SNEDDEN (aka VASILJKOVIC) v MINISTER FOR JUSTICE (Cth) and Another

FEDERAL COURT OF AUSTRALIA

DAVIES J

23–25 September, 15 November 2013 — Melbourne

[2013] FCA 1202

Criminal law — Extradition (overseas) — In March 2010 the applicant became an "eligible person" for surrender to Croatia under s 22(1) of the Extradition Act 1988 (Cth) — Section 22(2) requires the minister to determine that an eligible person is to be surrendered "as soon as is reasonably practicable, having regard to the circumstances" — Minister determined in November 2012 that applicant was eligible for surrender under s 22(2) of the Act — Whether the minister made his determination as soon as reasonably practicable — Minister's decision relied on correspondence between Attorney-General's Department and Croatian authorities that was not put to applicant for comment — Whether procedural fairness required the correspondence to be put to applicant — Whether minister obliged to consider Australia's international law obligations in exercising power under s 22(2) — (CTH) Extradition Act 1988 s 22.

Section 22(2) of the Extradition Act 1988 (Cth) (the Act) requires the first respondent, the Minister for Justice (Cth) (the minister), to determine whether a person is to be surrendered to the extradition country "as soon as is reasonably practicable" after a person becomes an "eligible person" as defined in s 22(1) of the Act. Section 22(3) prohibits the surrender of an eligible person unless the extradition country gives a "specialty assurance" in relation to the person and the minister, in his discretion, considers that the person should be surrendered in relation to the offence.

The applicant (Mr Snedden) was born in Yugoslavia (as it then was) and was an Australian citizen by naturalisation. In 2006, the Republic of Croatia requested of Australia that Mr Snedden be extradited for prosecution for three war crimes under the Basic Criminal Code (Croatia). On 12 April 2007, a federal magistrate found that Mr Snedden was eligible for surrender under s 19(9) of the Act. That determination was challenged by Mr Snedden and not resolved until the High Court of Australia confirmed the magistrate's orders on 10 March 2010: see *Republic of Croatia v Snedden* (2010) 241 CLR 461; 265 ALR 621; [2010] HCA 14. At that time, Mr Snedden became an eligible person under s 22(1) of the Act.

In September 2011, Croatia provided the specialty assurance to the Attorney-General's Department (the department). On 15 November 2012, the minister decided under s 22(2) that Mr Snedden should be surrendered to Croatia. The minister relied in part on a letter from the Croatian authorities responding to a letter from the department. The department's letter raised issues which Mr Snedden had himself raised with the department and included his claims that he was not wanted for prosecution in Croatia, that the Croatian courts were biased against Serbian defendants, and that his extradition was politically motivated. Neither the letters sent nor received by the department were put to Mr Snedden for comment.

In these proceedings, Mr Snedden argued that the minister's decision was vitiated by legal error on the following three grounds:

(1) the minister's power under s 22(2) had expired as a consequence of unreasonable delay;

(2) Mr Snedden was denied procedural fairness by the minister by not being given an opportunity to respond to the letters sent and received by the department;
(3) in exercising his discretion under s 22(3)(f) of the Act the minister relied on incorrect internal legal advice from the Department of International Law about whether international law required that an extradition request for Mr Snedden for the conduct alleged be supported by prima facie evidence.

Held, upholding ground 2, dismissing grounds 1 and 3 and quashing the minister's decision:

Ground 1

(i) The phrase "as soon as reasonably practicable" in s 22(2) conditions the time for the performance of the minister's duty to make the decision, not the existence of the power to make the decision: at [20].

> *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494; 296 ALR 625; 130 ALD 508; [2012] FCA 940, not followed.

(ii) The time from when to measure the performance of the minister's duty under s 22(2) is when Mr Snedden became an "eligible person" under s 22(1); that is, 10 March 2010 when the High Court of Australia so determined: at [29].

(iii) Here, absent a finding that the time taken to make the decision was the consequence of some neglect, oversight or inattention, it could not be concluded that the decision was made otherwise than "as soon as reasonably practicable": at [31].

Ground 2

(iv) The content to be given to the requirement to accord procedural fairness depends upon the particular statutory framework and the facts and circumstances of the particular case: at [40].

> *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; 231 ALR 592; 93 ALD 300; [2006] HCA 63, followed.

(v) In this statutory context, Mr Snedden was entitled to be informed about what Croatia put against him as to why he should be surrendered, unless the court is persuaded that the minister's failure to inform Mr Snedden had no bearing on the outcome: at [42]–[45].

> *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541; [2003] FCAFC 298, followed.

(vi) Mr Snedden need not establish that he would have put something to the minister by way of rebuttal of the information; it is enough that the court is not persuaded that the failure to inform Mr Snedden had no bearing on the outcome: at [43].

(vii) It could not be concluded that there would "simply be no answer" to the matters raised in the letter from the Croatian authorities. Accordingly, Mr Snedden was denied procedural fairness: at [45].

Ground 3

(viii) The relevant articles of the Geneva Convention III are not mandatory relevant considerations in the minister's exercise of power under s 22(2) of the Act and do not found jurisdictional error: at [53].

> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; 195 ALR 502; 72 ALD 613; [2003] HCA 6, followed.

Application

This was an application to the Federal Court of Australia for orders quashing a decision of the first respondent to surrender the applicant for extradition to Croatia.

J Burnside QC, *L De Ferrari*, *R Knowles* and *J Fetter* instructed by *Shine Lawyers* for the applicant (Daniel Snedden (aka Dragan Vasiljkovic)).

S Lloyd SC and *G Hill* instructed by *Ashurst Australia* for the first respondent (Minister for Justice (Cth)).

J Smith instructed by *Meridian Lawyers* for the second respondent (Governor of the Parklea Correctional Centre).

