FEDERAL COURT OF AUSTRALIA

# Marku v Minister for Home Affairs and Another*

[2013] FCA 561

Gordon J

21 May, 6 June 2013

*Extradition — Eligibility for surrender — Applicant challenged validity of notice given by Magistrate determining that he was eligible for surrender — Applicant subsequently challenged earlier notice given by Minister for Home Affairs that extradition request had been received — Whether latter issue should have been raised and determined in earlier proceedings — Extradition Act 1988 (Cth), ss 16, 19 — Judiciary Act 1903 (Cth), s 39B.*

Following an extradition request from the Republic of Albania in relation to the applicant: (i) the respondent Minister gave notice under s 16 of the *Extradition Act 1988* (Cth) (the Act) stating that the request had been received; (ii) the applicant was arrested and remanded in custody, and (iii) a Magistrate issued a notice under s 19(9) of the Act determining that the applicant was eligible for surrender. The applicant, who claimed a case of mistaken identity, initially brought proceedings under s 21 of the Act seeking a review of the Magistrate's decision to issue the s 19 notice, and alleging at common law that the Magistrate had erred in holding that he was not empowered to determine the identity question. He then brought a further proceeding pursuant to s 39B of the *Judiciary Act 1903* (Cth) seeking a review of the decision of the Minister to issue the s 16 notice. The Minister however argued that the latter proceeding should be summarily dismissed as an abuse of process pursuant to r 26.01(1)(d) of the *Federal Court Rules 2011* (Cth), as the question of whether the Minister had formed a valid opinion under s 16 had been, or could have been, raised and determined in the earlier proceedings, in the context of the preconditions for the issuing of the s 19 notice.

*Held*: The applicant is able to challenge the validity of the s 16 notice separately and subsequently to challenging the validity of the s 19 notice. [23]

*Per curiam*: The Minister has different tasks, functions and preconditions under s 16 of the Act than the Magistrate has under s 19, and he was therefore not a necessary or proper party to the earlier proceedings. [31]-[35]

## Cases Cited

*Brock v Minister for Home Affairs* (2008) 170 FCR 434.

*Commonwealth v Dutton* (2000) 102 FCR 168.

*Gibbs v Kinna* [1999] 2 VR 19.

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

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

*[EDITOR'S NOTE: See also *Marku v Republic of Albania* (2013) 212 FCR 50.]

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

*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

*Pasini v Vanstone* [1999] FCA 1271.

*Plaintiff S3/2013 v Minister for Immigration and Citizenship* (2013) 87 ALJR 676.

*Public Prosecutions, Director of (Cth) v Kainhofer* (1995) 185 CLR 528.

*Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275.

*Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699.

*State Bank of New South Wales Ltd v Stenhouse Ltd* [1997] Aust Torts Reports 64,077 (81-423).

*Trade Practices Commission v Milreis Pty Ltd, Re; Ex parte Thomson Publications (Aust) Pty Ltd* (1978) 18 ALR 17.

*Walton v Gardiner* (1993) 177 CLR 378.

**Application**

*LG De Ferrari* and *K Argiropoulos*, for the applicant.

*S Lloyd* SC, for the first respondent.

*Cur adv vult*

6 June 2013

**Gordon J.**

**Introduction**

1 The applicant, Mr Valentin Marku (Mr Marku), pursuant to s 39B of the *Judiciary Act 1903* (Cth), seeks review of a decision of the first respondent, the Minister for Home Affairs (the Minister), to give a notice under s 16 of the *Extradition Act 1988* (Cth) (the Act). This will be referred to as the s 39B Proceeding.

2 The Minister seeks summary judgment in the s 39B Proceeding as an abuse of the Court's process on the grounds that:

1. the proceeding is an attempt to litigate issues that have been, or could have been, raised and determined in another proceeding, *Marku v Republic of Albania* VID 1241 of 2011 (the Common Law Proceeding); and
2. the applicant, Mr Marku, has unreasonably delayed in bringing the s 39B Proceeding.

Mr Marku opposes the application for summary judgment and, instead, seeks discovery of particular documents to assist in the prosecution of his claim.

3 These reasons for judgment will consider the facts, including the history and substance of the related proceedings and the s 39B Proceeding, the applicable legal principles and then turn to consider whether the Minister should have the relief he seeks.

