FEDERAL COURT OF AUSTRALIA

Marku v Minister for Home Affairs and Another (No 2)*

[2013] FCA 1015

Gordon J

25 September, 7 October 2013

Extradition — Extradition request — Notice by Attorney-General stating that request received — Attorney-General need not consider whether the person named in request is the same person as one identified in Australia — Extradition Act 1988 (Cth), s 16.

Pursuant to s 16(1) of the *Extradition Act 1988* (Cth), if the Attorney-General received an extradition request from an extradition country in relation to a person, the Attorney-General could, by notice in writing expressed to be directed to any magistrate, state that the request had been received. Pursuant to s 16(2)(a), the Attorney-General could not give the notice unless, amongst other things, the Attorney-General was of the opinion that the person was an extraditable person. Pursuant to s 6, a person was an "extraditable person" if, relevantly, the person had been convicted of an offence or offences against the law of a country, the offence or any of the offences was an extradition offence in relation to the country, the whole or part of a sentence imposed on the person as a consequence of the conviction remained to be served, and the person was believed to be outside the country.

The Ministry of Justice of the Republic of Albania made a request for the extradition from Australia to Albania of "Agostin Lleshaj (Lleshi) alias Valentin Marku". The Minister gave a notice pursuant to s 16 in relation to Agostin Lleshaj. In doing so, the Minister did not consider whether Agostin Lleshaj was the same person as the applicant, Valentin Marku. The applicant sought judicial review of the decision to issue the notice. The applicant argued that the Minister committed jurisdictional error by failing to consider whether he was the same person as Agostin Lleshaj.

Held: To issue a notice pursuant to s 16(1), the Attorney-General must be of the opinion that the person named in the request is believed to be outside the requesting country. The Attorney-General need not consider whether the person named in the request is in fact the same person as one identified in Australia. [4], [36], [40]

Obiter: In making a decision under s 16(1), the requirement to observe procedural fairness is reduced to nothingness. [44]-[45]

Foster v Attorney-General (Cth) (1997) 97 A Crim R 560; *Bertran v Vanstone* (2000) 114 A Crim R 158, discussed.

*[EDITOR'S NOTE: See also *Marku v Republic of Albania and Another* (2013) 212 FCR 50 and *Marku v Minister for Home Affairs and Another* (2013) 212 FCR 471.]

Cases Cited

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

Bolton, Re; Ex parte Beane (1987) 162 CLR 514.

Commonwealth v Dutton (2000) 102 FCR 168.

Dunn v Australian Crime Commission (2009) 174 FCR 336.

Foster v Attorney-General (Cth) (1997) 97 A Crim R 560.

George v Rockett (1990) 170 CLR 104.

Johns v Australian Securities Commission (1993) 178 CLR 408.

Kioa v West (1985) 159 CLR 550.

Kirk v Industrial Court (NSW) (2010) 239 CLR 531.

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

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

Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation (1963) 113 CLR 475.

National Companies and Securities Commission v News Corporation Ltd (1984) 156 CLR 296.

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

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

Vasiljkovic v Commonwealth (2006) 227 CLR 614.

von Arnim v Ellison (2006) 150 FCR 282.

Williams v Minister for Justice and Customs (2007) 157 FCR 286.

Yates, Re; Ex parte Walsh (1925) 37 CLR 36.

Application for judicial review

LG De Ferrari, for the applicant.

Dr S Donaghue SC and *C Horan*, for the first respondent.

The second respondent filed a submitting notice.

Cur adv vult

7 October 2013

Gordon J.

Introduction

1 By an amended application under s 39B of the *Judiciary Act 1903* (Cth), Valentin Marku (the Applicant) seeks judicial review of a decision by the Minister for Home Affairs (the Minister) to give a notice under s 16 of the *Extradition Act 1988* (Cth) (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 who is wanted to serve a remaining period of 21 years and 11 months of a 25-year sentence imposed following his conviction on 16 December 1994 for the following extradition offences:

- Intentional homicide contrary to Article 84(b) of the *Penal Code* (Albania); and
- Attempted homicide contrary to Article 11 of the *Penal Code* (Albania),

(the Decision).

2 At the time the Minister gave the notice under s 16 of the Act, it relevantly provided:

> (1) Where the Attorney-General receives an extradition request from an extradition country in relation to *a person*, the Attorney-General may, in his or her discretion, by notice in writing in the statutory form expressed to be directed to any magistrate, state that the request has been received.
>
> (2) The Attorney-General shall *not* give the notice:
>
> (a) *unless* the Attorney-General *is of the opinion*:
>
> (i) that *the person* is an *extraditable person* in relation to the *extradition country*; and
>
> (ii) that, if the conduct of *the person* constituting the extradition offence, or any of the extradition offences, for which surrender of *the person* is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or
>
> (b) *if* the Attorney-General is of the opinion that there is an *extradition objection* in relation to the *extradition offence* … for which surrender of *the person* is sought.
>
> (3) As soon as practicable after the person is remanded under section 15 or the notice is issued, whichever is the later:
>
> (a) a copy of the notice; and
>
> (b) copies of the documents referred to in paragraph 19(2)(a) and, if applicable, paragraph 19(2)(b);
>
> shall be given to the person.