[1] Davies J. The applicant, Mr Snedden (also known as Dragan Vasiljkovic) has challenged the decision of the first respondent, Minister for Justice (Cth) (the minister) made under s 22(2) of the Extradition Act 1988 (Cth) (the Act) to surrender him for extradition to Croatia in relation to alleged war crimes offences (the decision). Mr Snedden claims that the decision is vitiated by legal error and should be quashed and other consequential orders made.

[2] The decision is the fourth stage of the extradition process under the Act: *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389; 125 ALR 36 at 38–9. The consequence of the decision, unless set aside, is that the minister will issue a warrant for the surrender of Mr Snedden to Croatia: s 23 of the Act.

Stage one of the extradition process: The extradition request

[3] Stage one was the extradition request.

[4] Mr Snedden was born in the former Republic of Yugoslavia and is a citizen of Australia by naturalisation. In January 2006, Australia received a request from the Republic of Croatia to extradite Mr Snedden for prosecution for two offences of war crimes against prisoners of war contrary to Art 122 of the Basic Criminal Code of the Republic of Croatia and one offence of war crimes against the civilian population contrary to Art 120 of that Code. The offences were alleged to have been committed by Mr Snedden in 1991 and 1993 when in command of a special purpose unit of the Serbian Paramilitary Troops which were in armed conflict with the armed forces of the Republic of Croatia.

Stages two and three of the extradition process: Remand and determination that Mr Snedden is an "eligible person"

[5] Stage two was the arrest of Mr Snedden in Australia on 19 January 2006 pursuant to a provisional arrest warrant issued by a magistrate under s 12(1) of the Act and his remand in custody the following day pursuant to s 15 of the Act.

[6] Stage three was the determination that he is eligible for surrender to Croatia. On 12 April 2007, a magistrate found Mr Snedden eligible for surrender to Croatia and committed him to prison under s 19(9) of the Act to await the surrender determination of the Attorney-General under s 22 of the Act. A challenge by Mr Snedden to that determination, exercising his right of review under s 21 of the Act, had the consequence that Mr Snedden did not become "an eligible person" for the purpose of the minister's exercise of powers under s 22(2) of the Act until 10 March 2010, when the High Court determined conclusively that the Magistrate's orders should be confirmed: *Republic of Croatia v Snedden* (2010) 241 CLR 461; 265 ALR 621; [2010] HCA 14 (*Snedden*).

The fourth stage: Surrender determination by the Attorney-General under s 22(2) of the Act

[7] Section 22(2) provides:

> 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.

[8] Section 22(2) must be read with 22(3), which places a legal prohibition on the surrender of the eligible person in the exercise of the s 22(2) power. Section 22(3) provides (so far as is relevant) that:

> 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 specialty assurance in relation to the person; and
>
> …
>
> (f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

[9] The minister may, as he did here, exercise the power given to the Attorney-General under s 22(2) of the Act: s 19 of the Acts Interpretation Act 1901 (Cth); *Attorney-General (Cth) v Foster* (1999) 84 FCR 582; 161 ALR 232; 55 ALD 393; [1999] FCA 81 (*Foster*); *Mokbel v Attorney-General (Cth)* [2007] FCAFC 161. The minister made the decision required by s 22(2) on 15 November 2012, some two-and-a-half years after Mr Snedden had become "an eligible person". In making that decision, the minister relied on a speciality assurance from Croatia and exercised the discretion conferred on him by s 22(3)(f).

The alleged legal errors in the making of the s 22(2) decision

[10] Mr Snedden's first ground is that by the time the minister made his decision on 15 November 2012, his power under s 22(2) had expired as a consequence of unreasonable delay (the delay ground).

[11] Mr Snedden's second ground (the procedural fairness ground) is that he was denied procedural fairness by the minister by reason that:

(a) he was not informed about, nor given an opportunity to respond to, adverse material that the Attorney-General's Department (the department) had obtained from the Croatian authorities;

(b) he was not informed about further communications between the department and Croatia concerning the specialty assurance that Croatia had provided for the purposes of s 22(3)(d) of the Act and was not provided with an opportunity to respond to further information from Croatia in relation to the specialty assurance; and

(c) he was not informed that the minister was intending to surrender him to Croatia "in violation of Australia's obligations under the Geneva Conventions" and was not given the opportunity to be heard on the issue of Australia's compliance with those obligations.

[12] Mr Snedden's third ground (the legal errors ground) is that jurisdictional errors of law were made by the minister in exercising his discretion under s 22(3)(f) because the minister:

(a) relied on incorrect legal advice that Australia could extradite Mr Snedden to Croatia pursuant to the extradition request without prima facie evidence of the offences in respect of which extradition is sought; and

(b) failed to consider whether Mr Snedden has protected status under Geneva Convention III as as a prisoner of war and whether the protections owed to him under Geneva Convention III as a prisoner of war would be breached by Croatia if he is surrendered.

The delay ground

[13] This ground raises both a question about the proper construction of s 22(2) (the construction point) and a factual argument (the factual claim).

The construction point

[14] Mr Snedden argued, relying on *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494; 296 ALR 625; 130 ALD 508; [2012] FCA 940 (*Santhirarajah*), that the minister had lost the power to make a decision under s 22(2) of the Act by the time that he came to make it because he failed to act "as soon as [was] reasonably practicable, having regard to the circumstances". In *Santhirarajah*, North J held that the Attorney-General no longer has the power to surrender a person under s 22(2) once the time stipulated by that section has passed. His Honour reasoned at [74] that the ordinary and natural meaning of the language of the section pointed to a meaning that the power ceased to exist if it was not exercised within time:

> [74] … First, the section specifies a time limitation. Second, that limitation is expressed emphatically — "as soon as". Third, the limitation is provided with a degree of flexibility — "reasonably practicable". By providing the Attorney-General with some leeway, this element suggests that the power is intended to be exercised without delay once circumstances, objectively assessed, render it reasonably practicable to do so. Finally, the word "shall" construed in the context of the Act, ought to be given its ordinary prescriptive meaning.