**Facts**

4 By an extradition request dated 12 September 2008, the Republic of Albania requested the extradition of "Agostin Lleshaj (Lleshi) alias Valentin Marku", who was (and remains) wanted to serve a remaining sentence of 21 years and

11 months of a 25-year sentence following his conviction in Albania on 16 December 1994 for the offences of intentional homicide and attempted homicide.

5 On 14 January 2009, the Minister gave a notice under s 16 of the Act which stated that an extradition request had been received from the Republic of Albania in relation to "Agostin Lleshaj" (the s 16 Notice).

6 On 3 March 2009, an application was made on behalf of the Republic of Albania for a provisional arrest warrant under s 12 of the Act in respect of "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)". The application was supported by an affidavit of a Senior Constable of Victoria Police sworn on 3 March 2009.

7 On 3 March 2009, a magistrate, under s 12 of the Act, issued a provisional arrest warrant for "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)". The warrant stated that "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)" was an extraditable person for the purpose of the Act in relation to the extradition country.

8 On 11 March 2009, Mr Marku was arrested under the provisional arrest warrant and was subsequently remanded in custody by a magistrate under s 15 of the Act.

9 Before the second respondent, who determined pursuant to s 19 of the Act whether the person the subject of the request was eligible for surrender (the s 19 Magistrate), Mr Marku acknowledged that he was Valentin Marku but denied that he was Agostin Lleshaj (or Agustin Lleshi), the person convicted of offences in Albania. The s 19 Magistrate concluded, on the basis of *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528, that he was not empowered to determine whether Mr Marku was an extraditable person. On 28 May 2010, pursuant to s 19(9) of the Act, the s 19 Magistrate issued a warrant committing "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)" to prison to await surrender (the s 19(9) Warrant).

10 Mr Marku commenced two proceedings. A notice of appeal (VID 1242 of 2011) seeking a review of the s 19 Magistrate's decision under s 21 of the Act (the s 21 Review) and the Common Law Proceeding alleging, inter alia, that the s 19 Magistrate erred in holding that he was not empowered to determine the identity question (defined as "whether the person on remand is the person convicted of the offences evidenced in the authenticated documents"). In the s 21 Review, Mr Marku sought an order that the decision of the s 19 Magistrate be quashed. In the Common Law Proceeding, Mr Marku sought:

> Orders setting aside the order by warrant purportedly made on 28 May 2010 by the [s 19 Magistrate] under section 19(9) of the … Act …, and directing the making of an order under s 19(10) instead.

In both the s 21 Review and the Common Law Proceeding, Mr Marku sought a determination of the identity question. In the Common Law Proceeding, Mr Marku sought that the Court make that determination without restriction to the material before the s 19 Magistrate (as would apply in the s 21 Review).

11 In *Marku v Republic of Albania* (2012) 293 ALR 301 (*Marku No 1*), Dodds-Streeton J determined (in the s 21 Review and the Common Law Proceeding) as separate questions:

> (a) that the [s 19 Magistrate] correctly held that it was not part of his function to determine the identity question; and

(b) that if determination of the identity question were part of the s 19 [M]agistrate's task, identity was not a jurisdictional fact.

On 31 July 2012, her Honour concluded that, although the decision of the High Court in *Kainhofer* was not a case where the person sought for extradition alleged mistaken identity, its pronouncements and reasoning excluded determination of the identity question by a magistrate under s 19 of the Act: see *Marku No 1* at [93]-[103].

12 On 3 May 2012, before the hearing (and judgment) in *Marku No 1*, Mr Marku sought leave to amend his originating motion filed in the Common Law Proceeding to add the following relief:

1A. At no time had the Attorney-General (Cth) given a notice under s 16(1) of the Act in respect of [Mr Marku], within the meaning of s 19(1)(b) or at all.

Particulars

In 2009, the then Minister for Home Affairs (Robert Debus) gave a notice in respect of the man named Lleshaj. (The notice is dated the 14th day of a month in 2009 — the month is handwritten illegibly). [Mr Marku] is not the man named Lleshaj.

1B. In consequence, the magistrate had no jurisdiction to conduct proceedings in relation to [Mr Marku] under s 19(1) of the Act, or therefore to make orders or to take any steps under s 19(9).

13 The issues raised by these proposed grounds were described by Mr Marku as:

(a) whether the s 16 notice given by Robert Debus in 2009 in respect of "Agostin Lleshaj" is a s 16 notice in respect of [Mr Marku]; and

(b) whether that s 16 notice — given as it was by the Minister for Home Affairs rather than the Attorney-General — is a valid notice under the Act.

