherwise required to be treated as an extradition offence in a relevant extradition treaty between Australia and the other country (s 5).

9 If an arrest warrant is issued under s 12 of the Act, a consequence is that the person may be arrested (s 13) and brought before a magistrate and either remanded in custody or on bail (s 15).

10 The second stage of the extradition process involves the issue of a notice by the Attorney-General under s 16 of the Act. Where the Attorney-General receives an extradition request from an extradition country in relation to the person, he or she may issue a notice, directed to a magistrate, stating that the request has been received. An extradition request is a request in writing by an extradition country for the surrender of a person to the country (s 5).

11 The Attorney-General can only give such a notice if he or she forms an opinion about two matters. First, the Attorney-General must be of the opinion that the person is an extraditable person in relation to an extradition country and that if the conduct the subject of the offence had occurred in Australia it would have constituted an extradition offence in relation to Australia (s 16(2)(a)). An extradition offence in relation to Australia is essentially an offence against a law of Australia for which the maximum penalty is death or imprisonment for not less than 12 months (s 5).

12 Secondly, the Attorney-General cannot give the notice if he or she is of the opinion that there is an extradition objection in relation to the extradition offence (s 16(2)(b)). The Act lists (in s 7) five categories of extradition objection. It is unnecessary to describe them in detail. They include: requests that involve political offences; requests where the surrender is sought for the purposes of prosecuting the person on account of his or her race, religion, nationality or political opinion; requests where the person would not receive a fair trial on account of his or her race, religion, nationality or political opinion; requests where the conduct would constitute an offence under the military law, but not the ordinary criminal law of Australia if it had occurred in Australia; and requests where the person has been acquitted, or pardoned, or already punished in respect of the relevant extradition offence or another offence constituted by the same conduct.

13 The decision by the Attorney-General to issue, or not issue, as the case may be, a notice under s 16 is important. If the Attorney-General decides not to issue a notice, he or she must then give a notice, directing the magistrate to release the person from custody or discharge any recognisances on which bail was granted (s 17(1)). The extradition process is then at an end. If the Attorney-General issues a notice, the person may either consent to being surrendered to the extradition country (s 18), or the process moves to the next stage, the third stage.

14 The third stage concerns the determination of the person's eligibility for surrender by a magistrate pursuant to s 19 of the Act. Section 19 provides, in essence, that a person is only eligible for surrender to an extradition country in relation to an extradition offence if: first, the relevant supporting documents in relation to the offence (as set out in s 19(3)) have been produced to the magistrate; secondly, the magistrate is satisfied that double criminality exists in relation to the offence (meaning, in general terms, that, if committed in Australia, the offence would have been an extradition offence in relation to Australia); and thirdly, the magistrate is not satisfied that there are substantial

grounds for believing that there is an extradition objection in relation to the offence. It is again unnecessary here to descend into the detail of these requirements.

15 If the magistrate determines that the person is eligible for surrender, the magistrate is required to order that the person be committed to prison to await the determination that constitutes the fourth stage of the process (s 19(9)). If the magistrate determines that the person is not eligible for surrender, the magistrate is to order the release of the person and advise the Attorney-General accordingly (s 19(10)). Subject to review, the extradition process is then at an end.

16 The magistrate's determination of a person's eligibility for surrender is subject to review by the Federal Court or (at the relevant time) the Supreme Court of a State or Territory (s 21). A review application may be made by either the person or the extradition country, depending on the order made by the magistrate. There is then a right of appeal to this Court.

17 The fourth stage, which as earlier indicated occurs if the person is found to be eligible for surrender under s 19, is the determination by the Attorney-General under s 22(2) of the Act that the person either is, or is not, to be surrendered in relation to a qualifying extradition offence. The determination under s 22(2) can, by reason of s 19 of the *Acts Interpretation Act 1901* (Cth), be made by any Minister: *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 (*Foster*); *Mokbel v Attorney-General (Cth)* (2007) 162 FCR 296.

18 It is this fourth stage which is the focus of this appeal.

19 Section 22(2) of the Act provides as follows:

> 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

20 Section 22(3) of the Act sets out a list of conditions that must be satisfied for a person to be surrendered. So far as is relevant to the issues on this appeal, it provides as follows:

> For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:
>
> …
>
> (d) the extradition country concerned has given a speciality assurance in relation to the person;
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> … and
>
> (f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

21 Section 22(4) sets out the circumstances in which an extradition country shall be taken to have given a speciality assurance.

22 Section 22(5) provides that if the Attorney-General determines under s 22(2) that the eligible person is not to be surrendered, the Attorney-General shall order the release of the person. This effectively brings the extradition process to an end.

23 If, on the other hand, the Attorney-General determines under s 22(2) that a person is to be surrendered, s 23 provides that the Attorney-General shall issue either a warrant for the surrender of the person, or a temporary surrender

warrant under s 24. A temporary surrender warrant deals with the situation where a person who is to be surrendered is already serving a sentence of imprisonment in Australia. It is not relevant to Mr Snedden.

Background facts

24 Mr Snedden was born Dragan Vasiljkovic in 1954 in Belgrade, the then capital of the Socialist Federal Republic of Yugoslavia. He is of Serbian heritage. In 1969 he immigrated to Australia with his family and changed his name to Daniel Snedden. He acquired Australian Citizenship in 1975.

25 It appears to be common ground that by at least the early 1990s Mr Snedden had returned to the former Yugoslavia. It is during this time that it is alleged that Mr Snedden was involved in the armed conflict that surrounded the breakup of Yugoslavia. It is alleged by Croatia that Mr Snedden, apparently then known as "Captain Dragan," was the commander of a "special purpose unit" of Serbian paramilitary troops during this period. These troops were involved in armed conflict with Croatian armed forces. It was in that context that Mr Snedden is said to have committed the alleged war crimes

26 On 19 January 2006, Croatia made a successful application request for a provisional arrest warrant under s 12 of the Act. Mr Snedden was arrested pursuant to the warrant on the same day. He appeared before a magistrate the following day and was remanded in custody.

27 In January 2006, Mr Snedden commenced proceedings in the original jurisdiction of the High Court claiming that certain provisions of the Act were invalid. His application was dismissed in June 2006: *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 (*Vasiljkovic v Commonwealth*).

28 Croatia presented its formal request to Australia for Mr Snedden's extradition on 17 February 2006. Mr Snedden's extradition was requested for prosecution in Croatia for three offences: two offences of war crimes against prisoners of war, contrary to Art 122 of the *Basic Criminal Code of the Republic of Croatia* (Basic Criminal Code); and one offence of war crimes against the civilian population contrary to Art 120, paras 1 and 2 of the Basic Criminal Code.

29 In December 2006 a magistrate conducted proceedings in accordance with s 19 of the Act to determine whether Mr Snedden was eligible for surrender to Croatia. The magistrate determined that Mr Snedden was eligible for surrender and on 12 April 2007 made an order under s 19(9) of the Act.

30 Eleven days later Mr Snedden commenced proceedings in this Court seeking a review of the magistrate's determination and order. That application was heard in mid-2008 and dismissed on 3 February 2009: *Snedden v Republic of Croatia* [2009] FCA 30.

31 Mr Snedden appealed that decision. He was initially successful. In September 2009, the Full Court allowed Mr Snedden's appeal and ordered that he be released from custody: *Snedden v Republic of Croatia* (2009) 178 FCR 546. He was released from custody on 4 September 2009.

32 Unfortunately for Mr Snedden, the High Court granted special leave to appeal and on 30 March 2010 allowed Croatia's appeal: *Republic of Croatia v Snedden* (2010) 241 CLR 461. The High Court confirmed the magistrate's determination that Mr Snedden was eligible for surrender and the order that he be committed to prison to await the surrender determination by the Attorney-General under

s 22 of the Act. Mr Snedden was initially not able to be located. He was eventually taken back into custody (pursuant to the magistrate's original s 19(9) warrant) in May 2010.

33 It is necessary to go into some detail about the events that followed. That is because one of the issues on this appeal concerns whether the surrender determination that was eventually made by the Minister was made as soon as was reasonably practicable after Mr Snedden became an eligible person.

34 Shortly after he was returned to custody in May 2010, Mr Snedden was invited by the Attorney-General's Department (the Department) to make any representations he wanted to make about why he should not be surrendered to Croatia. In the following months, the Department received lengthy and detailed representations on Mr Snedden's behalf from a number of people. The representations, together with the documents provided along with them, ran to almost 2000 pages.

35 On 3 August 2010, the Department wrote to the Croatian Ministry of Justice seeking a response to some matters raised in the representations made on Mr Snedden's behalf. From the large volume of information and material contained in Mr Snedden's representations, the Department had managed to distil eight issues that it considered warranted a response from Croatia. It is again necessary to provide some detail here because one of the appeal grounds turns, to an extent, on the information supplied by Croatia in response to this request.

36 The Department's letter summarised the issues raised by Mr Snedden and the response requested from Croatia as follows:

> In summary, the issues raised by Mr Snedden to which we seek Croatia's response include:
>
> 1. the lack of reciprocity in Australia's extradition relationship with Croatia, including that Croatia is not able to consider extradition requests made by Australia, and even if it can consider requests from Australia, that Croatia will not extradite its citizens to Australia
> 2. that Mr Snedden is not wanted for prosecution in Croatia, rather he is wanted merely for investigation in relation to the alleged offences
> 3. that Mr Snedden will not receive a fair trial in Croatia, with reference to the alleged bias of the Croatian judiciary against Serb defendants in war crimes proceedings and the alleged corruption of prosecution witnesses in Mr Snedden's case
> 4. concerns that Mr Snedden will not be safe in custody in Croatia, and that the safety of defence witnesses may be jeopardised if they travel to Croatia to give evidence at Mr Snedden's trial
> 5. the delay between the time of Mr Snedden's alleged offences and Croatia's extradition request, and possible implications for a fair trial in Croatia
> 6. the alleged political motivation behind Croatia's extradition request
> 7. that Croatia made an incorrect reference to criminal procedural laws in the extradition request which would not apply to Mr Snedden, and
> 8. that Croatia made incorrect reference to the offences alleged against Mr Snedden in the extradition request and that Mr Snedden's alleged conduct does not relate to the "correct" offence provision.

37 Croatia provided a written response to this request. It was received by the Department on 8 September 2010. The content and nature of Croatia's response, or parts of it, will be considered later in these reasons. It is relevant to one of the grounds in the Minister's cross-appeal.

38 Meanwhile, on 20 September 2010, Mr Snedden commenced a further court challenge to the extradition process. He applied to the Court seeking an order in the nature of a writ of *habeas corpus* on the basis that he was not an extraditable person. That application was summarily dismissed in mid-November 2010: *Vasiljkovic v O'Connor* (2010) 276 ALR 326. An appeal from this decision was eventually heard in August 2011 (after a delay mainly occasioned by Mr Snedden or his advisers) and dismissed on 30 September 2011: *Vasiljkovic v O'Connor (No 2)* [2011] FCAFC 125.

39 While the appeal from the summary dismissal was on foot, the Department took steps to secure a speciality assurance in relation to Mr Snedden as required by s 22(3)(d) of the Act. Communications between the Department and Croatia commenced in March 2011 and continued up to 21 September 2011 when Croatia provided a speciality assurance.

40 In November 2011, just over a month after the provision of the speciality assurance and the dismissal of Mr Snedden's latest appeal, an officer of the Department began work on a brief to the Minister concerning the surrender determination to be made in relation to Mr Snedden. This work continued for a year. The Ministerial brief was eventually cleared by the Assistant Secretary and signed by a First Assistant Secretary of the Department on 2 and 6 November 2012 respectively and provided to the Minister on 7 November 2012.

41 During that year, however, the matter was not static. The Department continued to communicate with Croatia about the speciality assurance, in particular in relation to the possibility of further charges against Mr Snedden. In May 2012, Croatia formally advised Australia that there were no criminal proceedings against Mr Snedden in Croatia other than those the subject of the extradition request.

42 The Department also continued to receive representations on behalf of Mr Snedden from numerous people. The last such submission was received in February 2012.

43 Importantly, on 13 February 2012 the officers who were working on the legal submission received legal advice from the Department's Office of International Law (OIL). This legal advice had first been requested in June 2011. The content of this advice is relevant to one of Mr Snedden's grounds of appeal. The advice requested was whether "international law require[d] that an extradition request for Mr Snedden for the conduct alleged be supported by *prima facie* evidence". The short answer provided by the OIL lawyer was in the following terms:

> No. International law does not require that the request for Mr Snedden's extradition be supported by *prima facie* evidence, regardless of whether the offences for which his extradition is being sought were committed in the course of an IAC [International Armed Conflict] or a NIAC [Non-International Armed Conflict].

44 On 15 November 2012, the Minister determined that Mr Snedden is to be surrendered to Croatia in relation to the offences specified in Croatia's extradition request.

Mr Snedden's challenge to the surrender determination

45 Mr Snedden then challenged the Minister's surrender determination in proceedings invoking the Court's jurisdiction under s 39B of the *Judiciary Act*

1903 (Cth). Before the primary judge, Mr Snedden alleged, in effect, that the determination was invalid and of no effect, or should be quashed, on three grounds.

46 First, he contended that the requirement in s 22(2) of the Act that the surrender determination be made "as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person" effectively created a limitation period for the determination. He argued that properly construed, s 22(2) provides that if the Attorney-General (or Minister) does not make the determination as soon as is reasonably practicable, he (or she) effectively loses the power to make the determination. Mr Snedden relied, in support of this submission, on a first instance of a decision of the Court in *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494 (*Santhirarajah*).

47 Mr Snedden contended that in his case, the Minister had failed to make the determination as soon as was reasonably practicable and thus he had no power to do so when he purported to make the determination.