North J cited *Re Griffiths* [1991] 2 Qd R 29 where Byrne J said at p 33 that in legislation the term "shall" ordinarily signifies "must". Central to North J's reasoning was that the purpose, scope and object of the Act supported the view that "shall" is used to oblige the Attorney-General to exercise the power within the stipulated time and at no other time. North J noted that there was no "saving clause".

[15] As the minister submitted that North J's conclusion that the s 22(2) power expires on a failure to exercise it within time is "clearly wrong" and should not be followed, it is desirable to set out his Honour's reasoning on this point in full (at [76]–[80]):

> [76] The purpose, scope and object of the Act also support the construction of s 22(2) advanced by the applicant. The extradition process intrudes into the life and liberty of people sought for surrender. The applicant's submissions highlight the attempts made in the Act to ensure the process is speedy. One purpose of this approach is to provide a reasonable limit on the intrusion into the life and liberty of people sought for surrender. In respect of an earlier form of s 21 which limited the time for commencement to apply

for a review of a decision of a magistrate on eligibility under s 19 to 15 days, Wilcox J in *Prevato v Governor, Metropolitan Remand Centre* (1986) 8 FCR 38 (*Prevato*) said at 363:

> "… there is no provision in the section for any extension of the period of 15 days allowed for the making of an application for review. The reason, no doubt, was that it was thought desirable to enable an early decision by the Attorney-General upon the question of surrender and, if the decision was to surrender, prompt surrender. *Speed is desirable; in the interests both of the fugitive, who is being held in some form of custody pending a decision and who yet may not be surrendered or may be acquitted of the relevant charge or charges, and of the administration of justice in the requesting State*. But the absence of any provision for extension of the relatively short time allowed for the making of an application for review throws a particular responsibility upon those acting on behalf of the fugitive to ensure that any application for review is made in time." [Emphasis added by North J.]

[77] The requirement that the Attorney-General exercise the power to surrender in a timely way, on the pain of losing the power, provides a strong incentive to the Attorney-General to act in accordance with the aim of providing a speedy process.

[78] Of course, the Act has more than one purpose. It also aims to promote compliance with Australia's extradition relationships with other states in order to ensure that criminal conduct subject to the jurisdiction of the requesting state is dealt with under the processes of that state. The Attorney-General argued that this purpose is weakened if the power to surrender ceases to exist after the timeframe limit specified in s 22(2) has passed. On the construction advocated by the Attorney-General, the time "as soon as is reasonably practicable, having regard to the circumstances" marks 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 at the suit of the person sought. In that way, so it was said, the rights of people sought for surrender are protected whilst the purpose of cooperating in countering criminal conduct is also served.

[79] There is force in that argument, but the answer given to it by the applicant should be accepted. The person seeking mandamus must first have the knowledge that there is a way to secure legal redress. In a typical situation, potential applicants will be strangers to the Australian legal system. They will normally be on remand with the attendant difficulty of seeking out and obtaining legal representation. Then, they will require funds to retain legal representation in circumstances where, as a result of their detention, they will have been unable to work for some time. These obstacles stand as a significant barrier to people sought for extradition instituting court proceedings for mandamus. In many cases these impediments will create a practical bar on people commencing proceedings for mandamus. And, in the interim, the person concerned is held in custody. Where a person is held in custody without any practical means of challenging the ongoing detention there is a clear injustice to that person. And even if mandamus proceedings are commenced, success is not automatic. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; 234 ALR 114; [2007] HCA 14 the majority at [40] referred to the remarks of Lord Chelmsford in *R v Churchwardens of All Saints, Wigan* (1876) 1 App Cas 611 at 620 as follows:

> "A writ of mandamus is a prerogative writ and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned."

[80] Against this potential injustice must be balanced the consequence to Australia's extradition arrangements with other states which might result from the Attorney-General losing the power to make a determination as a result of failing to act as soon as was reasonably practicable having regard to the circumstances. That

> consequence, however, is in the hands of the Attorney-General. It may be avoided by the Attorney-General acting in accordance with the time limitation stipulated in s 22(2).

[16] The minister argued that North J's construction was contrary to the legislative scheme. It was submitted that the legislative scheme requires the Attorney-General to make a decision under s 22(2). It was argued that the Attorney-General must make a decision under s 22(2) because it is that decision which authorises the issue of a warrant under s 23 or s 24 (where the decision is made to surrender the person) or the release of the person under s 22(5) (where the decision is made that the person is not to be surrendered) and, apart from s 22(5), there is no provision in the Act that authorises the release of "an eligible person". It was submitted that the correct construction of s 22(2) is that power conferred by s 22(2) has no temporal limitation. This construction was said to be supported by what Hayne J said in *Al-Kateb v Godwin* (2004) 219 CLR 562; 208 ALR 124; 79 ALD 233; [2004] HCA 37 at [227] (*Al-Kateb*) about the expression "as soon as reasonably practicable" as it appears in s 198(6) of the Migration Act 1958 (Cth):

> [227] It may be accepted that "as soon as reasonably practicable" assumes that the event concerned can happen, and that, if there is any uncertainty, it is about *when* the event will happen, not *whether* it will.

It was submitted that the failure by the minister to make the s 22(2) decision "as soon as is reasonably practicable" did not deprive him of the power to make it but, rather, that the remedy was to seek mandamus to compel him to make the decision upon which the statutory scheme operates, in respect of which the minister has a continuing duty.