14 On 17 September 2012, Mr Marku's solicitors obtained a second copy of a briefing memorandum from the Minister. That copy of the briefing memorandum was more extensive than the first copy of the memorandum; less had been excised. The more extensive version of the briefing memorandum was exhibited to an affidavit sworn by one of the solicitors acting for the Minister and filed in the Common Law Proceeding. That affidavit was tendered in evidence in the Common Law Proceeding.

15 On 27 September 2012, before her Honour heard Mr Marku's application for leave to amend his originating motion in the Common Law Proceeding, Mr Marku's solicitors wrote to the Court and to the solicitors acting for the Republic of Albania in the following terms:

[Mr Marku] wishes to inform the Court of his intention to initiate an additional proceeding, related in subject matter to his existing proceedings.

The additional proceeding will be brought under s 39B(1) of the *Judiciary Act 1903* (Cth); it will name the Minister for Home Affairs as respondent; and it will seek the quashing of the s 16 notice in respect of Agostin Lleshaj.

Relief will be sought on two bases:

(1) on the materials laid before him, the Minister could not have formed, and did not form:

- the opinion that "Valentin Marku" is a mere alias of Agostin Lleshaj; or therefore:
- the requisite opinion that [Mr Marku] is an extraditable person for the purposes of s 16(2)(a)(i); and

(2) in any event, the s 16 notice is invalid because it was not responsive to a valid extradition request (Albania's request being in relation to a non-existent composite of two persons, namely Lleshaj and Marku, instead of a single extant person contemplated by the s 5 definition of "extradition request").

This new proceeding should be drafted shortly. [Mr Marku] is giving this advance notice in case it assists the Court in programming his existing proceedings.

The foreshadowed proceeding is the s 39B Proceeding, the subject of the Minister's application for summary judgment.

16 The next step in the chronology occurred two weeks later on 4 October 2012 at the hearing of the application for leave to amend the originating motion in the Common Law Proceeding. Mr Marku did not pursue the application for leave in respect of the issue described in [13](b) above. In relation to the first issue (see [13](a) above), Mr Marku's application and submissions were described by Dodds-Streeton J in *Marku v Republic of Albania (No 2)* [2012] FCA 1182 (*Marku No 2*) at [17]-[20] as follows:

> [17] It remained necessary to determine whether [Mr Marku] should have leave to amend by alleging that the s 16 notice in respect of Agostin Lleshaj was not given in respect of [Mr Marku] and the s 19 magistrate thus lacked jurisdiction.
>
> [18] Due to ambiguity in [Mr Marku's] written submissions, it was necessary to clarify whether the proposed amendment went to:
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> 1. an alleged disconformity between:
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> (a) the person on remand under s 15 of the Act referred to in s 19(1)(a); and
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> (b) the person referred to in the s 16 notice; or
>
> 2. whether it went, in essence, to [Mr Marku's] denial that he is Agustin Lleshaj, the person convicted of the extradition offences and the subject of the extradition request.
>
> [19] Counsel for [Mr Marku] indicated that the proposed amendment went only to the former, but as explained below, it advances a basis for the court's determination of the identity question.
>
> [20] [Mr Marku's] written submissions advanced six cascading propositions in support of the proposed amendment, as follows:
>
> 1. That an ostensibly valid s 16 notice, which must be a s 16 notice in respect of the person on remand, was a jurisdictional precondition to the s 19 magistrate's powers, and thus a jurisdictional fact.
> 2. The Attorney-General cannot give a valid s 16 notice in respect of anyone who is not the subject of an extradition request.
> 3. The s 19 magistrate and any court reviewing his or her exercise of powers must assume the validity of the s 16 notice (unless it is *ex facie* invalid or quashed).
> 4. The s 16 notice in this case was valid and had not been quashed.
> 5. The presumption that the s 16 notice was valid incorporated a presumption that the person named in the s 16 notice is the person sought by the country in the extradition request — in this case, Agostin Lleshaj. The respondent, in seeking to rely on evidence including the extradition request to address the "disconformity" between the name in the s 16 notice and the names identifying the person on remand, erroneously sought to reverse that position, and determine the purport of the s 16 notice by the content of the extradition request. The Court was not, however, entitled to receive

evidence extraneous to the s 16 notice to examine its correspondence to the extradition request. While the s 19 magistrate (and the Court) could hear evidence "to determine whether the person on remand is the same person named in the notice", they could not "go behind the notice to see if the Attorney had in mind someone not named in it".