48 Secondly, Mr Snedden contended that he had been denied procedural fairness. He claimed that he had not been informed of, and therefore had not had an opportunity to respond to, three categories of material. The first category was said to be adverse material provided to the Department by Croatia in September 2010 in response to the Department's 3 August 2010 letter. The second category was the communications between the Department and Croatia concerning Croatia's speciality assurance. The third category was said to be the Minister's intention to surrender him in alleged violation of Australia's obligations under the Geneva Convention.

49 Thirdly, Mr Snedden contended that the Minister's determination was infected by two related jurisdictional errors. These errors both concerned the requirement in s 22(2)(f) of the Act that an eligible person not be surrendered unless the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the extradition offences. The first alleged error was said to be that the Minister relied on incorrect legal advice that Australia could extradite Mr Snedden to Croatia without prima facie evidence of the offences in respect of which extradition was sought. The second alleged error was that the Minister failed to consider the fact that the surrender of Mr Snedden would be in alleged breach of his protected status as a prisoner of war under the *Convention relative to the Treatment of Prisoners of War 1949*, done at Geneva on 12 August 1949 (the Third Geneva Convention).

50 The primary judge rejected the first ground (the delay ground) and the third ground (the Geneva Convention ground). The rejection of these grounds is the subject of Mr Snedden's appeal. The primary judge found in Mr Snedden's favour in relation to the second ground (the procedural fairness ground). The finding by the primary judge that Mr Snedden had been denied procedural fairness is the subject of the Minister's cross-appeal.

The judgment of the primary judge

51 The primary judge rejected the delay ground for two reasons. First, the primary judge found that the proper construction of s 22(2) of the Act did not support Mr Snedden's argument that the Attorney-General (or Minister) was deprived of the power to make a determination if it was not made "as soon as was reasonably practicable". Secondly, the primary judge found that, in any event, the Minister did not fail to make the determination as soon as was reasonably practicable.

52 It is unnecessary to rehearse her Honour's reasons in relation to the construction issue. Most of the considerations canvassed by her Honour are the subject of submissions on the appeal and will be addressed in that context later in these reasons. Suffice it to say that her Honour found that the contrary construction of s 22(2) that was arrived at in *Santhirarajah* was plainly wrong and should not be followed.

53 As to whether the Minister had in fact failed to act as soon as was reasonably practicable, the primary judge found that the relevant time period commenced when the High Court reversed the Full Court's decision and upheld the magistrate's decision that Mr Snedden was eligible for surrender. Her Honour then reviewed the chronology of events from that time and concluded that, whilst the Minister could be justifiably criticised for taking as long as he did to make the determination, she was not satisfied that the determination was not made as soon as was reasonably practicable having regard to the circumstances.

54 In relation to the procedural fairness ground, the primary judge found that Mr Snedden had been denied procedural fairness in respect of both the Croatian response and the ongoing communications between the Department and Croatia concerning the speciality assurance. In relation to the former, her Honour appeared to accept the Minister's submission that Croatia's response did not include any new information or considerations that Mr Snedden was not already aware of. Nevertheless, her Honour concluded that procedural fairness did require that Mr Snedden be given an opportunity to respond to the further information that the Department obtained from Croatia. Her Honour concluded (Judgment at [42]):

> … Mr Snedden was entitled to be informed about what Croatia put against him as to why he should be surrendered. Whilst the Croatian response may have raised no new considerations, procedural fairness nonetheless required Mr Snedden to be given the opportunity to consider that further information and put such further submissions as he wished to the Department.

55 In relation to the ongoing communications concerning the speciality assurance, the primary judge rejected the Minister's submission that none of this needed to be disclosed because there was no question that the assurance had been provided as required by s 22(3) of the Act. Her Honour relevantly concluded (Judgment at [45]):

> … Mr Snedden was entitled to know that Australia had concerns about whether additional charges may be brought against him and had sought further clarification from Croatia after the speciality assurance was received. This was relevant information that must materially bear upon the Minister's decision because of the legal prohibition on Mr Snedden's surrender if the speciality assurance was not given. Subject to questions of public interest immunity, if any, procedural fairness required that information to be put to Mr Snedden to allow him the opportunity to make submissions.

56 Her Honour found that Mr Snedden had been denied the opportunity to make submissions in relation to this "relevant information".

57 The primary judge rejected Mr Snedden's claim that he was denied procedural fairness because he was not provided with the OIL advice. Her Honour accepted the Minister's submission that the Department was not required to provide its privileged legal advice to Mr Snedden. Her Honour also found that in any event Mr Snedden was already on notice that the Minister's position was that prima facie evidence was not required to extradite

Mr Snedden. He had already been given an adequate opportunity to put his case that prima facie evidence was required. He had provided two expert reports to the Department to support his position. Fairness did not require him to be given a further opportunity.

58 Mr Snedden has filed a notice of contention in the Minister's cross-appeal challenging this finding.

59 In relation to the Geneva Convention ground, the primary judge rejected Mr Snedden's contention that the Minister's discretion under s 22(3)(f) miscarried because he either acted upon incorrect legal advice or failed to consider whether Mr Snedden was a protected person under the Third Geneva Convention, or that Croatia would breach Mr Snedden's protections under the convention.

60 The primary judge did not deal with the question of the correctness of the OIL advice or Mr Snedden's status under the Third Geneva Convention. Rather, her Honour found that the "short answer" was that the relevant Articles of the Third Geneva Convention were not mandatory relevant considerations in the exercise of the statutory power under s 22(2). The Minister was accordingly not required to have regard to them in deciding whether Mr Snedden is to be surrendered. Her Honour also found (Judgment at [53]), relying on *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 (*Le v Minister for Immigration*) at [59] and *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53 (*AB v Minister for Immigration*), that because Australia's obligations do not condition the lawful exercise of the statutory power under s 22(2), the provisions of the Third Geneva Convention did not become mandatory relevant considerations.

Appeal grounds and submissions

61 Grounds 1 to 4 of the appellant's notice of appeal contend, in short, that the primary judge erred in rejecting the delay ground.

62 Grounds 1 and 2 deal with the issue concerning the proper construction of s 22(2) of the Act. Mr Snedden contends that the primary judge erred in finding that the Minister had power to make a determination under s 22(2) of the Act in relation to the appellant, and erred in finding that the decision in *Santhirarajah* in relation to the construction of s 22(2) was plainly wrong.

63 Mr Snedden submits that there are four reasons why the *Santhirarajah* construction is correct and why her Honour's construction is wrong. First, he submits that the use of the word "shall" in s 22(2) is a clear textural indication that the "temporal limitation" in s 22(2) is intrinsic to the lawful exercise of power.

64 Secondly, he points to the fact that a person awaiting a surrender determination is generally on remand. It is said that given that the liberty of the individual is at stake, plain words would be needed to override fundamental common law protections relating to unduly prolonged deprivation of liberty. The appellant submits that the position of a person awaiting surrender is analogous to the position of a person who has been arrested and who must be brought before a bail justice as soon as reasonably practicable: cf *Williams v The Queen* (1986) 161 CLR 278 (*Williams v The Queen*).

65 Thirdly, Mr Snedden submits that if the Minister delays making a decision, the liberty of the individual is not sufficiently protected by the mere availability of an order the effect of which would be to compel the Attorney-General to

exercise the power. It is said that Parliament could not have intended that an order in the nature of a writ of mandamus would be the only remedy for undue delay. He submits that such a construction would also effectively ignore the words "as soon as is reasonably practicable" because recourse to mandamus could be had even in the absence of those words.

66 Fourthly, a construction which imposes an effective time limit on the Attorney-General is said to provide a strong incentive for the executive to act in a timely way. This is submitted to be consistent with the protective safeguards in s 22 and other sections of the Act.

67 In oral submissions, the appellant also relied, again essentially by analogy, on High Court authorities dealing with immigration detention including *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 (*Plaintiff M76*). In that context, the High Court has held that detention in custody is limited to "such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes [to consider and grant permission to remain in Australia and to deport if permission is not granted]" (*Plaintiff M76* at [140]).

68 Grounds 3 and 4 of the appellant's notice of appeal contend that the primary judge erred in finding that the Minister made the surrender determination as soon as was reasonably practicable. In particular it is contended that the primary judge erred in finding that there was no unexplained inaction by the Minister, that May 2012 (being the date when Croatia gave the speciality assurance) was the earliest date that a determination could be made, and that the length of time taken to complete the brief to the Minister had been fully explained.

69 In his submissions, Mr Snedden points to three essentially unexplained delays from 30 March 2010 when he became eligible for surrender. First, he submits that the Department took a year to seek a speciality assurance from Croatia. It then took Croatia six months to provide the assurance and then another eight months for that assurance to be "finalised".

70 Secondly, Mr Snedden points to the fact that it took the Department a year to seek legal advice about whether a prima facie case was required. This issue was first raised by the appellant in June 2010 and yet the advice was not sought until June 2011. There was then a delay of seven months before the advice was provided.

71 Thirdly, Mr Snedden submits that the Department did not commence work on the Ministerial brief until November 2011. The apparent explanation for this was that the Department was waiting for the appellant's habeas corpus proceedings to be finalised. It then took a year to complete.

72 Mr Snedden submits that none of these delays were properly explained by the Department in the evidence that was before the primary judge. He argues that once there appears to be a prima facie delay, the evidentiary onus shifts to the Department to explain the delay. It had not discharged that onus. In particular, Mr Snedden submits that, contrary to the finding of the primary judge, the length of time taken to complete the Ministerial brief was not "fully explained" in the evidence.

73 Mr Snedden also takes issue with the finding by the primary judge that May 2012 was the effective starting point in considering whether there was any delay. Her Honour reasoned that before that time the Department did not have

all the "necessary information" because it did not have Croatia's speciality assurance. Mr Snedden submits, however, that the Minister could have determined not to surrender Mr Snedden prior to that time. He did not have to wait for a speciality assurance to make that decision.

74 Finally, Mr Snedden submits that the primary judge erred by effectively imposing a requirement that he demonstrate that the delay was the result of some neglect, oversight or inattention. That is said to "set the bar too high". He submits that the only question is whether, considered objectively, the determination was not made as soon as was reasonably practicable.

75 Ground 5 of the appellant's notice of appeal relates to the Geneva Convention ground. In this ground, Mr Snedden contends, in effect, that the primary judge erred in failing to find that the Third Geneva Convention applied to at least one of the extradition offences for which Mr Snedden's extradition was sought. He also contends that the Minister's surrender determination was vitiated by jurisdictional error. The alleged jurisdictional error is said to be that the Minister misdirected himself on the proper construction of the Third Geneva Convention and erred in concluding that Australia would not be in breach of its international obligations if it surrendered Mr Snedden without requiring Croatia to demonstrate a prima facie case. It is common ground that Croatia had not sought to make out a prima facie case in its request.

76 Mr Snedden made detailed written and oral submissions in support of his contention that, as a matter of international law, Australia was prohibited from extraditing him in respect of at least one of the alleged extradition offences unless Croatia had made out a prima facie case. His argument hinges on the proper construction of Art 129 of Third Geneva Convention. Article 129 provides that, in the case of "grave breaches" of the Convention, a party to the Convention can either prosecute the accused person in its own courts, or "hand such persons over for trial" to another party, provided the other party had "made out a prima facie case".

77 Mr Snedden submits that the 1993 offence for which his surrender is sought took place during an international armed conflict. It also falls within the definition of grave breaches in Art 130 of the Third Geneva Convention. Accordingly, Art 129 is enlivened.

78 Whilst there is apparently no issue between the parties that the conduct alleged to constitute the 1993 offence would constitute a grave offence, there is an issue concerning the proper construction of Art 129. The main issue is whether Art 129 applies to extradition, as opposed to "handing over".

79 The substance of the OIL advice is that the process of "handing over", which is the process referred to in Art 129, is separate and distinct from extradition. It is said that Art 129 leaves open extradition as a third option, in addition to prosecution or "handing over". Reference is also made to Art 88 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977*, done at Geneva on 8 June 1977 (Protocol I), which provides that, in the case of extradition, the domestic law of the requested party applies.

80 Mr Snedden contends that the OIL advice is wrong. He submits that when the text of the Art 129 is carefully analysed, together with the history of the negotiations that resulted in the final wording of the Article and statements in the leading authoritative commentaries, it is clear that Art 129 applies to extradition. At risk of failing to do justice to Mr Snedden's detailed analysis, the

nub of his submission is that Art 129 reflects the international law obligation *aut dedere aut judicare*, or "extradite or prosecute". The Latin term "dedere" means "surrender" or "deliver". He submits that extradition is one form of surrender, being surrender pursuant to a bilateral or multilateral treaty. It is a subset of the broader concept of surrender or handing over. Accordingly, he submits that extradition is encompassed by "handing over" and is therefore covered by Art 129.

81 This construction is also supported, in Mr Snedden's submission, by authoritative commentaries in relation to the convention, including most significantly, the commentary by the International Committee of the Red Cross. That commentary specifically equates the expression "handing over" in Art 129 with extradition.

82 As for the OIL's reliance on Art 88 of Protocol I, Mr Snedden submits that this Article relates to mutual assistance in criminal matters. It is also expressly made subject to the substantive rights and obligations under the Third Geneva Convention.

83 The relevance of all this, in Mr Snedden's submission, is twofold. First, he submits that the question whether Australia would be in breach of its international obligations by surrendering him in circumstances where Croatia had not made out a prima facie case was a mandatory consideration for the Minister. That is because this issue had been the subject of representations made on Mr Snedden's behalf, and because the Minister had chosen to make this issue a relevant consideration by seeking and having regard to the OIL advice. He submits that as a result of relying on the incorrect OIL advice, the Minister failed to have regard to this mandatory consideration.

84 Secondly, and perhaps more significantly, Mr Snedden submits that because the OIL advice was legally wrong, the Minister acted on an erroneous view of the law (the interpretation of Art 129) in respect of a mandatory consideration in relation to the exercise of his discretion under s 22(2)(f) of the Act. This was a jurisdictional error.