(Emphasis added.)

3 The Applicant seeks:

1. A declaration that the Minister erred in failing to consider whether the Applicant was the person sought by the Republic of Albania in its request, made on 12 September 2008, for the extradition of an Albanian national (the Third Request).
2. A declaration that the Decision was made in breach of the rules of natural justice.
3. An order, in the nature of *certiorari*, quashing the Decision.
4. A declaration that the second respondent (the s 19 Magistrate) had no jurisdiction, under s 19 of the Act, to determine whether the Applicant was eligible for surrender.
5. 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)" to await surrender.
6. An order that the s 19 Magistrate, or in his absence any magistrate of Victoria in respect of whom an arrangement is in force under s 46 of the Act, order the release of the Applicant, from custody at Port Phillip Prison, Laverton, in the State of Victoria.

4 The issue may be simply stated — in making the Decision, did the Minister commit jurisdictional error by failing to consider whether the Applicant in these proceedings, Mr Marku, is the same person as Lleshaj? Put another way, did the Minister commit jurisdictional error "by failing to consider the identity issue"? For the reasons that follow, the answer is no.

Facts

5 On 16 December 1994, Lleshaj was convicted in the District Court of Mirditë in the Republic of Albania of intentional homicide and attempted homicide contrary to the Penal Code of Albania. He was sentenced to life imprisonment, which was subsequently reduced on appeal to 25 years' imprisonment. In March 1997, Lleshaj escaped from prison in Albania, with a period of 21 years and 11 months of his sentence remaining to be served.

6 In late February 2006, Federal Agent David Dalton (Australian Federal Police (AFP) Senior Liaison Officer, Belgrade) travelled to Albania for meetings with the Ministry of Interior and National Central Bureau (NCB) Interpol Tirana, during which Agent Dalton raised the matter of Lleshaj. Agent Dalton requested NCB Interpol Tirana to conduct enquiries to confirm that a person under suspicion in Australia (the Applicant) was Lleshaj, and for such purposes Agent Dalton supplied a set of fingerprints and a photograph of the Applicant.

7 On 22 February 2006, NCB Interpol Tirana advised Agent Dalton that the local police in Mirditë, Albania had confirmed that the photograph supplied was that of Lleshaj. On 23 February 2006, Federal Agent Barbara Peters (AFP Americas, Europe and Middle East (AEME) desk, Border and International) forwarded an email to Barton Hoyle (Senior Legal Officer, Criminal Justice Division, Attorney-General's Department) referring to the "positive identification" of Lleshaj.

8 On 2 March 2006, Mr Hoyle sent an email to Agent Peters and two members of the South Australian police (including John Braithwaite) stating that they were currently assessing whether Australia could accept an extradition request from Albania.

9 On 3 March 2006, Mr Hoyle made a file note in which he stated that "Lleshaj has been located in South Australia and Albania have advised that they would like to make an extradition request". On 3 April 2006, a Red Interpol alert notice was published in relation to Lleshaj. Among other things, the notice stated that Lleshaj was "the subject of an investigation in Australia, under the false identity of MARKU Valentin, relating to his involvement in a large cannabis-growing syndicate", and that "[a]ccording to information received, LLESHAJ arrived in Australia in January 1998, where he is living under the false identity of MARKU Valentin".

10 On 19 July 2006, Daniel Mossop (International Crime Cooperation Branch, Attorney-General's Department) sent an email to the AFP AEME desk in relation to the potential extradition of Lleshaj, in which he stated that Lleshaj had been located in South Australia and that a meeting between Agent Dalton and NCB Interpol Tirana in February 2006 had "confirmed that the person located in South Australia was indeed LLESHAJ".

11 On 26 October 2006, the Ministry of Justice of the Republic of Albania made a request for the extradition of Lleshaj from Australia to Albania (the First Request). That request was received by the Australian Embassy in Athens on 27 October 2006. The First Request was in relation to "Agustin Lleshi (Lleshaj) alias Valentin Marku". The documents provided included Lleshaj's birth certificate, a "convict's personal chart" with a small photograph (taken no later than 1995), and a larger photograph said to be that of Lleshaj. The larger photograph was, in fact, a photograph taken of the Applicant in Australia in 2005, which had been provided to the Albanian authorities by Agent Dalton.