6. "Unless [Mr Marku] is in fact Agostin Lleshaj, the s 16 notice is not a notice in respect of him, and the jurisdictional precondition has not been satisfied." Therefore, the Court "can hear identification evidence, to determine whether [Mr Marku] (the person on remand) is Agostin Lleshaj (the person named in the notice)".

17 As is apparent, the question sought to be agitated in the proposed amendment to the Common Law Proceeding assumed the validity of the s 16 Notice. Leave to amend was refused. Reasons for judgment were published on 26 October 2012: *Marku No 2*. On 15 November 2012, Dodds-Streeton J made orders dismissing the Common Law Proceeding.

18 The next day, 16 November 2012, Mr Marku filed the s 39B Proceeding seeking the following relief under s 39B of the *Judiciary Act*:

1. A declaration that the [Minister] erred in failing to consider whether [Mr Marku] was the person sought by the Republic of Albania in its request, made on 12 September 2008, for the extradition of an Albanian national.
2. An order in the nature of certiorari, quashing the decision of the [Minister], made on 14 January 2009, to give to give [sic] a "Notice of Receipt of Extradition Request", under s 16 of the [Act], directed to "a magistrate before whom the person named in this notice is brought", stating that an extradition request had been received from the Republic of Albania in relation to "Agostin Lleshaj".
3. A declaration that the [s 19 Magistrate] had no jurisdiction, under s 19 of the Act, to determine whether [Mr Marku] was eligible for surrender.
4. An order in the nature of certiorari, quashing the warrant issued on 28 May 2010 by the [s 19 Magistrate] ordering committal to prison of "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku" [sic] to await surrender.

19 Mr Marku then appealed against the answers to the separate questions in *Marku No 1* and the orders dismissing the Common Law Proceeding (VID 1095 and 1098 of 2012). Those appeals were heard and dismissed: *Marku v Republic of Albania* (2013) 212 FCR 50 (*Marku Full Court*).

20 In January 2013, Mr Marku sought the Minister's consent to amend the relief sought in the s 39B Proceeding. The Minister consented to amendments which included the addition of a new paragraph 1A:

> A declaration that the [Minister's] decision, made on 14 January 2009, to give a "Notice of Receipt of Extradition Request", under s 16 of the … Act …, directed to "a magistrate before whom the person named in this notice is brought", stating that an extradition request has been received from the Republic of Albania in relation to "Agostin Lleshaj" (the *Decision*), was made in breach of the rules of natural justice.

A new paragraph 4A sought an order that Mr Marku be released from custody.

21 Orders were made by consent in the s 39B Proceeding on 18 February 2013. By omission, the parties did not include in the minute of orders provided to the

Court orders granting Mr Marku leave to file and serve the amended originating application and statement of claim. There was no dispute that such orders should have been made. In any event, Mr Marku filed the amended statement of claim on 25 January 2013 with the notation that it was "amended pursuant to Rule 16.51(1)", which permits a party to amend a pleading once, before pleadings close, without leave. For the avoidance of confusion, an order should be made granting Mr Marku leave to file and serve the amended originating application.

22 It is against that background that the Minister has applied for summary judgment in the s 39B Proceeding.

**Issue**

23 The current issue may be simply stated — should Mr Marku have challenged the validity of the s 16 Notice in the Common Law Proceeding and further or alternatively, is his failure to do so fatal to the continuation of the s 39B Proceeding? The answer is no.

24 Before turning to consider the relevant principles and the application of those principles to the current facts, it is appropriate to record that the hearing of this application occupied half a day and necessitated counsel for the Minister travelling from interstate. Prior to, and at, the hearing the parties were invited to consider whether it was more expeditious to proceed to hear the substantive proceeding especially as delay was pleaded by the Minister as a defence to the substantive claim in the s 39B Proceeding. The Minister did not accede to that suggestion and requested that his application for summary judgment be heard and determined.

**Relevant principles — abuse of process**

25 The Federal Court has power to control its own process and prevent misuse of it: *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279.