85 In this respect, Mr Snedden submits that, to the extent that the decision in *Le v Minister for Immigration* is authority for the proposition that an erroneous construction of an international treaty cannot amount to a jurisdictional error, it is wrong and should not be followed. The primary judge was, in Mr Snedden's submission, wrong to follow *Le v Minister for Immigration* and conclude that an erroneous construction of Art 129 could not amount to a jurisdictional error.

Cross-appeal grounds and submissions

86 In his cross-appeal, the Minister contends that the primary judge erred in holding that procedural fairness required both that the Croatian response be disclosed to Mr Snedden, even if it raised no new considerations, and that Mr Snedden be informed that Australia had concerns about whether additional charges may be brought against him by Croatia.

87 The Minister accepts that he was required to afford Mr Snedden procedural fairness in arriving at his surrender determination. The issue is what procedural fairness required in the particular statutory context and the circumstances of the particular case. He submits that in deciding what procedural fairness required in Mr Snedden's case, the primary judge erred in not giving proper attention to either the statutory context or the particular circumstances.

88 In relation to the statutory context, the Minister accepts, as did the primary

judge, that the extradition process is essentially "adversarial". The significance of that, in the Minister's submission, is that procedural fairness was required to be afforded to both parties. That is, both Mr Snedden and Croatia. In the circumstances, he submits that the procedure adopted in Mr Snedden's case was fair. Mr Snedden was invited to make submissions as to why he should not be surrendered to Croatia. Croatia was then invited to respond. This process must also be considered in light of the fact that the statutory scheme had already involved a consideration of most of the relevant issues at the earlier stages of the extradition procedure.

89 In the Minister's submission, there is no absolute obligation for the Attorney-General (or Minister) to give the person whose extradition is being sought an opportunity to reply or respond to the requesting country's response to the person's representations. That is so particularly where, as here, Mr Snedden was effectively on notice that his representations should advance all arguments and materials that he sought to put before the Minister to persuade him not to surrender him. In support of this proposition, the Minister relies in particular, on a number of decisions that address procedural fairness in the extradition context including *Hala v Minister for Justice* [2014] FCA 457 (*Hala*); *Foster* at [70]; *Santhirarajah* at [339]; *Brock v Minister for Home Affairs* [2011] FCAFC 167 (*Brock*) at [22].

90 In relation to the circumstances of the case, the Minister submits that the information in the Croatian response was purely responsive. There was no new information personal to Mr Snedden. Nor was anything included in the response that Mr Snedden could not have addressed in his original representation. This appears to have been largely accepted by the primary judge. In these circumstances, the Minister submits that procedural fairness, the content of which falls to be assessed by a standard of practicality or reasonableness, did not require the Minister to give Mr Snedden an opportunity to respond.

91 In relation to the speciality assurance, the Minister's submission is that the primary judge erred in finding that, despite the fact that a speciality assurance was provided by Croatia, and accepted by Australia, procedural fairness required that Mr Snedden be notified of any "concerns" Australia had in relation to that assurance. In the Minister's submission, procedural fairness did not require Mr Snedden to be informed of the Department's thought processes. In any event, the Minister submits that ultimately there were no such concerns. The end result of the communications between Australia and Croatia was that Croatia confirmed and Australia accepted that there were presently no other proceedings against Mr Snedden.

92 Mr Snedden's submissions proceeded on the basis that, given the serious consequences of a surrender determination under s 22, procedural fairness required an "extensive hearing right". This meant that the person who faced surrender was entitled to a final right of reply. He maintained that the Croatian response was not purely responsive and contained new information that was adverse to his case. He relied in particular on the fact that the Ministerial brief contained numerous references to information in the Croatian response. He submitted that it followed that the information was therefore relevant and significant to the Minister's decision.

93 In relation to the speciality assurance, Mr Snedden appeared to accept that the effect of the communications between Croatia and Australia was to allay any concerns that the Department may have had about Croatia's assurance. He

submits that for this very reason the information was adverse to his case. Procedural fairness therefore dictated that he be given an opportunity to comment on that information.

94 Mr Snedden also filed a notice of contention concerning the finding by the primary judge that procedural fairness did not require the Minister to give him the OIL advice. He submits, relying on *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30 (*Maman*), that the mere fact that a document may contain confidential information does not dictate that it not be disclosed. In his submission, nothing prevented the Department or Minister from informing him of the gist or substance of the advice.

Mr Snedden's delay ground — consideration

95 It is convenient to deal first with the question of the construction of s 22(2) of the Act. If, as the primary judge found, Mr Snedden's construction of s 22(2) as imposing a time limit within which the Minister must exercise the power to surrender is incorrect, it is strictly unnecessary to address the factual question of whether the Minister did exercise the power "as soon as [was] reasonably practicable". Mr Snedden's appeal on this ground would fail in any event.

96 The general principles of statutory construction are well-settled. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*), McHugh, Gummow, Kirby and Hayne JJ said (at [69]-[71]):

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision.

(Footnotes omitted.)

97 The role of the context and purpose of a statute and their relationship with the text of the statute has been the subject of detailed consideration by the High Court since 1990: see the cases referred to in *Wilson v State Rail Authority (NSW)* (2010) 78 NSWLR 704 (*Wilson*) at [12]-[14]. More recent decisions of the High Court have emphasised the importance of the statutory text to the task of statutory construction: see in particular *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] (*Alcan*); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012)

250 CLR 503 at [39] (*Consolidated Media Holdings*). In *Consolidated Media Holdings*, French CJ, Hayne, Crennan, Bell and Gageler JJ said (at [39]):

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text" [*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [47]]. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

98 Nothing said in *Alcan* or *Consolidated Media Holdings* requires a decision about the clarity of meaning of text without reference to context and purpose. What was said in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at [10]-[11] and in the other High Court cases cited in *Wilson* at [12]-[14] remains binding authority: see *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13 at [75] (*Quikfund*).

99 The relative importance of context and purpose may vary depending on the subject matter and structure of the statute, as well as the general manner of expression used by the drafter. In *Quikfund*, this Court (Allsop CJ, White and Wigney JJ) said at [75]:

> Often, the relationship between context (including pre-enactment history), purpose and text will be illuminated by the subject matter of the statute, as well as by the approach to expression by the drafter. Statutes drafted in broad simple language that set a principled framework for a well-known body of law may well be approached with an eye to context, and especially pre-existing law. On the other hand, in legislation that is closely structured and finely worded, the importance of the text may be paramount: *Joffe v The Queen; Stromer v The Queen* [2012] NSWCCA 277; 82 NSWLR 510 at 518 [36]. Nevertheless, even in closely structured and finely worded legislation such as the TPA and ASIC Act, context and purpose may be important.

100 Here, the subject matter, structure and scheme of the Act are important contextual considerations. As the Minister submitted, and as was referred to earlier, the Act creates a tightly structured scheme which presents the decision-maker at various stages of the extradition process with a binary choice. If the decision-maker decides one way, the extradition proceeds to the next stage. The Act specifically provides what is then to happen next. Typically that involves the person whose extradition is sought being remanded in custody (or on bail) to await the next decision in the process. If the decision-maker decides in the other way, the extradition process effectively comes to an end. The Act again specifically provides what is then to happen. Typically that involves a direction to release the person. There is generally no intermediate position and no uncertainty as to what is to happen next.

101 Mr Snedden's construction of s 22(2) as imposing a time limitation which conditions the exercise of the power to surrender is inconsistent with this tightly structured scheme. The binary choice in s 22 is to surrender or to not surrender. If the Attorney-General (or Minister) decides to surrender, a surrender warrant (or temporary surrender warrant) is issued: s 23 of the Act. In general terms, the

surrender warrant authorises a police officer or foreign escort officer to transport the person out of Australia to a place in the extradition country: s 26 of the Act.

102 If, on the other hand, the Attorney-General decides that the person is not to be surrendered, the Attorney-General is required to order, in writing, the release of the person. The effect of this is to discharge or terminate the warrant issued by the magistrate at the earlier s 19 stage of the process: see s 19(9)(a) of the Act.

103 The effect of Mr Snedden's construction of s 22(2) is that if the Attorney-General does not make a decision one way or another "as soon as is reasonably practicable", the Minister loses his power to make the determination. He cannot decide to surrender and issue a warrant under s 23. Nor, however, can he decide not to surrender and to order the release of the person. The person would therefore remain in custody under the terms of the s 19(9) warrant. Aside from s 22(5), there is no provision in the Act for the setting aside or stay of a s 19(9) warrant.

104 No provision of the Act deals with the situation where, on Mr Snedden's construction, the Minister loses the power to make a determination under s 22.

105 The construction of s 22(2) which may result in the person whose extradition is being sought placed in limbo where he or she can neither be surrendered nor released by order of the Attorney-General is inconsistent with the tightly structured binary scheme in the Act. Given the importance of construing s 22(2) so that it is consistent with the language and purpose of all provisions of the Act (*Project Blue Sky* at [69]), this is a powerful reason for rejecting Mr Snedden's construction.

106 If the legislature had intended that the Minister's power to make a decision expired if it was not made "as soon as is reasonably practicable", the structure of the Act suggests that provision would have been made for what would happen if that came to pass. Section 26(5) and (6) of the Act provides an example of a provision which, consistent with the binary nature of the extradition scheme, makes specific provision for what is to happen if a particular act is not performed within a prescribed time. So too does s 17(2). No such provision is made in respect of the time prescription in s 22(2).

107 The text of s 22(2) also does not support Mr Snedden's construction. As the primary judge found, the language used in the subsection, including the use of the imperative "shall", confers on the Attorney-General both the power to make the surrender determination and the duty to make the determination as soon as is reasonably practicable. Read in that way, the time stipulation does not condition the exercise of power. Rather, it conditions the performance of the duty to exercise the power. As the Minister submits, and as the primary judge found, the performance of the duty to exercise the power as soon as is reasonably practicable can be compelled by an order in the nature of a writ of mandamus.

108 On Mr Snedden's construction, mandamus would effectively not be available to compel the Attorney-General to make a determination as soon as is reasonably practicable. That is because, on his construction, once a determination is not made as soon as is reasonably practicable, the Minister no longer has the power (and therefore the duty) to make the determination. There is therefore nothing to compel and mandamus would not lie.

109 Mr Snedden submits that mandamus would be available to compel the performance of the duty even if the words "as soon as is reasonably practicable" were not included in s 22(2). That is said to support his construction because those words should be given some work to do. That submission has no merit.

The words "as soon as is reasonably practicable" do have work to do in the context of the availability of mandamus. They determine the time from which a person can commence proceedings to enforce the Minister's duty. They avoid the need for an applicant for mandamus to have to rely on an implied or constructive refusal to make the decision based on unreasonable delay.

110 In *Santhirarajah*, North J accepted that there was force in the argument that the words "as soon as is reasonably practicable" marked the moment from which the Attorney-General has a duty to make the determination and from which time mandamus will lie to enforce that duty. His Honour, however, referred to the practical and other obstacles that a person facing extradition would encounter in commencing proceedings to enforce the duty. But as the primary judge correctly pointed out (Judgment at [21]) "the practical difficulties that a person in detention may face in taking action to compel the Attorney-General to perform his statutory duty cannot displace the plain meaning of the legislation".

111 Mr Snedden also relies on the reasoning of North J in *Santhirarajah* based on the desirability of providing protection for persons held in detention awaiting a surrender determination. North J (at [76]) pointed to the fact that the extradition process "intrudes into the life and liberty of people sought for surrender". His Honour reasoned from this that the apparent purpose of the provisions in the Act is to "ensure the process is speedy" and to provide a reasonable limit on the intrusion. His Honour concluded that in providing that the Attorney-General lost the power if not exercised in a timely way, the Act provides a "strong incentive" to the Attorney-General to act speedily (at [77]). But as the primary judge correctly pointed out (Judgment at [18]), citing *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26], the purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.

112 For essentially the same reasons, Mr Snedden's attempt to derive assistance from general principles in other contexts concerning the right to personal liberty is misplaced. Principles that emerge from cases, such as *Williams v The Queen*, which concern the rights of persons who have been arrested and charged with criminal offences provide limited, if any, assistance to the task of construing a provision in an entirely different statutory scheme and context.

113 The primary judge was correct to decline to follow *Santhirarajah* and was correct to reject Mr Snedden's construction of s 22(2) of the Act. The construction of s 22(2) in *Santhirarajah* is plainly wrong. It should also be noted that in *Hala*, Siopis J reached the same conclusion.

114 That is sufficient to dispose of Mr Snedden's delay ground. Even if Mr Snedden was able to demonstrate that the Minister failed to make the surrender determination as soon as was reasonably practicable (and that the primary judge erred in concluding to the contrary), Mr Snedden would not be entitled to the relief which he seeks in this appeal. The Minister would still be empowered to make a surrender determination under s 22(2) if the matter is remitted to him in the event that the primary judge's finding of denial of procedural fairness is upheld.

115 Nevertheless, in all the circumstances it is appropriate to address the factual question whether the Minister failed to make his determination as soon as was reasonably practicable. Detailed submissions were made by the parties in

relation to this issue. Given the possibility, if not likelihood, that Mr Snedden will appeal any decision on the construction issue that is adverse to him, the factual question should not be avoided.

116 There are essentially three elements to the composite expression "as soon as is reasonably practicable". First, the word "practicable" has the meaning of "capable of being carried out in action; feasible": *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 (*M38/2002*) at [65]. It identifies that which is able to put into practice and which can be effected or accomplished: *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*) at [121]. Secondly, the qualification "reasonably" limits or qualifies what would otherwise be an absolute obligation: *M38/2002* at [65]. It introduces an assessment or judgment of a period which is appropriate or suitable to the purpose of the legislative scheme: *Al-Kateb* at [121]. Thirdly, the phrase "as soon as" supplies a temporal element: *Al-Kateb* at [121]. It directs the decision-maker to make the determination without delay once it is reasonably practicable to do so: *Santhirarajah* at [74]; Judgment at [24].