12 On 15 February 2007, Mr Mossop wrote to the authorities of the Republic of

Albania stating that Australia required further information in order to be able to progress the extradition request in relation to Lleshaj. Mr Mossop asked Albania to provide, *inter alia*, an explanation of the different spellings of the name "Lleshi" and "Lleshaj", as well as the alias "Valentin Marku". In a file note dated 29 March 2007, Mr Mossop stated that "Lleshaj has been identified as residing in South Australia".

13 On 23 May 2007, Lisa O'Connell of the Attorney-General's Department wrote to Agent Dalton stating that she had "just been advised by [South Australian police] that Lleshaj has been arrested in Victoria for cannabis offences".

14 On 23 November 2007, Australia received a revised extradition request from Albania (the Second Request).

15 On 27 February 2008, Claire Buxton (Senior Legal Officer, Mutual Assistance and Extradition Branch, Attorney-General's Department) made a file note of a telephone conversation she had with Mr Braithwaite about requesting more information from Albania about the identity question and asking Albania to attach fingerprints to the extradition request.

16 On 29 February 2008, Susan Williamson (Legal Officer, Mutual Assistance and Extradition Branch, Attorney-General's Department) prepared a letter to the authorities of the Republic of Albania. Ms Williamson asked for confirmation that the names "Lleshaj" and "Lleshi" were equivalent in the Albanian language, and whether any further identifying information acquired by Albania could be inserted in the Second Request. The letter from Ms Williamson in part stated:

> It would be helpful if further identifying information acquired by the Republic of Albania, such as fingerprints contained within the Interpol red notice, could be inserted in the request instead. If possible, it would also be helpful to provide a clear colour photograph of Lleshaj. If you have no other photograph, you could use the photograph provided by Mr Dalton, however you should outline in the request how you obtained that photograph, and what steps you took to confirm the photograph was of Mr Lleshaj.

Ms Williamson sent that letter to Agent Dalton for delivery to the Albanian authorities.

17 On 28 March 2008, Agent Dalton sent an email to Ms Williamson indicating that the letter she had prepared had not been delivered to the Albanian authorities. Agent Dalton stated that the matter was more appropriately dealt with by the Department of Foreign Affairs and Trade and the Australian Embassy in Athens and, to that end, Ms Williamson's letter was to be returned to the AEME desk. Agent Dalton's email also stated that he had provided the set of fingerprints to NCB Interpol Tirana. On 30 April 2008, Ms Williamson wrote another letter to the authorities of the Republic of Albania seeking further information "including some minor changes to confirm Mr Lleshaj's identity", any further identifying information "such as a copy of Mr Lleshaj's fingerprints (but not any fingerprints which may have been provided to Albania by Australia [sic] authorities)", and confirmation that the names "Lleshaj" and "Lleshi" were equivalent surnames in the Albanian language. Ms Williamson's letter reiterated that "it would be helpful to provide a clear colour photograph of Lleshaj".

18 On 12 September 2008, the Ministry of Justice of the Republic of Albania

made the Third Request, seeking the extradition from Australia to Albania of "Agostin Lleshaj (Lleshi) alias Valentin Marku". The Third Request further stated, in part:

1. "Agostin Lleshaj (Lleshi) alias Valentin Marku" was the son of Pjeter and Dile, born on 20 March 1966 in Prosek, Mirditë;
2. in relation to the identification issue and the use of multiple names:

> As regards the identification of such a subject, failing to send the dactiloscopic prints of the subject or his original photograph, we make available the authentic copy of the document of identification by photograph, an ID of type QH No 364808, issued on 05. 10. 1982, owned by the Directorate General of Prisons, transmitted by the General Prosecutor's Office of Tirane via the letter No 2520 dated 17. 06. 2008.
>
> As regards the use of two surnames Lleshi or Lleshaj, upon the request of the District Prosecutor's Office of Lezhe, the Court of First Instance of Lezhe, by virtue of the decision No 140 dated 25. 07. 2008 has decided to correct the material error in the reasoning of the criminal decision No 83 dated 16. 02. 1994 of the same Court concerning the personal information of the sentenced person, correcting his name from Agustin to Agostin and his surname from Lleshi to Lleshaj.

19 The Third Request also enclosed, *inter alia*:

1. a copy of the birth certificate for "Agostin Lleshaj";
2. the convict's personal chart for "Agustin Lleshi" with a photograph attached;
3. a photograph of "Agustin Lleshaj"; and
4. an ID card of "Agostin Lleshaj" dated 5 October 1982 which included a photograph.