26 Under r 26.01(1)(d) of the *Federal Court Rules 2011* (Cth) (the Rules), the Court is specifically empowered to order summary judgment for a defendant on the basis that a proceeding is an abuse of the process of the Court. The power ought be very sparingly exercised and only in exceptional cases: *Sea Culture* at 279. The guiding considerations are oppression and unfairness to the other parties to the litigation and concern for the integrity of the system of administration of justice: *State Bank of New South Wales Ltd v Stenhouse Ltd* [1997] Aust Torts Reports 81-423 at 64-089.

27 The categories of abuse of process are not closed. The Court's process may be abused where a party attempts to relitigate matters already resolved in earlier litigation, or which ought reasonably have been raised in prior proceedings: *Walton v Gardiner* (1993) 177 CLR 378 at 393. Proceedings may in fact constitute an abuse of process even if the doctrines of *res judicata* or issue estoppel are not attracted: *Sea Culture* at 279; *Walton* at 393 and *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699 at [60] and [66]. The parties to the proceedings, the precise points for decision and the arguments on those points do not need to be identical for there to be an abuse of process: *Brock v Minister for Home Affairs* (2008) 170 FCR 434 at [69]-[73].

28 The policies underlying these powers include preventing waste of judicial resources and their use for purposes unrelated to the determination of genuine disputes and the necessity of maintaining confidence in, and respect for, the

authority of the courts: *Sea Culture* at 279. There is a public interest in the same issue not being litigated again. And from the litigant's perspective, a defendant should not be troubled twice for the same reasons: *Spalla* at [67].

**Analysis**

29 The core of the Minister's submissions was that, in the s 39B Proceeding, Mr Marku contends that:

1. the Minister's decision to give the s 16 Notice was vitiated by jurisdictional error because, among other matters, the Minister failed to consider whether Mr Marku was the same person as "Agostin Lleshaj" and consequently failed to form a valid opinion under s 16;
2. the Minister's decision to give the s 16 Notice was made in breach of the rules of natural justice; and
3. the s 19 Magistrate's decision to issue the s 19(9) Warrant was vitiated by jurisdictional error because the s 16 Notice was not valid and the jurisdictional requirement of s 19(1)(b) of the Act was not satisfied.

In short, the Minister contended that Mr Marku was seeking to challenge the validity of the s 16 Notice, the s 19 Magistrate's compliance with s 19(1)(b) and, he contended, "more broadly, the preconditions for the magistrate's power to conduct his functions under s 19".

30 The next step in the Minister's argument was to contend that having regard to the history and content of the Common Law Proceeding, the s 39B Proceeding sought to reopen issues already considered in the Common Law Proceeding or issues which were plainly within the scope of the Common Law Proceeding. In relation to the first category, the Minister contended that in the Common Law Proceeding, the Court had determined the requirements of s 19(1) and (2) including in relation to the "notice under s 16(1)" referred to in s 19(1)(b) and considered generally the s 19 Magistrate's power to perform his functions under s 19 and to issue the s 19(9) Warrant. In relation to the second category (that the current issues were plainly within the scope of the Common Law Proceeding), the Minister contended that Mr Marku could have raised in the Common Law Proceeding the allegation that the Minister failed to form a valid opinion under s 16 by failing to consider whether Mr Marku was the same person as "Agostin Lleshaj" and consequently the preconditions to s 19(1)(b) were not satisfied.

31 The Minister's submissions are rejected. Although Mr Marku is the applicant in all three proceedings, the Minister was not a party to the s 21 Review or the Common Law Proceeding. In fact, the Minister was not a necessary or proper party to either of those proceedings: rr 9.02 and 9.05 of the Rules; see further *Re Trade Practices Commission v Milreis Pty Ltd; Ex parte Thomson Publications (Aust) Pty Ltd* (1978) 18 ALR 17 at 22 and *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 524. The reason for that is clear. The Minister's task under s 16 and the magistrate's tasks under s 19 are substantively different; they involve separate and distinct stages of the extradition process: *Commonwealth v Dutton* (2000) 102 FCR 168 at [20]. Under s 16 of the Act, the role of the Minister (and the staff advising him) is not in aid of the extradition request. It involves the Minister independently scrutinising the request of the requesting country and, potentially, against the interests of the requesting country in exercising a discretion to issue a notice under s 16 of the Act: *Dutton* at [32]-[33]. The Minister acts as a contradictor to

the claim of the requesting country: *Dutton* at [32] and [37]. As Finn J said in *Pasini v Vanstone* [1999] FCA 1271 at [47], the Minister's s 16 decision has its own function in the extradition process.