117 It is undesirable to attempt to provide a rigid definition of when it would be "reasonably practicable" for the Attorney-General or Minister to make a determination under s 22(2): cf *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at [51]. That will depend on a consideration of all the relevant circumstances of the particular case at hand. So much is clear from the additional words "having regard to the circumstances" that are included in the subsection. A range of considerations may be relevant.

118 The primary judge found that the process in Mr Snedden's case took an "inordinately long time" and that "justifiable criticism may be levelled at the length of time taken for the relevant information to be obtained, reviewed and put to the Minister": Judgment at [30]. Nonetheless, her Honour was not persuaded that the determination was not made as soon as was reasonably practicable having regard to the circumstances: Judgment at [30].

119 That finding was open to the primary judge on the evidence before her. Her Honour did not err in any way in arriving at this conclusion. There is no basis to disturb the finding. There are, however, two aspects of the primary judge's reasons that need to be addressed. Both were said by Mr Snedden to reveal error in her Honour's approach to the question whether the decision was made as soon as was reasonably practicable.

120 The first issue concerns the date from which reasonable practicality should be measured. Before the primary judge, Mr Snedden argued that the time taken to make the s 22(2) determination should be measured from 12 April 2007 when the magistrate determined that he was eligible for surrender. This was rejected by the primary judge. Her Honour found that Mr Snedden did not become "an eligible person" for the purposes of s 22(2) until his appeal rights under s 21 of the Act were exhausted. That is clear from the terms of s 22(1)(b) of the Act. Mr Snedden's appeal rights were exhausted on 30 March 2010 when the High Court upheld Croatia's appeal relating to the magistrate's decision. Her Honour accordingly concluded that "the relevant time must be measured from 30 March 2010": Judgment at [29].

121 Mr Snedden does not contend that this finding was incorrect, though he does maintain in a general sense that "work" could have been commenced by the Department prior to that date. The finding that is attacked by Mr Snedden is her

Honour's finding that May 2012 was "the earliest date by which the decision was capable of being made as the Minister could not make his decision until necessary inquiries relating to the s 22(3) matters were finalised": Judgment at [31].

122 The primary judge's reference to May 2012 appears to be a reference to the date when the Croatian Minister of Justice and Commons formally advised Australia by third person note that there were no criminal proceedings being conducted against Mr Snedden in Croatia other than those in relation to the offences for which his extradition was being sought. It will be recalled that Australia requested a speciality assurance from Croatia in May 2011 and received an assurance on 21 September 2011. Following the receipt of that assurance, communications between Australia and Croatia concerning the speciality assurance continued both at the Departmental level and through diplomatic channels. The third party note essentially concluded those communications, apparently to the satisfaction of the Department.

123 Mr Snedden contends that the primary judge erred in law in finding that the s 22(2) determination was not capable of being made until May 2012. He submits that the Minister was capable of making a determination favourable to him prior to this time. The Minister did not, it is argued, need to await confirmation of the speciality assurance to find that Mr Snedden should not be surrendered.

124 Strictly speaking that may be correct. A fair reading of the primary judge's reasons, however, reveals that her Honour did not, or at least was not intending to, make a finding of law that the Minister was not able to make any determination under s 22(2) until the speciality assurance was provided. When this part of her Honour's reasons is read in context, it is clear that her Honour was simply distinguishing the facts of Mr Snedden's case from the facts in *Santhirarajah*. In that case, the Minister was in possession of all the information that was needed to make the decision for two years prior to the making of the decision. Her Honour was addressing the particular circumstances of Mr Snedden's case and noting that they were different to the circumstances in *Santhirarajah*.

125 There is no doubt that if the Attorney-General had effectively determined, for reasons unassociated with the existence of a speciality assurance, that a person should not be surrendered (for example, because the Attorney-General was not satisfied that there was no extradition objection: see s 22(3)(a) of the Act) a determination not to surrender could be made without waiting for the speciality assurance. That was not, however, the situation with Mr Snedden's extradition. As her Honour noted, work in relation to compiling a brief for the Minister had been underway prior to May 2012. There is nothing to suggest that, putting the speciality assurance to one side, the circumstances were such as to warrant a decision not to surrender Mr Snedden. In relation to the speciality assurance, it was essentially in Mr Snedden's interest for Australia to seek confirmation or clarification from Croatia concerning the assurance given in September 2011. The primary judge's finding was, in essence, no more than that at a practical level, in all the particular circumstances of Mr Snedden's case, the Minister could not have decided to surrender Mr Snedden before he was satisfied concerning the speciality assurance. That occurred in May 2012.

126 It follows that, read in context, her Honour's finding that May 2012 was the

earliest date that a decision was capable of being made did not involve any legal error. It was a finding at a practical level specifically related to the particular circumstances of Mr Snedden's case.

127 The second aspect of the primary judge's findings concerning the delay ground that is attacked by Mr Snedden relates to her Honour's finding that the evidence did not support a finding that the time taken to finalise the Ministerial brief was the consequence of "some neglect, oversight or inattention": Judgment at [31]. Mr Snedden submits that this finding "sets the bar too high". He submits that it was not necessary for him to prove that any unreasonable delay was due to the neglect, oversight or inattention on the part of the Minister or the Department. Rather, he submits that once there has been shown to be a delay in making the determination, as was the case here, the evidentiary onus shifts to the Minister to demonstrate that the delay was justifiable and not unreasonable.

128 There is some merit in that submission. Again, however, it appears to be based on an unfair reading of the reasons of the primary judge. Read fairly and in context, it does not appear that in referring to the absence of evidence of neglect, oversight or inattention her Honour was intending to impose an absolute legal test or bar to the reasonable practicality test in s 22(2). Nor, was her Honour suggesting that Mr Snedden bore the onus of demonstrating neglect, oversight or inattention on the part of the Minister. Rather, her Honour was simply stating that in the particular circumstances of Mr Snedden's case, which included that the length of time taken to complete the Ministerial brief was "fully explained" in the evidence (Judgment at [31]), the absence of evidence of neglect, oversight or inattention precluded a finding that the decision was not made as soon as was reasonably practicable. There is no demonstrable error in that reasoning.

129 Otherwise, Mr Snedden's challenge to the factual finding of the primary judge that the determination was made as soon as was reasonably practicable was that it was against the weight of the evidence. That submission is rejected.

130 Mr Snedden's analysis of the evidence concerning delay focuses on specific periods of delay. He points to three particular delays. First, the fact that it took the Department a year to seek the speciality assurance and a further 14 months to "finalise" that assurance. Secondly, it took until June 2011 for the Department to seek legal advice concerning the Third Geneva Convention and a further seven months elapsed before that advice was received. And thirdly, the Department did not begin work on the brief to the Minister until November 2011 and it then took a year to complete.

131 In the particular and somewhat unique circumstances of this matter, however, it is not necessarily appropriate, or of any real assistance, to break the process up into individual elements. A more holistic approach is warranted. It is more appropriate to consider the entire chronology, at least from March 2010, with a view to determining whether there are any unexplained, unjustified or unreasonable delays or periods when nothing was happening.

132 It is unnecessary here to rehearse the entire chronology. The primary judge provided a chronology of the main events (Judgment at [27]). In addressing the chronology the key considerations include the following. First, the representations made by or on behalf of Mr Snedden were lengthy, voluminous and both legally and factually complex. They raised at least five potentially relevant extradition objections as well as difficult questions of international law. It was

unquestionably necessary for the Department to carefully consider, analyse and seek responses to, or further information in relation to, the matters raised.

133 Secondly, matters were complicated by Mr Snedden's habeas corpus application. Those proceedings remained on foot between September 2010 and September 2011. No doubt the attention and resources of the Department were diverted to respond to those proceedings and deflected from otherwise dealing with the consideration of the matters that needed to be attended to at the s 22 stage.

134 Thirdly, as earlier indicated, Croatia's speciality assurance raised some complications. It was necessary for the Department to seek clarification and further assurances from Croatia. This was ultimately in the interests of Mr Snedden. The speciality assurance is a protection for the person whose extradition is being sought. It is not unreasonable to infer that communications between countries concerning such matters take some time. That is particularly so at the diplomatic level and particularly where the proposed extradition is a high profile or sensitive one. That was the case here.

135 Fourthly, the question of international law raised by Mr Snedden was by no means straightforward. The opinions provided by Mr Snedden's international lawyers were lengthy and detailed. Whilst the OIL advice was ultimately fairly brief, that does not mean the answer was straightforward or simple.

136 Finally, by reason of each of the above matters, the preparation of the Ministerial brief was no easy exercise. It involved the distillation and analysis of complex and difficult circumstances and considerations. Given Mr Snedden's past challenges to essentially every stage of the extradition process, it is perhaps not surprising that the brief took some time to compile and some further time to be scrutinised and cleared by other senior Departmental officers. As the Minister submitted, there is a certain tension between making voluminous, complex and tendentious representations on the one hand, and complaining that those representations took a long time to carefully analyse on the other.

137 The primary judge's finding that Mr Snedden had not demonstrated that the determination was not made as soon as was reasonably practicable having regard to the circumstances was open on the evidence. There is no error in her Honour's reasoning and no basis to disturb this factual finding.

The Geneva Convention ground

138 As with the delay ground, it is convenient to first address the question whether, if the OIL advice is wrong and Australia's international obligations as a party to the Third Geneva Convention preclude the extradition of Mr Snedden unless a prima facie case is established, the Minister's s 22(2) determination is vitiated for jurisdictional error. If that circumstance does not in any event give rise to jurisdictional error on the part of the Minister in Mr Snedden's case, it is unnecessary and probably undesirable to express an opinion on the issue of international law addressed in the OIL advice.

139 It is not in dispute that the substance of the OIL advice was before the Minister and that the Minister gave consideration to the question whether Australia's obligations as a party to the Third Geneva Convention applied to Mr Snedden's circumstances. The Minister signed the first page of the Ministerial brief to signify, amongst other things, that he had considered the Department's detailed advice on the statutory preconditions for the determinations under s 22 (Attachment G). Attachment G contains a summary of the representations made on behalf of Mr Snedden in relation to the

application of the Third Geneva Convention requirement for prima facie evidence to his circumstances, as well as the contrary advice from the OIL.

140 In the pleadings, the Minister relevantly admits that he gave "active intellectual consideration to whether the surrender of [Mr Snedden] under the Act would be consistent with Australia's international obligations" (Defence at paragraph 28(a)) and that he had "regard to the discussion in Attachment G of the Ministerial brief on the operation and effect" of the Third Geneva Convention (Defence at paragraph 30(b)). Importantly, however, the Minister denies that Australia's international obligations under the Convention were a relevant consideration in making his decision (Defence at paragraph 28(b) and (c)) and denies that he made his decision on the basis that the Geneva Conventions did not require that Croatia provide prima facie evidence before Australia could surrender Mr Snedden to Croatia (Defence at paragraph 30(c)).

141 The Geneva Convention issue is addressed in that part of Attachment G that deals with the general discretion under s 22(3)(f) of the Act. At paragraph 179 of Attachment G, the Department notes that the legislative framework (the Act and, relevantly, the *Extradition (Croatia) Regulations 2004* (Cth)) does not require — and Croatia has not provided — prima facie evidence in support of the extradition of Mr Snedden. The representations relied on by Mr Snedden in support of his claim that Australia's international obligations require that Croatia provide a prima facie case are then summarised.

142 At paragraphs 195 and 196, of Attachment G, the Department notes that following:

> However, the Department notes that Australia's extradition practice is, and must be, conducted in a manner that is consistent with its international obligations. This approach is applied consistently across Australia's extradition partners.
>
> Accordingly, the issue as to whether the domestic framework under which Australia has considered the extradition request for [Mr Snedden] is consistent with its international legal obligations is a matter relevant to the exercise of your general discretion whether to surrender [Mr Snedden] to Croatia.

143 After providing a detailed analysis of the OIL advice (at paragraphs 197 to 214 of Attachment G) the Department then summarises the effect of the advice as being that international law does not require the request for Mr Snedden's extradition for the criminal conduct alleged be supported by prima facie evidence. After then noting (at paragraph 218) that this "legal position" is consistent with the extradition practice of like-minded jurisdictions, the Department provides the following conclusion in respect of the issue (at paragraph 220 of Attachment G):

> The Department considers that you may be satisfied that international law does not require that the extradition request for [Mr Snedden] for the criminal conduct alleged be supported by *prima facie* evidence and, accordingly, that you are not precluded from exercising your discretion to surrender [Mr Snedden] to Croatia on the basis of any international obligations that have been claimed on behalf of [Mr Snedden] to arise in this context.

144 It is a fair inference from the Ministerial brief and Attachment G that the Minister had regard to whether the surrender of Mr Snedden in the absence of any prima facie case was consistent with Australia's international obligations. It may also be inferred that the Minister had regard to the OIL advice and the Department's conclusion. That is not to say, however, that the Minister made his

decision on the basis of a positive determination of law concerning the application of the Third Geneva Convention to Croatia's request for the extradition of Mr Snedden.

145 Putting to one side for the moment the correctness or otherwise of the OIL advice, Mr Snedden's argument that the Minister made a jurisdictional error in having regard to the OIL advice and the Department's conclusion in relation to Australia's international obligations relies on two contentions. First, he contends that the consideration of Australia's international obligations under the Third Geneva Convention was a mandatory consideration which, by reason of the (allegedly erroneous) OIL advice, the Minister ignored. Secondly, he contends that if the OIL advice is wrong, reliance on it is an error of law material to the Minister's jurisdiction to make a surrender determination under s 22(2).