[17] It is well established that a single judge of this court should, as a matter of judicial comity and precedent, follow the decision of another single judge of this court unless persuaded that the earlier decision is clearly or plainly wrong. It is also well established that a single judge should not lightly depart from an earlier single judge decision where the correctness of that decision is a matter on which minds may differ, and particularly so on questions of construction: *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [75] per French J; *Undershaft (No 1) Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 150; 253 ALR 280; [2009] FCA 41 at [70]–[74]. The court must none the less still give independent consideration to the proper construction of s 22(2) and, upon doing so, I have respectfully formed the view that North J fell into error in his approach to construction of s 22(2) and that the construction that his Honour gave to s 22(2) is clearly wrong.

[18] North J reached his construction by a balancing of injustices that in North J's view, favoured the "eligible person". The potential injustice to a person held in detention where the minister fails to make a decision "as soon as is reasonably practicable" is undoubted but as French CJ and Hayne J recently cautioned in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; 293 ALR 412; [2012] HCA 56 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.

[19] Textually s 22(2) conveys, by use of the imperative "shall", that that the power conferred by s 22(2) is not permissive and must be performed. The language is in terms that the power to make a decision under s 22(2) is a mandatory, not discretionary, power which must be exercised "as soon as is

reasonably practicable". The language used thus confers both the authority on the Attorney-General (or the minister) to make the decision whether "an eligible person" is to be surrendered and the duty to make such a decision "as soon as is reasonably practicable". Read in that way, the temporal limitation relates not to the existence of the power but to the performance of the duty to exercise the power.

[20] The proper construction of 22(2) cannot be considered independently of the statutory scheme of which it forms part. The minister, in my view, correctly submitted that the scheme of the Act requires an executive decision to be made under s 22(2). A decision is needed because the next step in the extradition process (either the issuing of a warrant under s 23 or s 24 or the release of the eligible person pursuant to s 22(5)) depends on that decision. It is therefore both consistent with, and gives the effect to, the statutory scheme to construe the phrase "as soon as is reasonably practicable" as it appears in s 22(2) as conditioning the time for the performance of the duty to make the decision, and not as conditioning the existence of the power.

[21] In my opinion, there is both a clear textual and contextual basis for concluding that s 22(2) should not be construed in the way that North J held. Quite plainly, the legislature intended that some temporal limitation should be imposed by s 22(2) but reference to the provisions with which s 22(2) interacts does not support the view that the legislature intended to deprive the Attorney-General of the power to make the decision required by s 22(2), because of a failure to make that decision within the stipulated time. The provisions must be considered and read together as a coherent scheme regulating the extradition process. Considered in that light, and giving effect to the words of s 22(2), the proper construction to be given to s 22(2) is that the Attorney-General, who is the repository of the power to decide whether the person is to be surrendered, must exercise the power "as soon as is reasonably practicable". That time stipulation does not condition the existence of the power but rather the time for performance of power, which is mandatory. Considerations of text, context and purpose support the construction that a breach of the section would constitute jurisdictional error amendable to prerogative relief. Such a breach would be enforceable by an order compelling the Attorney-General to perform his duty and make the decision upon which the extradition process depends for the next step: *Ward v Williams* (1955) 92 CLR 496 at 505–6; [1955] ALR 308 at 312–13. Considerations of 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.

[22] In the circumstances, I respectfully decline to follow North J's decision on the proper construction of s 22(2).

The factual claim

[23] In case I am wrong on the construction point, I should deal with Mr Snedden's factual contention that the minister's decision was not made "as soon as [was] reasonably practicable".

[24] The question as to whether the minister made his decision "as soon as [was] reasonably practicable" requires consideration of the "reasonable practicability" of making that decision earlier. Whether it was "reasonably practicable" for the decision to be made earlier than it was essentially depends on when it became feasible for the minister to make his decision "having regard to the circumstances": s 22(2). The concept of feasibility is inherent in the notion of

"practicable": *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506; 80 ALD 799; [2003] FCAFC 292 at [47]–[52]; *Al-Kateb* at [121] per Gummow J and at [227] per Hayne J; *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146; 199 ALR 290; 75 ALD 360; [2003] FCAFC 131 at [65]–[69] (*M38/2002*). The words "as soon as" direct that the decision should be made "without delay" once the circumstances render it reasonably practicable to do so: *Santhirarajah* at [74]; *Al-Kateb* at [121] per Gummow J.

[25] Two further observations may be made. The first observation is that the power (and duty) of the minister to make a decision whether or not to surrender a person arises "after" the person has become an "eligible person": s 22(2). The second observation is the performance of the duty involves consideration as to whether s 22(3) would prohibit the minister from making the decision to surrender that person. Section 22(3) contains a limitation on the exercise of power. The section provides, in express terms, that for the purposes of s 22(2), an eligible person is "only" to be surrendered in relation to a qualified extradition offence (1) "if" the minister is satisfied of certain matters: s 22(3)(a)(b) and (e); (2) "if" a relevant undertaking has been given by the extradition country to Australia, where the offence is punishable by a penalty of death: s 22(3)(c); (3) "if" the extradition country has given a specialty assurance: s 22(3)(d); and (4) "if" the minister in the exercise of his discretion considers that the person should be surrendered in relation to the offence: s 22(3)(f). The minister has a duty to consider those matters before making his decision under s 22(2) and this duty must be taken into consideration when assessing whether the decision was made as soon as was reasonably practicable.