20 On 15 October 2008, after the receipt of the Third Request, Ms Buxton wrote to Patricia Summerell (of the Office of the Commonwealth Director of Public Prosecutions (the Cth DPP)) requesting advice whether the Third Request satisfied the "dual criminality" requirement. The letter stated that the Attorney-General's Department had sought further information from Albania in relation to Mr Lleshaj's identity and had requested Albania to provide a copy of Mr Lleshaj's fingerprints (if available) and confirm Mr Lleshaj's surname. Ms Buxton's letter then went on to state that it appeared that, to the extent possible, those issues had been addressed in the Third Request. On 17 December 2008, the Cth DPP advised that "dual criminality" was satisfied.

21 On 8 January 2009, Anna Harmer (Assistant Secretary, Mutual Assistance and Extradition Branch, Attorney-General's Department) signed a briefing memorandum to the Minister recommending to the Minister that he sign and date a notice under s 16 of the Act stating that a request for the extradition of "Agostin Lleshaj" had been received from Albania for the extradition offences set out in the notice. The briefing memorandum did not include a copy of the Third Request.

22 On 14 January 2009, the Minister gave the notice under s 16 of the Act. The reference in s 16 of the Act to the Attorney-General includes a reference to the Minister (as one of the Ministers administering the Attorney-General's Department): see s 19A(1) of the *Acts Interpretation Act 1901* (Cth) and *Marku v Republic of Albania (No 2)* [2012] FCA 1182 at [16]. It was not in dispute that, in issuing the notice under s 16 of the Act, the Minister did not consider

whether Lleshaj and the Applicant are the same person. The fact that the Applicant was not given an opportunity to make submissions about whether or not he is Lleshaj was also not in dispute.

23 On 19 January 2009, Steve Goldsmith of the Attorney-General's Department spoke by telephone with Mr Braithwaite. They discussed the identity question and, in particular, the need to link the identity of the Applicant with that of Lleshaj. The file note of the conversation records that Mr Braithwaite told Mr Goldsmith that "Marku is the false identity that Lleshaj used to gain entry to Australia" and suggested that "a link can be established between the two by the fact that 'Marku's' fingerprints (from Australia) match those of 'Lleshaj' (from Albania) — both sets of fingerprints are said to be held on file (accessible by Victoria Police and AFP)". On the same day in response to an enquiry from Ms Summerell as to whether Mr Goldsmith had heard from Victoria Police, Mr Goldsmith told Ms Summerell that:

> … I have broached the subject of evidence establishing that "Marku" is in fact "Lleshaj" with South Australian and Victorian Police. South Australian police indicated that they have obtained Lleshaj's fingerprints from Albania, and that those prints match prints taken from "Marku". …

The email suggested that "Kerry Gassner should be able to obtain access to the Albanian prints via police-to-police contact with South Australia".

24 On 3 February 2009, Jessica Freeman (of the Attorney-General's Department) spoke with Detective Senior Constable Gassner of Victoria Police. The file note of that conversation headed "Lleshaj — Identity" records that fingerprints previously requested by NCB Interpol Tirana were necessary for identity and that Ms Freeman had requested any information that might be useful. Ms Freeman had a further conversation with Garry Johnson on 12 February 2009. The file note of that conversation records that Mr Johnson "will contact [Victoria Police] about Lleshaj's prints and … confirm whether there is sufficient evidence to confirm [that] prints have been matched in Albania".

25 On 3 March 2009, on an application made on behalf of the Republic of Albania, a magistrate issued a provisional arrest warrant under s 12 of the Act for the arrest of "AGOSTIN LLESHAJ (ALSO known as AGUSTIN LLESHI AND VALENTIN MARKU)".

26 On 11 March 2009, the Applicant was arrested and brought before a magistrate. He was remanded in custody pursuant to s 15 of the Act. On 28 May 2010, in proceedings conducted under s 19 of the Act, the s 19 Magistrate determined that "AGOSTIN LLESHAJ (ALSO known as AGUSTIN LLESHI AND VALENTIN MARKU)" was eligible for surrender in relation to two offences for which his surrender was sought by the Republic of Albania and made an order under s 19(9) of the Act that "AGOSTIN LLESHAJ (ALSO known as AGUSTIN LLESHI AND VALENTIN MARKU)" be committed to prison to await surrender or release under s 22(5) of the Act. The s 19 Magistrate found that it was not part of his function to determine identity under s 19. That finding was upheld on appeal: *Marku v Republic of Albania* (2013) 212 FCR 50 (*Marku*). However, as the Full Court of this Court pointed out (at [13]) in the course of dismissing the appeal, the s 19 Magistrate also found that "if it was part of his function to determine identity under s 19, he was satisfied on the material before him (which was extensive …) that [the Applicant] is Agostin Leshaj".