146 Neither contention is correct.

147 It is settled law that the factors a decision-maker is bound to consider in making a decision are determined by construction of the statute conferring the power or discretion. Section 22(3) expressly states the considerations to be taken into account. It is unnecessary to decide whether, as a matter of construction, the expressly enumerated factors are exhaustive or merely inclusive. That is because, as the primary judge correctly found (Judgment at [53]), in the absence of express provision, unenacted international obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (*Lam*) at [101]; *Le v Minister for Immigration* at [59]; *AB v Minister for Immigration* at [22].

148 Mr Snedden does not appear to contend that, as a matter of construction of s 22 of the Act, Australia's international obligations under the Third Geneva Convention are a mandatory consideration by implication from the subject matter, scope and purpose of the Act. Rather, he contends that, in the circumstances of his case, the international obligations became a mandatory consideration because they were the subject of representations by him and the Minister chose to take them into account in considering his discretion under s 22(3)(f).

149 That submission has no merit and is rejected.

150 In *Rivera v Minister for Justice and Customs* (2007) 160 FCR 115, Emmett J (with whom Conti J agreed) described the general discretion in s 22(3)(f) in the following terms (at [14]):

> Finally, under s 22(3)(f), the Minister must consider that the person should be surrendered in relation to the offence. Thus, the Minister has a general discretion whether to surrender an eligible person or not. The discretion is unfettered and the Minister may, in the exercise of the discretion, take into account any matters, or no matters, provided that the discretion is exercised in good faith and consistently with the objects, scope and purpose of the Act.

151 It follows that the Minister is not bound to take any particular matter into account in the exercise of his general discretion in s 22(3)(f) of the Act. The fact that a particular matter is the subject of a submission or representation does not mean that the Minister is bound to consider it. It is entirely a matter for the Minister to decide whether to take any such submission into account and, if so, in what way: *Brock v Minister for Home Affairs* [2010] FCA 1301 at [63] (Foster J — an appeal from Foster J was dismissed). There is no obligation to accept any particular submission: *Foster v Attorney-General (Cth)* (1998) 158

ALR 394 at 413 (Spender J — an appeal from Spender J was allowed but in relation to an unrelated issue). On the other hand, if the Minister does take a submission into account, it does not mean that it thereby becomes a mandatory consideration.

152 It follows that here, whilst Australia's international obligations under the Third Geneva Convention was a matter that the Minister could choose to take into account in considering Mr Snedden's case, he was not obliged to. If the Minister chose to take it into account, it did not thereby become a mandatory consideration.

153 Mr Snedden's second basis for contending that any error involving Australia's international obligations under the Geneva Convention was jurisdictional is, in essence, that any error involving a consideration which is legal and material is thereby jurisdictional. The short answer to that submission is that once it is found that the Minister was not bound to take this consideration into account in the exercise of his discretion under s 22(3)(f), any error relating to it will not be a jurisdictional error. At most it will be an error within jurisdiction, even if it was in some way material to the exercise of the discretion. That is so whether or not the consideration involves an issue of law.

154 In *AB v Minister for Citizenship*, Tracey J considered arguments similar to those advanced by Mr Snedden, albeit in the context of the *Migration Act 1958* (Cth). In considering whether to refuse an application for a visa pursuant to s 501 of the *Migration Act*, the Minister for Immigration chose to have regard to Australia's international obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984*, done at New York on 10 December 1984 and the *International Covenant on Civil and Political Rights 1966*, done at New York on 16 December 1966. The applicant argued that, once the Minister decided to have regard to those international obligations, she was obliged to correctly construe the obligations. If she did not, and this had a bearing on her decision, she could be said to have failed to have regard to a relevant consideration (the obligation correctly construed) or had regard to an irrelevant consideration (the misunderstood obligation). This argument was rejected. Tracey J said (at [27]).

> Australia's unenacted international treaty obligations relating to refoulment of persons within the jurisdiction are matters to which decision-makers are entitled to have regard when exercising powers under s 501 of the Act. In the absence of legislative requirement they are not, however, bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will occur. If they choose to have regard to treaty obligations but, in some way, misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. It has been held that misconstruction of a ministerial policy, by a minister who is free to depart from it, cannot amount to reviewable error: see *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65 at 77-8; 92 ALR 167 at 178-80; 16 ALD 611 at 620-2. Where the instrument concerned is an unincorporated international treaty which is subject to interpretation by a potentially wide range of international bodies it will be harder to make good an allegation of error much less jurisdictional error.

155 Tracey J's finding to this effect was considered and applied, again in relevantly similar circumstances, by Flick J in *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523. The decision of Flick J was overturned on appeal though for unrelated reasons.

156 Mr Snedden submits that the decision in *AB v Minister for Immigration* is

wrong, apparently on the basis that there was an "unspoken assumption" before Tracey J that the construction of a treaty was a question of fact. That submission is rejected. For the reasons that follow, even if Tracey J did proceed on this basis, which appears at best to amount to speculation, his Honour was in any event correct to find no jurisdictional error.

157 Mr Snedden places considerable reliance on the fact that the proper construction of the Third Geneva Convention is a question or issue of law. He accepts that if a decision-maker chooses to take into account a factual consideration and makes an error in relation to the relevant facts, that error is an error within jurisdiction. He submits, however, that if the error is an error of law, it must be jurisdictional. He relies in this respect on some broad statements made in a number of High Court decisions concerning jurisdictional error. Those cases include *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (*Yusuf*) and *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (*Plaintiff M61*).

158 There are at least four difficulties with this submission. First, it is doubtful whether, at least in this context, an error in interpreting or construing an Article of the Third Geneva Convention is relevantly an error of law. Mr Snedden relies on the decision of Perram J in *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)* (2013) 212 FCR 406. But that decision concerned the question of the admissibility of an expert report which was directed to showing that domestic Australian and Indonesian law compelled the airline to comply with the relevant international treaty. Perram J found (at [48]), in that context, that a question as to the interpretation of a treaty which "arises in the course of ascertaining the operation of Australian law is to be approached as a question of law". His Honour ruled in relation to the admissibility of parts of the report on that basis. It does not necessarily follow, however, that the construction of an unenacted treaty in the context of the exercise of a broad statutory discretion is relevantly an error of law, particularly if the relevant treaty obligations are not mandatory considerations.

159 Secondly, the evidence (and pleadings) here show no more than that the Minister gave active and intellectual consideration to Australia's international obligations and was likely to have considered the OIL advice concerning those obligations. Even if the OIL advice was wrong, it does not follow that the Minister himself relevantly made an error of law. He may have done no more than simply prefer or rely on one opinion over another, when exercising his discretion.

160 Thirdly, and perhaps more significantly, in this context it is immaterial whether Australia's international treaty obligations involved a question of law or a question of fact. In the circumstances, any error of law in construing the Third Geneva Convention in the context of the general discretion under s 22(3)(f) of the Act would still not amount to a jurisdictional error.

161 In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 (*Bodruddaza*), the High Court considered the situation where it was contended that a delegate of the Minister for Immigration had misconstrued a provision in the *Migration Regulations 1994* (Cth) which was relevant to a criterion for the grant of a visa. Though it was ultimately unnecessary for this question to be decided, the majority (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) questioned (at [70]) whether, even if the interpretation

of the regulation was erroneous, it had the consequence of vitiating the decision for jurisdictional error, rather than representing an error within jurisdiction.

162 The alleged error in *Bodruddaza* was unquestionably legal and relevant to the visa decision, yet the High Court still questioned whether or not it was jurisdictional in nature.

163 Fourthly, Mr Snedden's reliance on *Yusuf* and *Plaintiff M61* is misplaced. Those and many other authorities describe jurisdictional error in terms that include errors involving a decision-maker identifying a wrong issue, or asking a wrong question or misunderstanding the nature of the opinion to be formed or the test to be applied. Yet it is tolerably clear that when reference is made to those sorts of errors, in the context of jurisdictional error, the wrong issues, questions or tests must relate to the nature or scope of the relevant power or jurisdiction being exercised. Were it otherwise, virtually any error by a decision-maker in the exercise of a discretion would be a jurisdictional error simply on the basis that it was in some way relevant to the exercise of the discretion.

164 Here, if there was an error about Australia's international obligations having regard to Art 129 of the Third Geneva Convention, it was an error within jurisdiction. That is so whether or not it was an error of law and whether or not it influenced, in some way, the exercise of the Minister's broad discretion conferred by s 22(3)(f). Any such error did not concern any of the enumerated mandatory considerations in s 22(3) and did not become a mandatory consideration even if the Minister in some way considered or took it into account in the exercise of his discretion. It did not involve or result in the Minister identifying any wrong issue, question or test that went to the scope or nature of the power being exercised. It was not jurisdictional.

165 Mr Snedden submits that in the event that the Court found that any error concerning the application of the Third Geneva Convention was not jurisdictional, the Court should nevertheless address the question whether the Minister did in fact misconstrue Art 129 of the Convention. He submits that it would in any event be appropriate for the Court to grant declaratory relief if it was found that the Minister so erred. The declaration would have utility, in Mr Snedden's submission, if the decision is remitted to the Minister for reconsideration, which would be the case if the Minister's cross-appeal fails. He says that, in any event, he would or may be able to rely on such a declaration in a different forum in Croatia or internationally.

166 The form of the declaration proposed by Mr Snedden is as follows:

> The determination purportedly made by the first respondent on 15 November 2012 under s 22 (2) of the *Extradition Act 1988* (Cth) in relation to the appellant is vitiated by jurisdictional error because, in exercising the discretion in s 22 (3) (f) of the Act, the first respondent misdirected himself on the proper construction of Article 129 of the *Third Geneva Convention of 1949*.

167 A declaration in those terms would not be appropriate even if it was found that the OIL or Departmental advice concerning the proper construction of Art 129 of the Third Geneva Convention was incorrect. That is so even if the reference to jurisdictional error is deleted.

168 It is doubtful, to say the least, that the making of such a declaration would be justified even if the Minister's cross-appeal is dismissed and the matter is remitted to the Minister for re-determination. As already indicated, it is entirely a matter for the Minister to decide what considerations he takes into account in

the exercise of the general discretion under s 22(3)(f). A declaration concerning the proper construction of Art 129 of the Third Geneva Convention would amount to little more than an advisory opinion that the Minister may or may not take into account. Such an order would produce no foreseeable consequences for the parties, but would be directed to nothing more than answering an abstract or hypothetical question: see *Plaintiff M61* at [103] and the cases there cited.

169 Unlike in *Plaintiff M61* and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mr Snedden has no "real interest" in obtaining the declaration. If the Minister's decision is not vitiated by jurisdictional error, the surrender warrant issued by the Minister pursuant to s 23 of the Act will remain on foot and must be executed by reason of s 26(2) of the Act, whether or not any declaratory relief is granted. Mr Snedden will be surrendered to Croatia. It is difficult to see that a Croatian court or the Croatian authorities would have regard to any declaration made by the Court, particularly in the form proposed.

170 In all the circumstances, it is therefore unnecessary and undesirable to consider the correctness or otherwise of the OIL advice concerning Art 129 of the Third Geneva Convention. That is despite the careful and thorough submissions by both parties in relation to that issue. No relief will turn on the resolution of the issue.

171 The question in any event is not easy. Contrary to Mr Snedden's submission, it is at the very least doubtful that the OIL advice is "undoubtedly" wrong. Nor is the construction of Art 129 advanced by Mr Snedden necessarily one that is "universally held", as also suggested by Mr Snedden in his submissions. The task of construing a treaty is different to the task of construing domestic legislation. As McHugh, Gummow, Kirby and Hayne JJ pointed out in *Project Blue Sky* (at [96]) many international agreements are expressed in indeterminate language as the result of compromises made between the contracting state parties. Such is the case here. Whilst the Court was taken to various authoritative commentaries and other extrinsic resources, there can be no assurance that the material that the Court has been taken to is exhaustive. In circumstances where an obiter opinion expressed might have implications in other contexts, the Court should generally refrain from attempting to resolve that issue unless there is some good reason to do so. Here there is no good reason.

Procedural fairness ground

172 Three questions need to be considered in the context of procedural fairness. The first two are the subject matter of the Minister's cross-appeal. They are whether Mr Snedden was denied procedural fairness because, first, he was not given any opportunity to respond to the information provided by Croatia in response to the Department's request, and secondly, because the communications between Croatia and Australia concerning the speciality assurance were not disclosed to him. The primary judge answered both question in the affirmative. The Minister says her Honour was wrong to do so.

173 The third question, the subject of Mr Snedden's notice of contention, is whether Mr Snedden was denied procedural fairness because the OIL advice was not disclosed to him. The primary judge answered this in the negative. Mr Snedden contends that her Honour was wrong to do so.

174 Before addressing each of these three questions in turn, something should be said about the general principles relating to procedural fairness. This can be

done briefly because, for the large part, the relevant principles are not in dispute between the parties. What is in dispute is the application of the principles to the facts of Mr Snedden's case.

175 There is no dispute that Mr Snedden was entitled to procedural fairness at the s 22 stage of the extradition process: *Santhirarajah* at [324]. In general terms that means the Minister was relevantly obliged to inform Mr Snedden of the case against him and provide him with a reasonable opportunity to answer it: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40]. Mr Snedden was entitled to be made aware of, and have the opportunity to address, the critical issues or factors on which the decision was likely to turn, as well as any adverse information that was credible, relevant and significant to the decision to be made: *Kioa v West* (1985) 159 CLR 550 (*Kioa*) at 587 (Mason J) and 629 (Brennan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (*VEAL*) at [15].

176 That is not to say that a decision-maker is necessarily required to disclose to a person affected by the decision every piece of information that the decision-maker has or might consider: *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223 (*SZQHH*) at [30]. Nor is a decision-maker necessarily required to disclose issues in respect of which the person is already on notice or information the substance of which is already known to the person: *SZQHH* at [30]; *Brock* at [22]. Whilst a decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material, there is no obligation for the decision-maker to expose mental processes or provisional views: *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 (*Alphaone*) at 592.