[26] Although Mr Snedden was arrested in January 2006, he did not become an "eligible person" for the purposes of s 22(2) until 30 March 2010. The gap is explained by the time it took for various legal challenges by Mr Snedden to be completed. Those challenges included a challenge to his status as "an eligible person". On 12 April 2007, a magistrate determined that Mr Snedden was eligible for surrender to Croatia and committed him to prison under s 19(9) of the Act to await the surrender determination under s 22. Mr Snedden exercised his rights of review under s 21 of the Act. He failed in his review proceeding before a single judge of this court but the Full Federal Court allowed his appeal. The matter then went to the High Court which allowed the appeal from the Full Federal Court decision: *Snedden*. It was only then, when the High Court handed down its decision on 30 March 2010, that Mr Snedden finally became an "eligible person" as that expression is defined in s 22(1)(b). "Eligible person" for the purposes of s 22(2) means relevantly: "a person who has been committed to prison or released on bail:

> (b) By order made under subsection 19(9) or 21(2A) (including because of an appeal referred to in section 21), where no proceedings under section 21 are being conducted or are available in relation to the determination under subsection19(9) to which the order relates."

[27] The chronology of key events that occurred between 30 March 2010 and 15 November 2012 is as follows:

(a) Mr Snedden, who had been released from custody on 4 September 2009 following his successful appeal to the Full Federal Court, was unable to be located by the Australian Federal Police for 43 days following the High Court's decision. He did not return to custody until 12 May 2010.

(b) On 14 May 2010, the department wrote to Mr Snedden advising him that he was entitled to make representations to the minister as to why he should not be surrendered to Croatia. The letter requested any representations by close of business on 15 June 2010. This deadline was extended to 25 June 2010 at the request of Mr Snedden's lawyers.

(c) Between May and mid-July 2010, the department received representations from Mr Snedden and from other persons and organisations as to why Mr Snedden should not be surrendered to Croatia. The department reviewed all the representations and determined that there were eight issues raised in the representations on which it was appropriate to provide Croatia with the opportunity to respond.

(d) In August 2010, the department wrote to the Croatian Ministry of Justice, Croatia's central authority for international extradition. The letter sought a response to the eight issues that the department had identified, which the department received in September 2010.

(e) On 20 September 2010, Mr Snedden commenced new proceedings challenging the extradition process. In November 2010, the department was successful on its application to have the proceedings dismissed summarily: *Vasiljkovic v Honourable Brendan O'Connor* (2010) 276 ALR 326; [2010] FCA 1246. An appeal by Mr Snedden was heard in August 2011 and dismissed in September 2011: *Vasiljkovic v Honourable Brendan O'Connor (No 2)* [2011] FCAFC 125. (The department's case was that these proceedings contributed to the time taken for the department to complete its brief to the minister because of resourcing issues.)

(f) From March to May 2011, the department took steps in relation to requesting the specialty assurance from Croatia's central authority in relation to Mr Snedden. The formal request was made in May 2011. In June 2011, Croatia raised questions about the specialty assurance that raised the possibility of additional charges. In July 2011 Australia sought formal advice from Croatia about the possibility of further charges. The speciality assurance was provided in September 2011, but there were ongoing communications between Australia and Croatia about the possibility of further charges. In March 2012, Australia sought further formal advice from Croatia about the possibility of further charges. In May 2012, the Croatian Ministry of Justice 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 was requested.

(g) In June 2011, the department sought advice internally from the Office of International Law (OIL) regarding the question of whether international law requires that an extradition request for Mr Snedden for the conduct alleged be supported by prima facie evidence. That advice was only provided in February 2012, some seven and a half months after the request was made.

(h) Throughout this time the department continued to receive representations from persons and organisations regarding whether Mr Snedden should be surrendered to Croatia, with the last submission received on 8 February 2012.

(i) From the latter part of October 2011 onwards, concerns were being expressed to the department on behalf of Mr Snedden about the length of time being taken to make a decision.

(j) Work commenced in November 2011 on the brief to the minister which contained material relevant to the minister making a decision about whether or not to surrender Mr Snedden. A draft was completed in June 2012 and cleared on 6 November 2012 to be put before the minister.

(k) On 15 November 2012, the minister made his decision.

[28] It was argued forcefully for Mr Snedden that the minister had not made his decision as soon as was reasonably practicable. It was argued that the time taken to make the decision should be measured from 12 April 2007 when the Magistrate determined Mr Snedden to be an eligible person. It was submitted that the department could, and should then have commenced undertaking the work required for the s 22(2) decision though Mr Snedden was exercising his appeal rights under s 21 of the Act. It was submitted further that the fact that Mr Snedden has been held in detention (including, for a period, in isolation) is relevant to the question of whether the decision had been made as soon as was reasonably practicable and that the department had failed to explain why it delayed until the High Court handed down its decision in March 2010.

[29] I do not accept the proposition that time should be measured from April 2007 when assessing whether the minister made his decision "as soon as [was] reasonably practicable". Mr Snedden did not become "an eligible person" for the purposes for s 22(2) of the Act until his appeal rights under s 21 of the Act were exhausted: s 22(1). The minister's power to make the decision arose only after Mr Snedden became an "eligible person", as that term is defined for the purposes of s 22(2). Mr Snedden may never have become "an eligible person" and, until the appeal process was completed, he did not have that status. Commensurately, the minister's duty to make his decision as soon as was reasonably practicable arose only "after" Mr Snedden became "an eligible person". That is, once Mr Snedden became "an eligible person". There was no legislative obligation for any step to be taken to progress the minister's s 22(2) decision before Mr Snedden's status as "an eligible person" was confirmed by the High Court. I also reject for the same reason the submission that the "circumstances" to be taken into account in measuring the timeliness of the exercise of power must include the fact that Mr Snedden was determined to be an "eligible person" by a magistrate back in April 2007. In my view, the relevant time must be measured from 30 March 2010.

[30] Significant criticisms were levelled at the department for tardiness and unexplained delays in seeking a specialty assurance from Croatia, seeking and obtaining advice from OIL and submitting the brief to the minister. It is undoubted that the process took an inordinately long time and justifiable criticism may be levelled at the length of time taken for the relevant information to be obtained, reviewed and put to the minister. But however justified that criticism may be, I am not persuaded that the decision was not made "as soon as [was] reasonably practicable, having regard to the circumstances".