Analysis

27 First, the Act. Section 16 was in the form set out at [2] above. The first question which arises is who is the "person" referred to in the phrase "[w]here the Attorney-General receives an extradition request from an extradition country in relation to *a person* …" (emphasis added) in s 16(1) of the Act?

28 The opening phrase of s 16(1) identifies when the Attorney-General may act, namely "[w]here the Attorney-General receives an extradition request from an extradition country in relation to *a person*" (emphasis added). That necessarily focuses attention on three matters — (1) that there is an extradition request (2) from an extradition country (3) in relation to a person.

29 Here, there is no dispute that for the purposes of the Act, the Third Request was an extradition request from an extradition country. The definition of "extradition country" in s 5 of the Act includes "any foreign state to which the former [*Extradition (Foreign States) Act 1966* (Cth)] applied by virtue of s 9 of that Act". Section 9(1A) of the *Extradition (Foreign States) Act 1966* (Cth) declared that that Act applied to each of the countries specified in the Schedule. Albania was listed in that Schedule.

30 That then leaves the third matter — identification of the person the subject of the Third Request. That directs attention to the Third Request. The Third Request was an extradition request from an extradition country (Albania) in relation to "Agostin Lleshaj (Lleshi) alias Valentin Marku": see [18] above.

31 This last matter — identification of the person the subject of the Third Request — was one of the central issues in dispute. The Minister contended that, for the purposes of s 16(1), *a person* was Agostin Lleshaj. The Applicant contended that, for the purposes of s 16(1), *a person* was not Agostin Lleshaj but Mr Marku. That dispute is necessarily resolved by looking at the Act and at the Third Request. As has been noted, the Third Request was in relation to "Agostin Lleshaj (Lleshi) alias Valentin Marku": see [18] above.

32 The balance of s 16 of the Act prescribed what the Attorney-General had to do *before* giving a notice under s 16 of the Act in relation to an extradition request. In particular, the Attorney-General was required to form an opinion in relation to the following matters:

1. whether the person to whom the extradition request relates is an "*extraditable person*": s 16(2)(a)(i);
2. whether the conduct of the person constituting the relevant extradition offence or offences for which surrender of the person is sought, or equivalent conduct, would have constituted an extradition offence in relation to Australia if it had taken place in Australia at the time at which the extradition request was received (the "dual criminality" requirement): s 16(2)(a)(ii); and
3. whether there is an extradition objection in relation to the extradition offence or offences for which surrender of the person is sought: s 16(2)(b);

see, by way of example, *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [21] and *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 537-538.

33 Taking each of those matters in turn, it is apparent that the Third Request was not in relation to the Applicant but in relation to "Agostin Lleshaj" who is also known as Lleshi and as Valentin Marku.

34 First, the requirement in s 16(2)(a)(i) that the Attorney-General form an

opinion about whether the person to whom the extradition request relates is an "*extraditable person*". The phrase "extraditable person" is defined in s 6 of the Act to mean:

> Where:
>
> (a) either:
>
> (i) …; or
>
> (ii) a person has been convicted of an offence or offences against the law of a country either before or after the commencement of this Act and:
>
> (A) …; or
>
> (B) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served;
>
> (b) the offence or any of the offences is an extradition offence in relation to the country; and
>
> (c) the person is believed to be outside the country;
>
> the person is, for the purposes of this Act, an extraditable person in relation to the country.

35 The question posed in the present case by s 16(2)(a)(i) is whether the person to whom the extradition request relates has been convicted of an offence against the law of Albania and the whole or a part of the sentence imposed on that person as a result of that conviction remains to be served. The Third Request records that the person convicted of an offence against the law of Albania was Agostin Lleshaj. It is important to note that the initial decision of the First Instance Court of Mirditë (Decision No 83) (and the subsequent decisions of the Appeal Court and the Court of Cassation) recorded the convict's name as "Agustin Lleshi". The erroneous spelling was rectified by decision 140 of the First Instance Court of Judicial Circle Lezhe which changed the personal data of the person convicted by the First Instance Court of Mirditë (Decision No 83) from "Agustin Lleshi" to "Agostin Lleshaj". The Third Request sought the extradition of that person and not Valentin Marku.