177 The rules of procedural fairness do not have an immutably fixed content: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [156]. There are no concrete rules as to what procedures a decision-maker must employ to provide procedural fairness in any particular case. What will be both sufficient and necessary to ensure a fair hearing in any given case will depend on, and vary with, the context in which a decision-maker acts, including any statutory or regulatory requirements or considerations: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (*SZBEL*) at [26], [29]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (*Saeed*) at [19]-[20]; *SZQHH* at [26]; see too *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [30]-[32]. The content of procedural fairness is flexible and adaptable to the circumstances of the particular case (*Saeed* at [18]) and must be approached on the basis of what is reasonable (*Kioa* at 627) and necessary to avoid "practical injustice": *Lam* at [37]-[38].

178 As the Full Court (Allsop CJ, Middleton and Foster JJ) in *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 reminded us at [86]:

> The required content of fairness in any particular case will depend on context: constitutional, statutory and human, on all the circumstances of the case: *Salemi v MacKellar (No 2)* [1977] HCA 26; 137 CLR 396 at 419. The fairness required relates principally to the procedure employed in dealing with the party in question. That may involve the exercise of state or governmental power over the individual, who may be vulnerable and powerless, or a great corporation. The terms of any statute will be critical. The common element is that, generally speaking, the

> exercise of power should be fair. That exercise will always have a human context. That is why, as Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at 14, fairness is not an abstract concept, but essentially practical. The concern of the law is to avoid practical injustice. Fairness is normative, evaluative, context-specific and relative.

179 The context in which the content of the procedural fairness must be considered here is the statutory scheme for extradition in the Act and the ongoing communications between Mr Snedden and the Department. It is relevant, and potentially important, that at the s 22 stage most of the issues to be addressed by the Minister as decision-maker are fairly well defined. The matter has previously been through the first three stages of the extradition process. The person whose extradition is sought has already been found by a magistrate to be eligible for surrender and has had rights of review in relation to that decision. Many of the issues to be canvassed by the Minister at the s 22 stage would most likely have been canvassed at the s 19 stage. Significant too is the fact that s 22(3) assists by further defining the likely issues. That subsection sets out with precision the issues that the Attorney-General must consider. As a result, by the s 22 stage the person whose extradition is sought is likely to know the case he or she has to meet and the matters he or she should address in response to that case.

180 The only real exception or qualification to this involves matters that might be relevant to the general discretion in s 22(3)(f) of the Act. Depending on the particular circumstances, fairness is likely to require the Attorney-General to disclose to the person any matters adverse to him or her that might be relevant to the exercise of the discretion in favour of surrender which do not fall within the other paragraphs of s 22(3) and are not otherwise known by or obvious to the person. The person whose extradition is sought should also have the opportunity to make representations to the Attorney-General concerning matters that should be taken into account in his or her favour in relation to the exercise of the general discretion.

181 The extradition process has been described as essentially adversarial in nature: *Mokbel v The Queen* (2013) 40 VR 625 at [1]. The primary judge accepted that this was the case: Judgment at [41]. One party, the extradition country, is seeking the extradition of the other party, the person whose extradition is being sought, usually without their consent. At the s 22 stage, it is the Attorney-General who must decide between the opposing rights and interests of the two parties. One thing that flows from this is that the Attorney-General must afford procedural fairness to both parties, the extradition country and the person whose extradition is being sought.

182 It does not follow from the adversarial nature of the process, however, that the Attorney-General is required to follow the steps that would ordinarily be taken by a court acting judicially and deciding a matter by adversarial means: *VEAL* at [24].

183 The Act does not mandate any specific procedure to be followed at the s 22(2) stage. It is essentially a matter for the Attorney-General to determine a procedure that is reasonable and will avoid practical injustice or unfairness having regard to the circumstances of the particular case. What is required may vary having regard to what has already occurred and what is said or done during the process. In *Lam*, Gleeson CJ observed (at [34]):

> It is not in dispute that … the respondent was obliged to extend procedural fairness to the applicant. And it is clear that the content of the requirements of fairness may be affected by what is said or done during the process of the decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed.

The Croatian response

184 The question here is whether Mr Snedden was denied procedural fairness — was there practical injustice — because he was not provided with the Croatian response, or information contained in it, and was therefore not given an opportunity to reply to it? This in turn raises two issues for consideration.

185 First, did procedural fairness in the circumstances require that Mr Snedden be given an opportunity to consider and reply to the Croatian response irrespective of the content of the Croatian response? This is important given the apparent acceptance by the primary judge that the Croatian response may have "raised no new considerations": Judgment at [42]. Her Honour appears to have accepted that Mr Snedden had a right of reply irrespective of the content of the Croatian response and, having been denied that right, was denied procedural fairness.

186 Secondly, was there any adverse information in the Croatian response that was both new (not previously known or addressed by Mr Snedden) and credible, relevant and significant to the Minister's decision? If there was, it appears to be common ground that it may have been necessary to disclose that information (though not necessarily the entire Croatian response) to Mr Snedden. The primary judge did not appear to approach the matter this way. That may have been because before her Honour, Mr Snedden appears to have approached the matter at a high level of generality. He took the same approach on appeal. Whilst Mr Snedden submitted that the Croatian response contained adverse information, little if any attempt was made to descend to any level of detail.

187 In relation to the first question, lawyers steeped in the procedures usually adopted in adversarial proceedings in courts of law might instinctively think that Mr Snedden should have been given a right of reply. But the extradition process, whilst adversarial in some respects, is not a judicial proceeding in a court. The context is quite different. Likewise, whilst it may perhaps have been prudent for the Minister, adopting a cautious stance, to provide Mr Snedden with the Croatian response, it does not necessarily follow that he was required to do so to ensure procedural fairness in the circumstances

188 As previously indicated, the Act does not prescribe any particular procedure for the Attorney-General or Minister to follow when making a s 22 determination. It is a matter for the Attorney-General or Minister to adopt a procedure that is fair to both the extradition country and the eligible person and avoids any practical injustice. Here, the procedure adopted by the Department, on the Minster's behalf, was to first invite Mr Snedden to make any representations he would like to make. By letter dated 14 May 2010 the Department wrote to Mr Snedden and invited him to make representations. The letter relevantly stated:

> You are entitled to make representations to the Minister as to why you should not be surrendered to Croatia. Any relevant representations you make will be brought to the Minister's attention when he makes his determination under section 22 of the Act.
>
> …

> Information you provide may be disclosed to law enforcement or other government agencies in Australia or other countries if that is considered necessary by the Department or the Minister to determine the weight to be given to that information in the extradition determination.

189 Three points should be made in relation to this letter. First, the letter did not seek to confine the nature or scope of the representations that Mr Snedden could make. By this stage the matter had already passed through three stages of the extradition process. It had already been the subject of litigation and judicial review. Representations and submissions had already been made by and on behalf of Mr Snedden at the earlier stages and in the associated reviews and litigation. It was, in any event, open to Mr Snedden to raise again any or all of the matters previously raised, or any new matters he wished to raise, in his representations to the Minister. He "had the opportunity to define the ambit of the issues which he regarded as being relevant to the Minister's decision, and to provide such information and submissions as he saw fit": *Hala* at [57]. Importantly also, as a result of submissions made by or on behalf of Croatia and the Minister at the earlier stages of the process and the various review applications, Mr Snedden already knew the likely response to many of his submissions.

190 Secondly, the letter made it clear that the Minister might disclose Mr Snedden's representations to Croatia for comment or response. It is at least implicit in what is said in the letter that any response provided by Croatia might affect or be relevant to the weight ultimately given by the Minister to any of the information provided by Mr Snedden.

191 However, and this is significant, the letter did not represent (either expressly or implicitly) that the Minister would necessarily respond further to Mr Snedden following any response by Croatia. Further, the letter did not represent (either expressly or implicitly) that Mr Snedden would necessarily be given the opportunity to respond to any response by Croatia.

192 Thirdly, the Department did not otherwise indicate to Mr Snedden that he would be given any further opportunity to reply to any response the Department might receive from Croatia. Indeed, it is implicit that Mr Snedden would not be given a right of reply. Despite knowing that the Department might seek a response from Croatia, Mr Snedden never expressly requested that he be provided with that response or that he be given an opportunity to reply to it.

193 It is true that by letter dated 24 June 2010, Mr Snedden's solicitors asked that Mr Snedden be given the right to respond to material facts and assumptions that may lead to an adverse decision. That general request, however, did not amount to a specific request that Mr Snedden be given a right of reply to any response by Croatia. Nor did it suggest that Mr Snedden was operating under any assumption that he had an automatic right of reply.

194 As outlined earlier in these reasons, Mr Snedden did respond to the Department's invitation and availed himself of the opportunity to make representations. He did so with considerable gusto. Numerous representations were made by or on behalf of Mr Snedden in the months that followed. They were voluminous. They addressed numerous issues and contained a good deal of information. The Department distilled from the representations eight issues in respect of which it sought Croatia's response. Croatia then provided a response to the eight issues.

195 The specific content of the Croatian response will be addressed in some more

detail later in these reasons. Suffice it to say at this stage that in *Hala*, Siopis J held, in relevantly identical circumstances, that the requirements of procedural fairness did not oblige the Department to refer a response it received from the extradition country to the person whose extradition was being sought for further comments. His Honour said (at [59] and [60]):

> In my view, this is an example of a circumstance referred to by Gleeson CJ in *Lam* … of where the dealings between the parties is relevant in determining the content of the obligation to provide procedural fairness.
>
> It is possible to contemplate a circumstance where the response of the extraditing country may raise an issue which is not at all germane to the issues raised by the eligible person. As anticipated in the *Brock* decision, this may give rise to an obligation upon the department to give the eligible person an opportunity to comment upon this extraneous issue. However, this is not the kind of case advanced by the applicant. Here the applicant complained about the denial of an opportunity to deal with matters which fell squarely within the issues identified in his initial submissions, namely, the extraordinary delay between the alleged offences, the commencement of criminal proceedings and the retrial, the Czech Republic's knowledge of his whereabouts and its culpability for the delay, the unfairness attendant thereupon, and whether the applicant had left the Czech Republic as a fugitive.

196 Siopis J referred to earlier decisions of the Court which supported the proposition that there was no absolute right of reply in these circumstances. In *Foster*, the Department did invite the eligible person to respond to some specific information that had been provided by the extradition country. But given that Mr Foster had already made extensive submissions on the s 22(3) issues, the Full Court said (at [70]) that it was questionable whether procedural fairness required that any further opportunity be given to Mr Foster to make submissions.

197 In *Santhirarajah*, like here, the Department wrote to the extradition country, the United States of America, outlining the eligible person's contentions and seeking a response. North J found (at [331]) that the response contained information not otherwise known to Mr Santhirarajah, including the extradition country's version of the circumstances leading to the arrest of Mr Santhirarajah's co-accused. The Department provided a brief to the Minister which included that information. Nevertheless, North J rejected the contention that there had been a denial of procedural fairness. His Honour said (at [339]):

> Similarly, the applicant's argument that there was a denial of procedural fairness because he was not shown the US Department of Justice letter of reply dated 14 September 2009, or expressly made aware of its contents should not be accepted. The applicant did not contradict the Attorney-General's submission that the material in the letter was disclosed in the s 19 hearing. In any event, it was reasonable for the Department to determine that the process to be followed would be to seek representations from the applicant and then to seek a response from the US Department of Justice.

198 The Full Court in *Brock* considered a slightly different situation. The person whose extradition was being sought, Mr Brock, had made detailed submissions to the Department contending that there had been a material error or deficiency at the s 16 stage. In its brief to the Minister, the Department provided a comment that essentially refuted Mr Brock's contention. Mr Brock claimed that

procedural fairness required that he be given an opportunity to reply to that comment. Downes J (with whom Yates and Katzmann JJ agreed) rejected the argument and observed (at [22]):

> What amounts to want of procedural fairness depends on the circumstances of each case. In its broadest sense procedural fairness, where it applies, permits a subject "to know the case sought to be made against him and to be given an opportunity of replying to it" (*Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 582 per Mason J). It does not require a decision-maker to put every nuance of what the decision-maker is considering for comment just as judges are not required to produce draft reasons for judgment for comment. If a decision-maker proposes to act on new considerations or new matters, not known to the subject, giving the subject an opportunity to comment will generally be appropriate. However, the matters said to attract procedural fairness in this case were at the heart of Mr Brock's arguments. They were comprehensively dealt with in Mr Brock's well-written submissions. Although Mr Brock did not, of course, refer to the departmental comment, his submissions put his arguments against their conclusion.

199 The primary judge here found that Mr Snedden was entitled to be informed about "what Croatia put against him", apparently even if it raised "no new considerations": Judgment at [42]. Mr Snedden (before the primary judge and this Court) did not point to any new adverse information in the Croatian response. Mr Snedden did not suggest that there was any new information that was credible, relevant and significant to the Minister's decision. In fact, as the primary judge seemed to accept, that Croatia's letter was purely responsive.

200 For the reasons given by Siopis J in *Hala*, if the Croatian response raised any new issue, or contained any new piece of information, not previously known to Mr Snedden, that was adverse to his interests and credible, reliable and significant to the decision, procedural fairness may have required that Mr Snedden be advised of that new issue or new information. That may not have required the entire response to be provided to Mr Snedden. But it may have required, at least, that Mr Snedden be given the opportunity to comment on the new adverse information.

201 If, however, the Croatian response did not contain any new adverse information but simply refuted, or provided information to rebut, contentions that had been advanced by Mr Snedden, it was unnecessary to provide it to Mr Snedden at all. There would, in such circumstances, be no practical injustice. Mr Snedden had been given an opportunity to make whatever representations he wished to make. He had no reason to expect he would be given a further opportunity. Given the course the extradition process had already taken, it could hardly be said that Mr Snedden would have expected Croatia to do anything other than refute many of the contentions he had advanced.