[31] Mr Snedden's continuing detention is one of the considerations to take into account, but the determination as to whether, in all the circumstances, the minister made his decision as soon as was reasonably practicable is concerned with when it was reasonably practicable to make the decision, not with the length of time that Mr Snedden has been held in detention: *M38/2002* at [65] and

Al-Kateb; and the present case is not a case where there was unexplained inaction for any substantial period which would enable the court to conclude that the minister did not make his decision as soon as he was reasonably able to do so. Mr Snedden's case is, in my view, distinguishable from the facts of *Santhirarajah*. A crucial fact in that case was that there was a 2-year period when Australia was in possession of all the information it needed to make a decision but no decision was made. In the present case, the department did not have all of the necessary information until May 2012, when the formal advice from Croatia regarding the specialty assurance was received. May 2012 was the earliest date by which the decision was capable of being made as the minister could not make his decision until the necessary inquiries relating to the s 22(3) matters were finalised. The department had, in the meantime, been working on the brief to the minister, with work commencing in November 2011. The length of time taken to complete the brief was fully explained in evidence by a departmental officer whose evidence was not discredited. The evidence does not support a finding that the time taken was the consequence of some neglect, oversight or inattention. Absent such a finding, I would not conclude that the decision was not made as soon as was reasonably practicable once Mr Snedden became an "eligible person".

Second ground: Failure to provide procedural fairness

[32] The gravamen of this ground is that Mr Snedden was not given the opportunity to deal with adverse information that was credible, relevant and significant to the decision to surrender him.

The Croatian response

[33] In the submissions that Mr Snedden made to the department as to why he should not be surrendered, Mr Snedden made a number of claims including that: Croatia would not extradite a citizen in equivalent circumstances; he was not wanted for prosecution in Croatia; the Croatian courts were biased against Serb defendants; he and his witnesses would be unsafe in Croatia; the long delay in charging him deprived him of a fair trial; his extradition was politically motivated; and the Croatian authorities had invoked the wrong statute. The department raised these issues with the Croatian authorities which responded in a letter dated 2 September 2010. The minister had regard to that letter in making his decision. It was argued for Mr Snedden that he was denied procedural fairness because the letter that was sent by the department to Croatia and the Croatian response should have been put to him together with an invitation to comment on it.

[34] The principles governing procedural fairness are well established. Whether there is a requirement to afford procedural fairness depends on the particular statutory context. Where the exercise of the statutory power attracts the requirement for procedural fairness, it is a fundamental principle that the party liable to be directly affected by the decision is to be given the opportunity to be heard. Ordinarily, the person is entitled to be informed of the nature and content of adverse material which is relevant to the decision to be made and ordinarily, procedural fairness requires the person to be given an opportunity to respond to, rebut or qualify that adverse material: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; 231 ALR 592; 93 ALD 300; [2006] HCA 63 (*SZBEL*); *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; 127 ALR 699; 34 ALD 324 (*Alphaone*).

[35] The minister argued that while procedural fairness required him to put Mr Snedden's claims to the Croatian authorities because Croatia is the extradition country, he was not obliged to put Croatia's response to Mr Snedden because no new considerations or matters were raised in the response and Mr Snedden was alive to the issues that the minister must address under s 22(3) and the fact that the minister had a discretion under s 22(3). In support the minister relied on *Foster*, which also concerned procedural fairness in the context of s 22(2) of the Act. In issue in that case was whether Mr Foster had been given adequate opportunity to be heard or to put submissions to the Attorney-General. Mr Foster had made representations to the Attorney-General that he feared for his safety if he was extradited to the United Kingdom. The department had given Mr Foster the response from the United Kingdom to that claim and Mr Foster had then put in further submissions in response. The Full Federal Court rejected Mr Foster's claim that he had been denied procedural fairness. The court held that Mr Foster had been given the further opportunity to comment and that he and his advisors were alive to the issues that the Attorney-General was required to address under s 22(3). In the course of reasoning the Full Federal Court stated at [70] that it was "questionable whether procedural fairness required that any further opportunity be given to Mr Foster to make submissions".

[36] The minister also relied on *Santhirarajah*. In that case, North J rejected Mr Santhirarajah's argument that he was denied procedural fairness because he was not shown a letter from the US Department of Justice which replied to representations that he had made to the department nor was he made aware of its contents. North J noted that Mr Santhirarajah had not contradicted the Attorney-General's submission that the material in the letter had been disclosed in the s 19 hearing. His Honour also stated (at [339]) that:

> [339] … 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.

It was submitted that it was implicit that North J thought that there would not have been a breach of procedural fairness, even if the material had not been disclosed at the s 19 hearing.

[37] The minister argued that migration decisions concerning the circumstances in which procedural fairness requires that country information be put to a person who claims to be a refugee also support the contention that there was no denial of procedural fairness to Mr Snedden in not providing him with the Croatian response. Reference was made in particular to *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223; 287 ALR 523; [2012] FCAFC 45 (*SZQHH*) and *SZQGL v Minister for Immigration and Citizenship* (2012) 206 FCR 474; [2012] FCA 1011 (*SZQGL*).

[38] In *SZQHH* the Full Federal Court rejected an argument that the independent merits reviewer had breached procedural fairness by failing to put a particular piece of country information to the applicant in that case. Rares and Jagot JJ stated that procedural fairness required that the applicant be given the substance of the credible relevant and significant information available to the reviewer on an issue in the review "of which the applicant was not already on notice". Their Honours said (at [30]):

> [30] … Affording the person an opportunity of dealing with some matter that he or she has not already had a chance to address in the process ensures that the process itself is fair.