32 By way of contrast, the magistrate's role under s 19 of the Act is distinct. Indeed, proceedings under s 19 of the Act are not essential. If the person the subject of the request voluntarily consents to being surrendered, the matter is dealt with under s 18 of the Act and the magistrate advises the Attorney-General of the offences in respect of which the person has consented to be surrendered: *Dutton* at [20]. If, however, the person does not consent, the process under s 19 of the Act is now well established. The proceedings before the magistrate are akin to that of a committal hearing to determine whether a prima facie case existed for extradition. The person the subject of the request is not entitled to adduce, and the magistrate may not receive, evidence in support of the contention that the person did not do what is alleged: s 19(5) of the Act. A s 19 Magistrate must be satisfied that the conditions of jurisdiction set out in s 19(1) of the Act are satisfied. Those conditions of jurisdiction are important, namely:

> Where:
>
> (a) a person is on remand under section 15;
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> (b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;
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> (c) an application is made to a magistrate by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and
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> (d) the magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;
>
> the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.

A careful reader of s 19(1) of the Act will note that a condition of jurisdiction is that the Attorney-General has given a notice under s 16(1). It is the fact that the notice has been given that is the necessary condition: *Kainhofer* at 539. It is neither necessary nor appropriate for the s 19 Magistrate to seek to go behind that notice: *Marku Full Court* at [63], [79] and [80]. As the High Court said in *Kainhofer*, the power of a s 19 Magistrate does not extend to reviewing the satisfaction of the opinion of the Attorney-General (or in this case, the Minister): at 535-538. The magistrate must proceed on the footing that the s 16 notice was validly made: *Kainhofer* at 539.

33 Once the difference in functions and preconditions to the exercise of those functions by the Minister under s 16 and the magistrate under s 19 is understood, it is apparent that Mr Marku's challenge to the s 16 Notice was not relevant to the s 19 proceedings, the s 21 Review and the Common Law Proceeding. Put another way, it remains possible for a challenge to the Minister's actions under s 16 to proceed at the same time as, and independently of, proceedings under s 19 of the Act. Indeed, a challenge to the s 16 Notice may be the only legal challenge: see s 18 of the Act.

34 For those reasons, the Minister's contention that the relief sought by Mr Marku in the s 39B Proceeding could have been claimed in the Common Law Proceeding is rejected. Also, the Minister's contention that the relief sought by Mr Marku in the s 39B Proceeding ought to have been claimed in the Common Law Proceeding is rejected. The Common Law Proceeding was

directed at a different stage of the extradition process where the relevant decision maker (the s 19 Magistrate) had different functions and different preconditions to the exercise of those functions: cf r 9.01 of the Rules.

35 Put simply, it cannot be said that the same or substantially the same facts considered in the earlier proceedings will arise for consideration in the s 39B Proceeding (it is directed at a different function at a different point in time involving different players); the claim raised in the s 39B Proceeding could not have been raised in the Common Law Proceeding: cf *Gibbs v Kinna* [1999] 2 VR 19 at [23].

36 The decision to reject the Minister's contention that the relief sought by Mr Marku in the s 39B Proceeding could (or ought to) have been claimed in the Common Law Proceeding is not affected by the fact that Mr Marku seeks relief in the s 39B Proceeding which includes the relief set out in paragraphs 2, 3 and 4 (see [18] above), relief which is arguably to the same substantive result as that claimed in the Common Law Proceeding. In my view, the principal relief sought in the s 39B Proceeding (paragraph 1 at [18] above) was not and could not be included in the Common Law Proceeding. The balance of the relief sought in the s 39B Proceeding (paragraphs 2, 3 and 4 at [18] above) is consequential. Ultimately, if Mr Marku were to succeed, part, at least, of that consequential relief may be unnecessary. On the other hand, if Mr Marku fails in relation to paragraph 1 of the relief in the s 39B Proceeding, the balance of the relief claimed becomes irrelevant.