36 There is no dispute that the offences for which "Agustin Lleshi"/"Agostin Lleshaj" was convicted were an "extradition offence": subs (b) of the definition of "extraditable person" in s 6 of the Act. That leaves the third element — that *the person is believed to be outside the country*: subs (c) of the definition of "extraditable person" in s 6 of the Act. The "country" is, of course, Albania. The Attorney-General was required to form an opinion that "Agustin Lleshi"/"Agostin Lleshaj" is believed to be outside Albania. Again, Albania is not looking for Valentin Marku. Albania is looking for the man named "Agustin Lleshi"/"Agostin Lleshaj" convicted of homicide and attempted homicide in Albania. And, as the Minister submitted, subs (c) of the definition of "extraditable person" in s 6 of the Act does not require the Minister to form an opinion that Lleshaj was outside Albania. It was sufficient if there was material before the Minister which showed that Lleshaj was believed to be outside Albania. Put another way, provided the Minister personally is of the opinion that the person is believed to be outside the extradition country (Albania), s 16(2)(a)(i) is satisfied. In this case, it was open to the Minister to hold that belief that Lleshaj was outside Albania based on the material in the briefing memorandum: see s 16(2)(a)(i), the definition of extraditable (see [34] above), *George v Rockett* (1990) 170 CLR 104 at 116 and *Dunn v Australian Crime Commission* (2009) 174 FCR 336 at [85]. The briefing memorandum included a

statement, *inter alia*, that "Lleshaj is in Australia and is therefore outside Albania". Whether or not that statement was factually correct does not impact upon the validity of the opinion formed by the Minister. It was not the case that the Minister had no evidence upon which he could form the requisite opinion or that it was unreasonable for the Minister to rely upon the information contained in the briefing memorandum. The Minister addressed the correct question — whether Lleshaj was believed to be outside Albania.

37 The fact that the person the subject of the request used or purported to use an alias is not determinative in the Minister forming the requisite opinions. Indeed, it is unnecessary at the s 16 stage for the Minister to determine whether the person the subject of the request has used or is currently using another name. Information about the name or names used, or being used, by a person the subject of a request may not be available. The person the subject of the request may adopt or change his or her alias at a particular stage of the extradition process. It cannot be the position that an extradition request must identify all of the aliases used or being used by a person the subject of a valid extradition request. Such a contention is practically absurd.

38 The other two matters in s 16(2) about which the Minister is required to form an opinion also support the contention that the use of an alias may be put to one side at the s 16 stage. The second matter is whether the conduct of the person constituting the relevant extradition offence or offences for which surrender of the person is sought, or equivalent conduct, would have constituted an extradition offence in relation to Australia if it had taken place in Australia at the time at which the extradition request was received (the "dual criminality" requirement): s 16(2)(a)(ii). Again, that focuses on the conduct of the person in the country making the request. The name or names used since those offences are irrelevant to that enquiry.

39 The last matter required to be considered by the Minister is whether there is an extradition objection in relation to the extradition offence or offences for which surrender of the person is sought: s 16(2)(b). "Extradition objection" is defined in s 7 of the Act. Those two sections (s 16(2)(b) read with s 7) focus on the extradition offence and aspects of the way in which the country making the request has dealt with the person in relation to that offence. Any aliases used by the person are also irrelevant to those enquiries.

40 There is one further practical matter that tends against the construction contended for by the Applicant. The notice to be given by the Minister under s 16 can be given at a time when the person the subject of the request may not have entered Australia. The Minister must believe that the person the subject of the request is outside the requesting State, not that the person is in Australia: subs (c) of the definition of "extraditable person" in s 6 of the Act. That is unsurprising. The Act leaves open the real possibility that if an extraditable person is being sought by a requesting State and that requesting State believes that person might enter Australia, the requesting State can send a request to Australia seeking the extradition of a person if that person does enter Australia. That fact tends against the construction contended for by the Applicant because, in the circumstances just outlined, the enquiry as to identity contended for by the Applicant would not be possible. How would the Minister assess whether the person the subject of the request was in fact the person identified in Australia when the person the subject of the request had not entered Australia?

There is nothing to support two different constructions of s 16 depending on whether the person the subject of the request is in Australia or outside Australia at the time of the request.

41 These conclusions are not inconsistent with earlier observations that the Minister must scrutinise the request for extradition carefully and independently of the extradition country, potentially against the interests of the extradition country. The Minister's role (as well as the role of the officers of the department advising the Minister) is as contradictor to the claim of the requesting State but that role (at the s 16 stage) is limited to the matters specified in s 16 of the Act: *Commonwealth v Dutton* (2000) 102 FCR 168 at [32]-[33] and *von Arnim v Ellison* (2006) 150 FCR 282 at [70]-[71]. The fact that the Minister acts as a contradictor or scrutineer does not and cannot alter the statutory questions the Minister must ask as contradictor or scrutineer.