Rares and Jagot JJ concluded at [35] that there was no breach of procedural fairness because the matters discussed and the particular country information "were all matters substantively in the country information of which the applicant and his adviser were aware".

[39] *SZQHH* was applied in *SZQGL* as authority that where an applicant is on notice that a particular issue discussed in country material is a relevant issue upon which the reviewer could rely in the course of the review process, there is no obligation to provide the specific country material to the applicant for comment.

[40] No general proposition can, or should, be elicited from those cases that procedural fairness does not require a person to be given an opportunity to respond to adverse information where the relevant issues are already known to the person. The migration decisions in particular are not determinative of the procedural fairness requirements here as those cases are distinguishable because of their different statutory context. As the High Court has made clear, the particular content to be given to the requirement to accord procedural fairness will depend upon the relevant statutory framework and the facts and circumstances of the particular case: *SZBEL* at [26].

[41] The minister correctly accepted that the extradition process does attract the requirements of procedural fairness because the process is, by its nature, adversarial: *Mokbel v R* [2013] VSCA 118 at [1], where the Victorian Court of Appeal described the process as follows:

> [1] Extradition of a fugitive offender is, by its nature, an adversarial process. The assertion of executive authority by the requesting country is avowedly hostile, directed as it is at securing the surrender of the fugitive and his/her return to face the processes of criminal justice in the home jurisdiction. The fugitive, on the other hand, is entitled to resist extradition by all lawful means, that is, by insisting on strict compliance by both the requesting country and the surrendering country with the legal regimes respectively applicable to them. [Citation omitted.]

The very nature of the process thus informs the content of procedural fairness in this context where the question is whether procedural fairness required Mr Snedden to be given the opportunity to respond to the further information that the department obtained from Croatia which was relevant to the decision that the minister must make.

[42] In my opinion, procedural fairness did require Mr Snedden to be given the opportunity to respond to the further information that the department obtained from Croatia: *Alphaone* at FCR 592; ALR 715–16; ALD 330–1. This is not a case where the information provided by the Croatian authorities was said to be irrelevant to the decision-making process. Subject to issues of public interest immunity, if any (and not claimed here) Mr Snedden was entitled to be informed about what Croatia put against him as to why he should be surrendered. While the Croatian response may have raised no new considerations, procedural fairness none the less required Mr Snedden to be given the opportunity to consider that further information and put such further submissions as he wished to the department.

[43] It was submitted for the minister that there was, in any event, no "practical unfairness" to Mr Snedden in not showing him the Croatian response because Mr Snedden has not suggested that there is anything he could have said in relation to it. Mr Snedden does not have to establish that he would have put something to the minister by way of rebuttal. As the authorities make clear, Mr Snedden is 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; [2003] FCAFC 298. In the present case I would not conclude that there would "simply be no answer" to the matters raised by the Croatian authorities or that the matters are "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 v Maman* (2012) 200 FCR 30; 286 ALR 680; 125 ALD 379; [2012] FCAFC 13 at [50]. As Megarry J in *John v Rees* [1970] Ch 345; [1969] 2 All ER 274 cautioned (at Ch 402; All ER 309):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

As the opportunity to be heard on the Croatian response was denied to Mr Snedden, there has been a breach of procedural fairness.

The specialty assurance

[44] The issue here concerns the fact that the department did not inform Mr Snedden that there were ongoing communications between Australia and Croatia after the specialty assurance was provided about the possibility of further charges against Mr Snedden. The "specialty assurance" is an assurance that, after the person is surrendered to the extradition country the person will not be detained or tried for offences other than those arising from the conduct constituting the surrender offence(s) without either an opportunity to leave the country or the consent of the Attorney-General of Australia. Those ongoing communications led to formal advice from Croatia that "there were no criminal proceedings presently being conducted against [Mr Snedden] in Croatia other than in relation to the offences in which his extradition has been requested". It was argued that Mr Snedden should have been provided with the opportunity to make submissions about the Croatian response to the department's inquiries concerning the possibility of other criminal proceedings being brought against him in Croatia. It was also submitted that he was entitled to know that there was some concern about the genuineness of the specialty assurance that had been provided by Croatia. It was submitted that he was obliged to be informed of this relevant issue and to be given an opportunity to be heard in relation to it.

[45] It was contended for the minister that none of this needed to be disclosed to Mr Snedden because the critical matter was the receipt of the specialty assurance and there was no question that the specialty assurance provided was not as is required by s 22(3). The argument misses the point in my view. In the context where Croatia, as the extraditing country, is seeking the surrender of Mr Snedden, 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 specialty 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 specialty 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.

The OIL advice

[46] The department received legal advice from OIL that international law does not require the request for Mr Snedden's extradition to be supported by prima facie evidence of the offences for which Mr Snedden's extradition is sought. That advice was before the minister when he made his decision. The advice that the minister received contradicted the position advanced by Mr Snedden in his representations to the minister. Mr Snedden was not told that the department had obtained that advice nor was he told that the minister may rely on that advice in determining whether or not to surrender Mr Snedden. It was argued for Mr Snedden that procedural fairness required Mr Snedden to be informed of the existence and contents of the OIL advice.

[47] The argument for Mr Snedden was put as follows:

(a) the advice that the minister obtained was wrong;

(b) Mr Snedden was not informed of the possibility that, in making the decision, the minister would rely on that wrong advice and, as a result, act in a matter inconsistent with Australia's international law obligations under the Geneva Conventions; and

(c) the OIL advice contained information supporting a conclusion that, on the basis of the material Mr Snedden knew to be before the minister, was not obviously open given that Mr Snedden had furnished two expert opinions that he submitted to the minister to the effect that international law did require Croatia to provide prima facie evidence in support of its extradition request.

[48] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; 128 ALR 353; 39 ALD 206 (*Teoh*) was relied on as authority supporting the way in which the procedural fairness claim was framed.