37 The remaining question then is whether Mr Marku's "delay" in commencing the s 39B Proceeding can amount to an abuse of process. In my view, the answer is no. Mr Marku's legal advisers obtained a largely unredacted copy of the briefing memorandum on 17 September 2012. Having regard to the contents of the unredacted copy of the briefing memorandum, Mr Marku's legal advisers foreshadowed filing the s 39B Proceeding to the Court and the legal advisers for the Republic of Albania and the Minister on 27 September 2012: see [15] above. The proceedings were issued on 16 November 2012. In the circumstances, that was not a delay sufficient to constitute an abuse of process. Moreover, the Minister did not assert that he would suffer any disadvantage or prejudice if the s 39B Proceeding was not stayed or terminated.

38 Two other matters raised by the Minister should be addressed. First, the decision in *Brock* does not assist the Minister. *Brock* concerned an abuse of process by attempted relitigation of an issue necessarily determined by an earlier concluded judicial determination. The issue in *Brock* was whether the dual criminality requirement was met. That was an issue for the Minister under s 16. But importantly, it was also an issue for the magistrate under s 19(2) to satisfy herself independently that the dual criminality requirement was met: *Brock* at [77]. In the present case, the issue Mr Marku seeks to agitate in the s 39B Proceeding is not an issue for the magistrate: see [31] above. Contrary to the position in *Brock*, in the s 39B Proceeding there is nothing "spent". The Minister's decision to give the s 16 Notice is amenable to judicial review in which the satisfaction or opinion that the person is an "extraditable person" may be challenged for legal error: *Marku Full Court* at [39] and [66]. That issue did not and cannot arise in the Common Law Proceeding.

39 Second, the decision in *Plaintiff S3/2013 v Minister for Immigration and Citizenship* (2013) 87 ALJR 676 does not assist the Minister. Unlike the

position in *Plaintiff S3*, it cannot be said here that the claims made in the s 39B Proceeding could have been raised in the Common Law Proceeding or the s 21 Review.

**Discovery**

40 The last issue to be addressed concerns Mr Marku's application for discovery. Counsel for Mr Marku sought an order that certain identified documents that all pre-dated the giving of the s 16 Notice be discovered by the Minister. The documents are listed in Annexure A. Counsel for the Minister opposed that order.

41 It is by no means clear whether the documents listed in Annexure A, or some of them, are relevant to the disputed issues and, if so, whether the Minister continues to object to production of those documents on the ground of public interest immunity. In the circumstances, the Minister is directed to review the documents listed in Annexure A and identify which documents contain material relevant to the disputed issues, whether the Minister continues to object to production of those documents, and if so, the ground(s) of objection.

42 The parties should consult about setting a timetable for the completion of these tasks and for bringing the substantive matter on for hearing at the earliest possible opportunity and provide that timetable to the Court without delay.

*Orders accordingly*

Solicitors for the applicant: *DLA Piper*.

Solicitors for the first respondent: *Ashurst Australia*.

SARAH SOMERSET

**Annexure A**

| | **Privilege Claim** | **Full/ partial** | **Type of document** | **To** | **From** | **Subject** |
|---|---|---|---|---|---|---|
| 52 | PII | Full | Email | SA Police | AGD | Possible extradition of Agostin Lleshaj |
| 53 | PII | Full | Email | AGD | AFP | Extradition logistics |
| 54 | PII | Full | Email | AGD | AFP | Extradition logistics |
| 55 | PII | Full | Email | AFP | AGD | Extradition logistics |
| 56 | PII | Full | Email | AFP | AGD | Email chain: Extradition inquiries for Agostin Lleshaj |
| 57 | PII | Full | Email | AGD | AFP | Email chain: Extradition inquiries for Agostin Lleshaj |
| 58 | PII | Full | Email | AGD | AGD | Email chain: Extradition inquiries for Agostin Lleshaj |
| 59 | PII | Full | Email | AGD | AFP | Extradition inquiries for Agostin Lleshaj |
| 60 | PII | Full | Email | AGD | AFP | Possible extradition of Agostin Lleshaj |

| | Privilege Claim | Full/ partial | Type of document | To | From | Subject |
|---|---|---|---|---|---|---|
| 61 | PII | Full | Email | AGD | AGD | Possible extradition of Agostin Lleshaj |
| 62 | PII | Full | File note | AGD | AGD | |
| 63 | PII | Full | File note | AGD | AGD | |
| 64 | PII | Full | Email | AFP and SA Police | AGD | Email chain — Extradition inquiries re Agostin Lleshaj |
| 65 | PII | Full | Email | AGD | AGD and SA Police | Extradition inquiries re Agostin Lleshaj |