42 Before turning to the avenues available to a person the subject of a request for them to test the question of identity, it is necessary to consider the decision of the Full Court of the Federal Court in *Williams v Minister for Justice and Customs* (2007) 157 FCR 286 at [47]. The Applicant submitted that *Williams* established that for the purposes of s 16(2)(a)(ii) of the Act, the Minister must personally consider whether the alleged conduct (or the equivalent conduct) would have constituted an extradition offence in relation to Australia and, in order to be able to consider that matter, the Minister must be informed of the alleged conduct. In the context of s 16(2)(a)(ii) of the Act, the Court said that in discharge of the obligation imposed on the Minister under s 16(2)(a)(ii) of the Act, it was an insufficient response for the Minister to say "whatever might be the conduct, of which I am unaware, if my advisers say s 16(2)(a)(ii) is satisfied, I will rely upon that". By parity of reasoning with *Williams*, the Applicant submitted that under s 16(2)(a)(i) of the Act, the Minister had to personally consider whether the "person" is an extraditable person and, in this case, the person identified in the extradition request was "*Agostin Lleshaj (Lleshi) alias Valentin Marku*". There is a complete answer to that contention. *Williams* considered a different statutory provision imposing different statutory obligations on the Minister. The reasoning in *Williams* has no application to the task for the Minister under s 16(2)(a)(i). The task of the Minister under s 16(2)(a)(i) of the Act is set by that provision. Nothing more, nothing less.

43 Given the views formed, it is strictly unnecessary to consider the Applicant's further submission that the power to give a notice under s 16(1) of the Act is subject to a requirement to observe procedural fairness. As the respondent submitted, in determining the content of any procedural fairness obligations, it is necessary to have regard to the particular statutory framework being the "express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject matter": *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 326 and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26].

44 What the preceding analysis of the particular statutory framework (namely the Act and, in particular s 16(1)) demonstrates is that in the circumstances in which the power to give a notice under s 16(1) of the Act is exercised, the

requirement to observe procedural fairness is reduced to "nothingness" in the manner described in *Kioa v West* (1985) 159 CLR 550 at 615. As Kenny J said in *Bertran v Vanstone* (2000) 114 A Crim R 158 at [120]:

> As regards the issue of a notice under s 16, the Act necessarily contemplates that the [M]inister will act on information provided by the requesting state that is contained in the extradition request. The Act also contemplates that, at this early stage in the extradition process, information may not be complete and it makes provision for further consideration of relevant matters at later stages in the process, including by a magistrate under s 19 and by the Attorney-General under s 22. Section 22(3)(f), in particular, confers a broad discretion on the Attorney-General to consider any matter that may at that stage of the process be relevant to the exercise of his or her discretion regarding the surrender of the person sought.

45 In addition, the requirement to observe procedural fairness is reduced to "nothingness" because the Act contemplates that a notice may be given under s 16 in relation to a person to whom the extradition request relates (1) before any application is made for a provisional arrest warrant in relation to that person (as occurred here); (2) before the person may have entered Australia; or (3) even before the whereabouts of the person are known. That construction finds further support in the express terms of the Act. Section 16(3) of the Act expressly provides for the person to be given a copy of the s 16 notice "as soon as practicable after the person is remanded under s 15 or the [s 16] notice is issued, *whichever is the later*" (emphasis added). This section reveals a legislative intention that the person the subject of the request will not be given prior notice of the receipt of the extradition request or of the Minister's intention to issue a notice under s 16 stating that a request has been received. At a practical level that is not surprising. As Cooper J said in *Foster v Attorney-General (Cth)* (1997) 97 A Crim R 560 at 575-576:

> Nor, in my view, do the rules of natural justice or procedural fairness require that a magistrate or the Attorney-General disclose to the person against whom extradition is sought prior to exercising the powers under s 12 or s 16 that a request from an extradition country has been received and give that person an opportunity to respond. For to do so may render ineffective or frustrate the process: *Johns v Australian Securities Commission* at 431; *Kioa v West* at 615.

Challenge to identity not precluded

46 What then does a person, faced with an extradition request, do if they contend that they are not the person the subject of the request? There are multiple avenues available to them to test identity: see *Marku* at [66]. Some are contained within the Act (ss 12, 15, 17 and 22) and another is an application for *habeas corpus*. These avenues are not mutually exclusive.

47 The first is at the s 12 stage of the process. Section 12, headed "Provisional arrest warrants", relevantly provided:

> (1) Where:
>
> (a) an application is made, in the statutory form, on behalf of an extradition country to a magistrate for the issue of a warrant for the arrest of a person; and
>
> (b) the magistrate is satisfied, on the basis of information given by affidavit, that the person is an extraditable person in relation to the

extradition country;

the magistrate shall issue a warrant, in the statutory form, for the arrest of the person.

(2) The magistrate shall forthwith send to the Attorney-General a report stating that the magistrate has issued the warrant, together with a copy of the affidavit.