[49] I accept the submission for the minister that the privileged legal advice was not required to be furnished to Mr Snedden. The requirement to put adverse information to a person does not mean that the department was obliged to disclose confidential legal advice: *Griffiths v Rose* (2010) 190 FCR 173; 273 ALR 612; 117 ALD 473; [2010] FCA 964; *NSW Council for Civil Liberties Inc v Classification Review Board* (2006) 236 ALR 313; [2006] FCA 1409; *Waterford v Commonwealth* (1987) 163 CLR 54; 71 ALR 673; 12 ALD 741. Nor indeed was there an obligation even if the advice was not privileged. Procedural fairness requires the opportunity to deal with adverse information but that does not mean that the person must be given a copy of any document containing that information or its source identified: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; 222 ALR 411; 87 ALD 512; [2005] HCA 72 at [29].

[50] Moreover, the High Court decision in *Teoh* does not support the claim that Mr Snedden was denied procedural fairness. In that case it was held that an administrator who proposed to make a decision involving a departure from the provisions of an international treaty ratified by Australia would deny procedural fairness to an individual whose interests would be affected by the decision and who had not first been given an opportunity to be heard on the issue of departing from the treaty. Here Mr Snedden was on already notice that the decision to extradite him may be made without prima facie evidence of the offences in relation to which extradition is sought and he already had an adequate opportunity to present a case as to why prima facie evidence was required. In the constitutional challenge that Mr Snedden had made to the Act which was heard

and determined by the High Court in *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; 228 ALR 447; [2006] HCA 40, the Commonwealth had argued that the Act did not require the extradition request to be supported by prima facie evidence. Mr Snedden was alert to the issue as to whether prima facie evidence is required and had provided two expert opinions to the department supporting the view that prima facie evidence is required. Mr Snedden knew of the issue and knew of the Commonwealth's view towards it and had availed himself of the opportunity to put submissions to the department about it. Mr Snedden did not have to be given any further opportunity to be heard in relation to this issue.

[51] This claim accordingly is not made out.

Ground three: Claimed errors in relation to the Geneva Conventions

[52] It was submitted for Mr Snedden that there is jurisdictional error in the minister's decision because the minister, in the exercise of his discretion under s 22(3)(f):

(a) acted upon incorrect legal advice from OIL; and

(b) failed to consider whether Mr Snedden is a protected person under Geneva Convention III and whether, if he is surrendered, Croatia would breach the protections owed to Mr Snedden as a prisoner of war under Geneva Convention III.

[53] This ground must also fail. The short answer is that the relevant articles of the conventions are not mandatory relevant considerations in the exercise of the statutory power under s 22(2) of the Act and do not found jurisdictional error: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; 195 ALR 502; 72 ALD 613; [2003] HCA 6 at [101]. The provisions of the Act do not require the minister to have regard to those conventions in deciding whether Mr Snedden is to be surrendered, nor did they become mandatory relevant considerations because Australia has obligations at international law under those conventions: *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 at [59]; *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53; [2007] FCA 910 (*AB*). As Australia's international obligations do not condition the lawful exercise of the statutory power under s 22(2), either claim, if made out, would not constitute jurisdictional error: *AB*. This is sufficient reason to dispense with this ground.

[54] The minister urged me not to deal the merits of the claims should I reach this conclusion, though the merits were fully argued before me. Upon consideration, I accept that it is undesirable that I should deal with those issues by way of obiter dicta and do not do so accordingly. However, I do wish to record the very helpful assistance and full submissions that I received from the parties on these issues.

Expert evidence

[55] In the course of hearing I ruled that certain parts of the expert report of Professor Tim McCormack dated 2 August 2013 and the whole of his expert report dated 5 September 2013 were inadmissible and stated that I would give my reasons in the reasons for judgment.

[56] Professor Tim McCormack is an internationally recognised expert in international humanitarian law and international criminal law. He was asked to opine on a number of matters in relation to relevant provisions of the Geneva Conventions. There are three reasons why I ruled against admissibility.

[57] The first reason was on the authority of *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd (No 9)* (2013) 212 FCR 406; 301 ALR 399; [2013] FCA 323. Perram J, in carefully considered reasoning, concluded at [48] that the 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, rather than as of one of fact.

[58] The second reason relates to those parts of the first opinion ruled inadmissible. Those parts contained Professor McCormack's opinion as to the application of the relevant articles of the Geneva Conventions. Even if the interpretation of the conventions may properly have been the subject of expert evidence, the application of those conventions was not properly the subject of evidence. While evidence about the content of foreign law may properly be admitted the court must form and act upon its own view as to the effect of foreign law and evidence of opinion as to the proper application of foreign law to fact is not admissible: *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54 at [120]; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6) (Allstate Judgment No 33)* (1996) 64 FCR 79; 137 ALR 138 (*Allstate Life Insurance Co*); *Noza Holdings Pty Ltd v Commissioner of Taxation* (2010) 273 ALR 621; 80 ATR 390; [2010] FCA 990.

[59] The third reason applies to the second report. Professor McCormack's second report was directed at argument as to why the OIL advice was wrong. The question of international law requirements regarding the standard of evidence for extradition of Mr Snedden was a question of law for the court to decide and Professor McCormack's views, as evidence of his opinion, was not probative of the legal question that the court must decide: *Allstate Life Insurance Co* at FCR 83; ALR 142.

[60] However I did allow the inadmissible expert evidence to be received by way of submission: r 5.04(3), Item 19 of the Federal Court Rules 2011 (Cth). That course was not objected to by the minister and the material was of assistance to the court in the form of submissions.

Orders

[61] I direct the parties to provide a form of order giving effect to the reasons for judgment by 4 pm, 21 November 2013.

PETER PEREIRA
SOLICITOR