202 It should be noted in this context that the mere fact that the Ministerial brief contained references to the Croatian response does not mean that the Croatian response contained information that was relevantly new, adverse and significant to the Minister's decision.

203 It is necessary to consider whether the Croatian response did, in fact, contain any new adverse information. If it did, the failure to provide Mr Snedden with an opportunity to comment on that specific piece of new information may amount to a denial of procedural fairness

204 In his written and oral submissions, Mr Snedden pointed to certain paragraphs in Attachment G that contain summaries of parts of the Croatian

response. He submits, in effect that because Attachment G referred to parts of the Croatian response, those parts were relevantly adverse to his interests. The mere fact that Attachment G refers to parts of the Croatian response does not make those parts adverse information that procedural fairness required to be disclosed to Mr Snedden. In *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559 (*VHAP*), Allsop J (with Gyles and Conti JJ agreeing at [17]) said the following in relation to such reasoning (at [27]):

> Natural justice and the analysis of whether, in any case, it was afforded is not a process of syllogistic reasoning. One does not approach it thus: the person is entitled to adverse material, this material was relied on in reaching an adverse result, that makes it adverse material, it was not provided in terms, therefore there has been a failure to afford natural justice.

205 It is necessary to pay some close attention to the material in the parts of Attachment G highlighted by Mr Snedden to determine whether there was any *new* and *adverse* information which needed to be disclosed to Mr Snedden in all the circumstances.

206 It is important to recall that the ultimate issue is whether Mr Snedden had a *fair* opportunity for correcting or contradicting anything adverse to his interests. For this to occur, Mr Snedden needed to be made aware of any material adversely affecting him, and upon which he had not already been given a fair opportunity to respond.

207 Before turning to the specific passages in Attachment G, three general observations can be made. First, with possibly two exceptions, none of the information in the passages relied on by Mr Snedden is information concerning Mr Snedden himself or his personal circumstances. Rather it is information concerning aspects of Croatian law and criminal procedure and practice. That information is at a high level of generality, largely uncontroversial and in the public domain. Secondly, each piece of information is directly responsive to contrary contentions advanced in Mr Snedden's representations. And thirdly, virtually all of the information relates in some way to issues and contentions that were the subject of extensive submissions in the various proceedings in the Local Court, this Court and the High Court to which Mr Snedden was a party in the course of the extradition process.

208 The first passage of Attachment G pointed to by Mr Snedden is at paragraphs 254 to 256. This is one of the instances where the information is personal to Mr Snedden. The information in these passages is responsive to Mr Snedden's representation that there was an unexplained delay before Croatia sought his extradition. The information included the fact that the alleged offences by Mr Snedden had been the subject police inquiries and police reports in 1992 and 2005.

209 This information was neither new nor material. The extradition request itself referred to police inquiries and the filing of the 2005 report. The request had been the subject of submission and debate at the earlier stages of the extradition process in this Court and the High Court. There is no reference in the request to the earlier 1992 report. However that is of no moment whatsoever. The passages of Attachment G which follow those relied on by Mr Snedden, including the Department's comment, reveal that nothing turned on the fact that there may have been an earlier 1992 report. It is difficult to see how it could possibly have been of any relevance to the Minister's decision and even more difficult to see

what Mr Snedden could have said about it if given the opportunity to comment further. We make this observation mindful of the caution made by Megarry J in *John v Rees* [1970] Ch 345 at 402, and referred to by the primary judge at [43], but a practical and common sense approach should be taken to administrative decision-making taking into account the context as we have previously explained. We also appreciate that the content of the duty to accord procedural fairness does not depend upon what Mr Snedden may or may not be able to say in reply upon being provided with adverse material. However, the content of the duty does depend on a practical approach, taking into account the opportunities Mr Snedden has already been given in the process undertaken by the Department and the Minister, and Mr Snedden's responses in the course of that process.

210 Otherwise, the passages of paragraphs 254 to 256 include very general information about Croatia's Criminal Procedure Act and the fact that war crimes proceedings in Croatia are closely monitored. Both matters had been the subject of discussion and debate at earlier stages of the extradition process and in Mr Snedden's detailed representations. There is no relevantly new issue or information in these passages. The passages in Attachment G that follow those relied on by Mr Snedden reveal that this information was, in any event, highly unlikely to have been material to the Minister's decision.

211 The next passage pointed to by Mr Snedden is paragraph 270 of Attachment G. It contains Croatia's response to Mr Snedden's contention that the extradition request is politically motivated. The information is as follows:

> Croatia has advised that the extradition of [Mr Snedden] is requested because of the well-founded suspicion that he committed very serious criminal offences, namely "crimes against values protected by international law (war crimes)". Croatia has further advised that those accused of war crimes are held responsible regardless of their political and other beliefs, and regardless of their nationality.

212 This information was not new and did not raise a new issue. Mr Snedden's contention that the extradition was politically motivated, and Croatia's response to it, was considered in earlier proceedings in this Court and in the High Court. The first part of this information is the information that is contained in the extradition request itself.

213 Mr Snedden next points to paragraphs 294 to 296 of Attachment G. These paragraphs summarise Croatia's response to Mr Snedden's contention that there is a lack of reciprocity and mutuality in the extradition relationship between Australia and Croatia. Mr Snedden relies on two differences. First, Croatia can refuse to extradite its citizens whereas Australian law permits the extradition of its citizens. Secondly, Croatia requires requests from Australia to include prima facie evidence, whereas Australia does not require prima facie evidence from Croatia.

214 Croatia's response in substance confirms that these differences in fact exist. That is hardly adverse to Mr Snedden. It in fact provided some level of support for his representation. The following paragraphs of Attachment G, however, reveal why it was open to the Minister to form the view that these differences were ultimately immaterial to whether Mr Snedden should be surrendered to Croatia.

215 The next passages relied on by Mr Snedden are at paragraphs 320 to 325 of Attachment G. These paragraphs summarise Croatia's response to Mr Snedden's representations that he was not accused of an offence for the

purposes of the Act because he was only wanted for questioning for investigative purposes in Croatia. Mr Snedden's representations in this respect were based on *Zentai v O'Connor (No 4)* [2010] FCA 1385 which was subsequently overturned in *O'Connor v Zentai* (2011) 195 FCR 515 (*Zentai*). The Croatian response includes some information personal to Mr Snedden. It refers to the criminal process on foot in Croatia against Mr Snedden. It refers to a ruling by a judge of the County Court made on 12 December 2005. This was not, however, new information. This ruling is in fact referred to at length in the extradition request.

216 The balance of the information concerns the general nature of criminal proceedings in Croatia. As Croatia is a civil law system, the nature of criminal proceedings differs from proceedings in Australia. The information in substance confirms that, if surrendered to Croatia, Mr Snedden would be examined by an investigative judge. Again, that is hardly adverse to Mr Snedden. In substance it again provided some factual support for his representations. The following paragraphs of Attachment G, however, demonstrate why, in the light of the Full Court decision in *Zentai*, it was open to the Minister to find that Mr Snedden's representations did not provide a sound basis for a decision that Mr Snedden not be surrendered.

217 It should also be noted that Mr Snedden's argument that he was not an extraditable person because he was only wanted for questioning was the subject of submissions and debate in Mr Snedden's habeas corpus proceedings. Mr Snedden was aware of the position taken by the Minister in respect of this issue. This was not, in any sense, a new issue.

218 Next, Mr Snedden points to paragraphs 368 to 379 of Attachment G. These paragraphs summarise Croatia's response to Mr Snedden's claim that, for a number of different reasons, he would not receive a fair trial in Croatia. This again was not a new claim. Mr Snedden's representations were in substance a redevelopment or restructure of submissions he had previously made concerning extradition objections at earlier stages of the extradition process.

219 Croatia's response contains information at a high level of generality concerning war crimes prosecutions in Croatia. It includes references to obviously publicly available reports and provisions of the Criminal Procedure Act. These were all matters that Mr Snedden had already had the opportunity to make representations in relation to earlier in the extradition process: cf *SZQHH* at [30]. They were all matters that were "clearly on the table to be addressed" by Mr Snedden in his initial representations: *VHAP* at [17] (Gyles and Conti JJ). Fairness did not require him to have another opportunity to make representations about this general and publicly available information.

220 Exactly the same can be said concerning the next paragraphs highlighted by Mr Snedden. Paragraphs 393 to 397 of Attachment G summarise Croatia's response to Mr Snedden's claim that he will not be safe if extradited to Croatia. Mr Snedden's claim was that he cannot or will not be safely held in custody in Croatia. The information provided by Croatia was again no more than general information concerning the Criminal Procedure Act and various regulations, all of which were contained in Croatia's publicly available official Gazette. None of this information was personal to Mr Snedden. None of this publicly available information was new. None of it was relevantly adverse. Fairness did not require Mr Snedden be given a further opportunity to make submissions in relation to this information.

221 Finally, Mr Snedden relies on two passages in Attachment G that can conveniently be dealt with together. Paragraphs 405 to 408 and 414 to 417 contain the substance of Croatia's responses to Mr Snedden's contentions that the extradition request contained incorrect references to the Criminal Procedure Law and relevant offence provisions in Croatia. Croatia's response simply refutes this contention by referring to the relevant versions of the Criminal Procedure Act and Basic Criminal Code, all of which are publicly available because they are published in Croatia's official Gazette. Fairness did not require Mr Snedden to be given a further opportunity to address this publicly available information for the reasons previously given.

222 It follows that Mr Snedden was not denied procedural fairness as a result of not being provided with the Croatian response or any information contained within it. There was no absolute requirement to provide Mr Snedden with a right of reply. The procedure adopted by the Minister was in all the circumstances fair and reasonable. Mr Snedden was advised of this procedure. He was not told that he had a right of reply. Mr Snedden was given ample opportunity to make appropriate and relevant representations at the s 22 stage. There was no new information within the Croatian response that was adverse, credible, relevant and significant such that procedural fairness required the Minister to provide that information to Mr Snedden for comment. No practical unfairness flowed from the fact that Mr Snedden was not given the opportunity to make a further round of representations based on any information contained within the Croatian response.

223 Therefore, the primary judge was in error in finding that Mr Snedden was not accorded procedural fairness.

224 It should be emphasised that the conclusion that, given the content of the Croatian response, there was no "practical injustice" (cf *Lam* at [37]) and therefore no denial of procedural fairness, has nothing to do with the discretionary denial of relief. The primary judge correctly pointed out (Judgment at [43]) that if there had been a denial of procedural fairness, Mr Snedden was entitled to relief unless the Court is persuaded that the breach could not have had any bearing on the outcome: *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 (*Dagli*). But here, the absence of any practical injustice meant that there was no breach. The procedure adopted by the Minister was fair and reasonable. In all the circumstances, fairness did not require anything in the Croatian response to be put to Mr Snedden for further comment. The authorities, such as *Dagli*, that relate to the discretionary refusal of relief are accordingly of no relevance.

225 The Minister has accordingly made out the ground of his cross-appeal that the primary judge erred in holding that there was a denial of procedural fairness arising from the Croatian response.

The speciality assurance communication

226 The primary judge found that Mr Snedden was denied procedural fairness because he was not provided with certain information concerning the speciality assurance given by Croatia. Her Honour's critical findings in this regard were as follows (Judgment at [45]):

> … Mr Snedden was entitled to know that Australia had concerns about whether additional charges may be brought against him and had sought further clarification from Croatia after the [speciality] assurance was received. This was relevant information that must materially bear upon the Minister's decision because of the

> legal prohibition on Mr Snedden's surrender if the [speciality] assurance was not given. Subject to questions of public interest immunity, if any, procedural fairness required that information to be put to Mr Snedden to allow him the opportunity to make submissions

227 The evidence relevant to this finding is narrow in compass. It is essentially limited to the following paragraphs of Attachment G:

> 160. By Third Person Note dated 21 September 2011, which was provided through the diplomatic channel, the Minister for Justice of Croatia provided a speciality assurance to Australia in relation to [Mr Snedden] in the following terms:
>
> > Ministry of Justice of the Republic of Croatia, undertakes that Dragan Vasiljkovic, after being surrendered to the Republic of Croatia, will not, unless he has left or had the opportunity of leaving the Republic of Croatia:
> >
> > 1) be detained or tried in the Republic of Croatia for any offence that is alleged to have been committed, or was committed, before his surrender, other than:
> >   a) any surrender offence;
> >   b) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or deprivation of liberty) of which he could be convicted on proof of the conduct constituting any surrender offence;
> >   c) any extradition offence in relation to the country (not being an offence for which the Republic of Croatia sought his surrender in proceedings under section 19 of the Australian *Extradition Act 1988*) in respect of which the Attorney-General of Australia consents to he being so detained or tried; or
> > 2) be detained in the Republic of Croatia 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 his surrender to the Republic of Croatia by Australia, other than any offence in respect of which the Attorney-General of Australia consents to him being so detained or surrendered.
>
> 161. The speciality assurance provided by Croatia complies with the requirements outlined in paragraphs 22(4)(d) and 22(4)(e). In addition, the Department notes that the assurance carries a presumption of good faith on the part of the Croatian state.
>
> 162. Following Australia's request for a speciality assurance in relation to [Mr Snedden], Croatian authorities sought clarification from the Department of a number of matters. The queries received raised the possibility of additional charges against [Mr Snedden] in Croatia.
>
> 163. In response, the Department sought formal advice from Croatian authorities about possible additional charges against [Mr Snedden]. In particular, the Department sought advice as to whether enquires by Croatian authorities in relation to any further charges had or would shortly reach the stage of establishing a "well-founded" suspicion against [Mr Snedden] (which would provide a basis for the issuance of an arrest warrant against him for the charges).
>
> 164. By Third Person Note dated 15 May 2012, the Minister of Justice of Croatia formally advised Australia that there are no criminal proceedings

presently being conducted against [Mr Snedden] in Croatia other than in relation to the offences for which his extradition has been requested.