(3) Where:

(a) the Attorney-General has received the report under subsection (2) or has otherwise become aware of the issue of the warrant;

(b) the person has not been arrested under the warrant; and

(c) either:

(i) the Attorney-General decides not to issue a notice under subsection 16(1) in relation to the person; or

(ii) the Attorney-General considers for any other reason that the warrant should be cancelled;

the Attorney-General shall, by notice in writing in the statutory form, direct a magistrate to cancel the warrant.

48 There are a number of matters to be noted. First, the s 12 stage can occur before or after the s 16 stage: see, by way of example, s 17 of the Act.

49 Next, the application for a provisional arrest warrant under s 12 is made on behalf of an extradition country to a magistrate for *a warrant for the arrest of a person*. The *person* to be named in the warrant must be an extraditable person in relation to the extradition country that has had the application made on its behalf. The person named in the warrant may or may not be a person named in an extradition request because the extradition request may not have been received by the Minister.

50 How then is the magistrate able to be satisfied that the *person* to be named in the warrant is an extraditable person in relation to the extradition country that has had the application for the warrant? Section 12 provides the answer — on the basis of information given by affidavit. The contents of that affidavit will necessarily vary from case to case. The only requirement is that the contents of the affidavit are sufficient to satisfy the magistrate that the *person* to be named in the warrant and to be arrested is an extraditable person in relation to the extradition country: *Kainhofer* at 534 and 538. Practically, that requires the magistrate to be satisfied that the person who is to be the subject of the warrant is a person who meets each paragraph of the definition of "extraditable person" in s 6 of the Act. If the affidavit does not address each of those requirements to the necessary standard, then a warrant for the arrest of a named person will not be issued.

51 The Applicant submitted that the s 12 stage of the process is not a time to test the question of identity. I reject that contention. Although the application for a provisional arrest warrant is generally made *ex parte*, the application must be made on the basis of information given by affidavit. If a person purportedly arrested under a provisional arrest warrant contends that he or she is not the person named in the warrant, it is open to that person to seek *habeas corpus* to test the lawfulness of the arrest and detention: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581; *Marku* at [67]-[68]; *Kainhofer* at 563; *Re Yates; Ex parte Walsh* (1925) 37 CLR 36; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; and Aronson M and Groves M, *Judicial Review of Administrative Action* (5th ed, Law Book Company, 2013) at [14.20]. Given the nature of the enquiry at the s 12 stage and what then occurs, it is an appropriate time to test the issue.

52 After the issue of the provisional arrest warrant under s 12 of the Act and the arrest of the person named in the warrant, that person is brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested: s 15(1). That person is then remanded by a magistrate in custody or granted bail: s 15(2). Again, the focus of the enquiry is that the person named in the warrant as being a person the magistrate was satisfied was an extraditable person in relation to the extradition country be remanded in custody or granted bail. At this time, the hearing is necessarily *inter partes*. Given the nature of the enquiry at the s 15 stage and what has preceded it, it is an appropriate time to test any challenge to identity (though the s 15 hearing itself may not constitute an effective forum for a contested hearing on the identity question: *Marku* at [27] and [61]). Again, if a person arrested under a provisional arrest warrant contends that he or she is not the person named in the warrant and should not be remanded, that person should seek *habeas corpus* to test the lawfulness of the arrest and detention. The Act does not and cannot preclude it: *Kirk* at 581 and Aronson M and Groves M, *Judicial Review of Administrative Action* at [14.20].

53 Earlier decisions of the Court have considered the inability of an applicant to test the identity issue at the s 19 stage: see *Marku* at [61]-[65] and the authorities cited therein. That stage of the extradition process may be put to one side. It was not in issue in these proceedings. Attention then shifts to the s 22 stage of the process. The Minister submitted that in this case the Attorney-General will be required by s 22(3)(e) of the Act to consider issues of identity at the final stage of the extradition process because of Art 11 of the *Extradition Treaty between the United Kingdom of Great Britain and Northern Ireland and the Albanian Republic 1926*, done at Tirana on 22 July 1926, [1928] ATS 6 which entered into force in Australia on 8 March 1928 (the Treaty). That Article provides:

> The extradition shall take place only if the evidence be found sufficient, according to the laws of the State applied to, … to prove that the prisoner is the identical person convicted by the courts of the State which makes the requisition, ….

Having regard to the terms of the Act and its application to the Treaty, that Article arises for consideration at the s 22 stage.

54 There is therefore no need to inject questions of identity into the s 16 stage. Indeed, as identified earlier, it often would not be possible in the ordinary course of the operation of the Act to do so.

Conclusion

55 For those reasons, the application is dismissed. The Applicant is to pay the Minister's costs, such costs to be taxed unless agreed.

Orders accordingly

Solicitors for the applicant: *DLA Piper*.

Solicitors for the first respondent: *Ashurst Australia*.

DANIEL LORBEER