165. Accordingly, and in all of the circumstances, the Department considers that you may be satisfied that Croatia has given an appropriate speciality assurance in relation to [Mr Snedden] under paragraph 22(3)(d) of the Extradition Act.

(Footnote omitted.)

228 A number of points should be made about this evidence. First, Croatia had given an undertaking to Australia which satisfied the requirements of s 22(4)(c), (d) and (e) of the Act. Accordingly, by reason of s 22(4), Croatia was taken to have a given a speciality assurance in relation to Mr Snedden. It follows that the requirement in s 22(3)(d) had been satisfied. Contrary to the finding of the primary judge (Judgment at [45]), there was accordingly no question of any "legal prohibition on Mr Snedden's surrender" because a speciality assurance had been given.

229 There is also no evidence that the Department or the Minister had any doubts or concerns about the validity or the genuineness of Croatia's speciality assurance. If the Department had any "concerns" at all, those concerns related to whether communications received from Croatia suggested the possibility of additional charges against Mr Snedden in Croatia. These communications led the Department to seek, and Croatia to in due course provide by diplomatic note, formal advice that there were no criminal proceedings presently being conducted in relation to Mr Snedden in Croatia other than the surrender offences. Thus, to the extent that there were ever any concerns, those concerns had been allayed by May 2012.

230 In any event, the fact that the Department sought clarification about the possibility of further charges does not mean that it had concerns about the speciality assurance. A speciality assurance within the meaning of s 22(4) does not absolutely prevent further charges. For example, s 22(4)(d)(iii) permits further charges if the Attorney-General consents.

231 Mr Snedden's submission that the evidence supported an inference that there were concerns about the validity or genuineness of the speciality assurance must accordingly be rejected. The evidence does not support such an inference. It revealed no more than that there had been a process of clarification and confirmation about the assurance received.

232 In these circumstances, it is difficult to see why fairness required the Minister to reveal the communications to Mr Snedden. They could not be material to whether s 22(3)(d) had been satisfied because it plainly had. Contrary to her Honour's finding, the information in or concerning these communications was not material to whether the speciality assurance had been given. There was no question of there being any "legal prohibition". The assurance had been given and accepted by Australia. The information could not, on any view, have provided a basis for a submission that no speciality assurance had been given, or that the assurance that had been given was for some reason not valid.

233 Nor could these communications be relevant to any representations Mr Snedden could have made in the context of the Minister's discretion under s 22(3)(f) of the Act. The information, however one may look at it, could not have provided any basis for a submission by Mr Snedden to the Minister that he should doubt the genuineness of the speciality assurance, or that the Minister

should conclude that Croatia would or might prosecute Mr Snedden for other offences in Croatia despite the assurance. Such a submission, if made, could scarcely be considered to be credible. There was no practical injustice.

234 The information in or concerning the communication between Australia and Croatia was accordingly not relevantly adverse, credible or significant to the exercise of the Minister's discretion. For the reasons given in the context of the Croatian response, the fact that the information concerning the communications was contained in Attachment G and may have been taken into account by the Minister does not mean that it is relevantly adverse or material. Nor does the fact that the communication may have resolved an issue that at one stage may have existed concerning the possibility of further charges. The fact that the Department may, at some stage, have had a concern about the possibility of further charges did not need to be disclosed to Mr Snedden for comment. The mental processes and provisional views of the Department were not required to be exposed (cf *Alphaone* at 592; *SZBEL* at [48]) all the more so since it was the Minister, not the Department, who was the ultimate decision-maker.

235 If follows that the Minister has made good the ground in the cross-appeal that the primary judge erred in concluding that there was a denial of procedural fairness arising from the non-disclosure of the speciality assurance communications.

The OIL advice

236 Mr Snedden's contention that the primary judge erred in finding that procedural fairness did not oblige the Minister to disclose the privileged legal advice from OIL can be disposed of shortly. Mr Snedden accepts that a decision-maker may not need to disclose adverse information where there may be a "problem of confidentiality": *Kioa* at 629 (Brennan J). He submits, however, relying on *Maman* at [34]-[35], [37], that the fact that a document might contain confidential information itself does not prevent disclosure in every case. Nor does it prevent a decision-maker from disclosing the gist or substance of privileged advice.

237 Mr Snedden's reliance on *Maman* is misplaced. The information in *Maman* was not information that was legally professionally privileged. It was simply information that was confidential in a personal sense. In both *Griffiths v Rose* (2010) 190 FCR 173 and *New South Wales Council for Civil Liberties Inc v Classification Review Board* (2006) 236 ALR 313, single judges of this Court held that the rules of procedural fairness could not compel a decision-maker to produce documents that were legally professionally privileged. There could be little doubt that the OIL advice was privileged: see *Waterford v Commonwealth* (1987) 163 CLR 54. The Department was accordingly not required to disclose it. Nor could it be obliged to disclose the "gist" or "substance" of the privileged advice in the circumstances. Any such disclosure, to be meaningful in the context of procedural fairness, would inevitably result in a waiver. An administrative decision-maker cannot be compelled to disclose the gist of legal advice if this would result in waiver of the privilege.

238 In any event, for the reasons given by the primary judge (Judgment at [50]), procedural fairness did not require the disclosure of the OIL advice, or its gist or substance, even if it was not privileged. Mr Snedden was well aware that the Commonwealth's position was that Mr Snedden could be surrendered to Croatia under the Act without Croatia supporting its request by prima facie evidence. That was the basis of his constitutional challenge to the Act: see *Vasiljkovic v*

Commonwealth. That was also the reason Mr Snedden made detailed representations based on the Third Geneva Convention supported by opinions from international lawyers. In the circumstances, procedural fairness did not require that Mr Snedden be provided with the opportunity to reply to any contrary legal advice received by the Department. He had already been given an adequate opportunity to be heard on this issue.

239 It follows that the decision of the primary judge in relation to the procedural fairness ground cannot be upheld on the basis of the ground advanced in Mr Snedden's notice of contention.

Disposition

240 The appropriate orders would seem to be that Mr Snedden's appeal is dismissed with costs and the Minister's cross-appeal is allowed with costs. The orders made by the primary judge are to be set aside and in lieu thereof the application be dismissed. Mr Snedden should pay the costs of the Minister in the Court below.

241 However, we will direct that by 4.00 pm on 17 December 2014 the parties confer, and file and serve minutes of orders reflecting these reasons. If agreement cannot be reached, directions will be made as to the filing of brief written submissions.

Pagone J.

242 I have had the benefit of reading a draft of the reasons for judgment of Middleton and Wigney JJ, and I join with them in all but one respect. I have a different view on the question of whether her Honour was correct to conclude that Mr Snedden had not been accorded procedural fairness and, therefore, I would not allow the Minister's cross-appeal on this ground.

243 The issue in contention in this proceeding concerned the content of the Minister's duty to hear Mr Snedden. It was correctly accepted that the Minister had a duty to hear him but the parties disagreed about whether the content of the duty required the Minister to give Mr Snedden an opportunity to be heard on the Croatian response before the Minister made his decision. The resolution of that disagreement does not depend upon whether Mr Snedden was or was not heard (for that would confuse breach with duty) nor with either an assertion by Mr Snedden of an entitlement to be heard (if no entitlement existed) or a denial by the Minister of an obligation to hear (if an obligation existed). In *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559, Allsop J (as his Honour then was) warned against applying the rules of natural justice by reference to syllogistic reasoning. His Honour said at [27] (Giles and Conti JJ agreeing at [17]):

> Natural justice and the analysis of whether, in any case, it was afforded is not a process of syllogistic reasoning. One does not approach it thus: the person is entitled to adverse material, this material was relied on in reaching an adverse result, that makes it adverse material, it was not provided in terms, therefore there has been a failure to afford natural justice.

Natural justice, as his Honour went on to observe at [28], is ultimately a question of fairness and in that case did not require the provision of the specific text of relevant country information where the Tribunal had raised "subjects of concern" and the appellant had appeared before the Tribunal armed with material about her country of origin to persuade the Tribunal to reach a state of satisfaction. The requirement of the rule of natural justice "are flexible and will

be determined by what is fair in all the circumstances of a particular case" (Aronson M and Groves M, *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, 2013) at [8.50], 500) and in *VHAP* there was no unfairness in the failure to provide the specific text taken into account in deciding in that case in the context of the process adopted by the Tribunal of having raised subjects of concern with the person affected by the decision and allowing her the opportunity to satisfy the Tribunal.

244 The process adopted by the Minister on the question of whether to surrender Mr Snedden was different and, as her Honour reasoned, the Minister's duty to give Mr Snedden an opportunity to be heard on the material in the Croatian response was to be found in the nature of the process which the Minister had adopted in Mr Snedden's case. The Act does not prescribe the nature of the hearing that must be afforded to a person subject to surrender but the process of extradition is by its nature adversarial: *Mokbel v The Queen* (2013) 40 VR 625 at [1]. That does not mean that the Minister is obliged to treat the process as litigation between parties or that the Minister is obliged to give the person subject to surrender an opportunity to respond to all materials or all submissions which are before the Minister but the nature of the process will inform the requirements of fairness for the Minister to observe. Aspects of that process which are important to the requirement of fairness is that Mr Snedden was the person whose surrender was sought and that Croatia was the Country which was seeking his surrender. The process adopted by the Minister about whether to surrender Mr Snedden contemplated to require, and did require, information from Croatia, including information specific to Mr Snedden. The consequences of extradition for Mr Snedden were very serious and the information in the Croatian response was central to his objections to extradition and to the Minister's exercise of power under s 22 of the *Extradition Act 1988* (Cth) (the Act). The response from Croatia was not general information of the kind considered in *VHAP* nor from a disinterested party but, rather, from the country which had made the application which Mr Snedden sought to resist and which provided information related specifically to him. The Minister was not well placed to evaluate the veracity of statements by either Mr Snedden or by the Croatian government whenever they differed. There was, in addition, no restriction on the Minister in providing the information to Mr Snedden since Croatia had not provided information on the basis that it would not be made available to him. Indeed, the letter from the Attorney-General's department to the Ministry of Justice in Croatia on 3 August 2010 seeking information had, in its first paragraph, informed the Croatian officials that Mr Snedden was able to make representations to the Minister about why he should not be surrendered and that the Minister would take into account relevant representations in making the determination. Fairness in those circumstances required that the person to be surrendered have an opportunity to respond to the information supplied by the Country seeking his surrender.

245 In this case Mr Snedden had sought an opportunity to be heard on the material which the Minister intended to consider but which had not been available to Mr Snedden. The existence, and the content, of the duty to afford a person affected by a decision with an opportunity to be heard cannot, of course, depend upon the assertion of an entitlement to be heard if it does not exist, but what the parties say may have a bearing upon whether the process followed has been fair. On 24 June 2010 Mr Snedden's solicitors made submissions that

Mr Snedden should not be surrendered to Croatia pursuant to s 22 of the Act. The letter from Mr Snedden's solicitors to the Minister contained the following request:

> We ask that the Minister accord Mr Snedden procedural fairness by offering him an opportunity to respond to material which the Minister intends to consider. While what is actually required will vary from case to case, we ask the Minister to bear in mind the fundamental importance attached to Mr Snedden knowing the case he has to meet, and his right to respond to material, facts and assumptions which may lead to an adverse decision.

On 3 August 2010 an assistant secretary of the Attorney-General's department wrote to the relevant person at the Ministry of Justice in Croatia seeking specific information. The Croatian response was dated 31 August 2010. The response dealt with the matters which had been sought on behalf of the Minister and included references to specific facts as well as more general statements. That response was specifically referred to in the material before the Minister in deciding whether to surrender Mr Snedden. He may well have expected that the Croatian information would refute many of the contentions he had advanced, but he could not be assumed to have predicted or to have known sufficiently in advance of its receipt what the Croatian response would be such that he should be assumed to have made all representations that might have borne upon what the Minister received from Croatia. Mr Snedden may fairly be said to have had an opportunity to make whatever representations he wished to make before the Minister sought information for Croatia, but Mr Snedden had been given no opportunity to be heard on the content of the Croatian response upon which the Minister's decision depended.

246 A failure to be given the opportunity to be heard will not, of course, always entitle the affected person to a remedy where, for example, it is established that to have afforded an opportunity to be heard could not have had any bearing on the outcome. That may be the case where, for instance, the same outcome is dictated by an independent and alternative basis (see *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; 235 ALR 609), but it will be difficult to conclude that the same outcome must have obtained when the decision in dispute depends upon whether the person affected had been given an opportunity to be heard and the opportunity had not been given. Applications for judicial review on the grounds of a failure to be afforded an opportunity to be heard are not occasions for a review of the merits of what might have been said had the opportunity been granted or for the decision maker to hypothesise that nothing could have been said in the face of the person affected wanting the opportunity to say something. Mr Snedden was, therefore, entitled to be heard unless the Court is persuaded that the breach could not have had any bearing on the outcome of his case: *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541. Her Honour found at [43] that she would not conclude on the material before her that there would "simply be no answer" to the matters raised by the Croatian authorities or that the matters were "so blindingly obvious as not to require any comment or submission": *Applicants M1015/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1309 at [54]; *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30 at [50]. As her Honour observed at [43], the authorities have cautioned against finding that a hearing was unnecessary because it would have served no purpose: see *John v Rees* [1970]

Ch 345 at 402; and also *R v University of Cambridge (Dr Bentley's Case)* (1722) 93 ER 698. That finding was open to her Honour on the evidence and in those circumstances I would not conclude that Mr Snedden's failure to be heard on the Croatian response could not have had a bearing on the Minister's decision.

Orders accordingly

Solicitors for the appellant: *Shine Lawyers*.

Solicitors for the first respondent: *Ashurst Australia*.

NICHOLAS DERRINGTON