FEDERAL COURT OF AUSTRALIA

Marku v Republic of Albania and Another

[2013] FCAFC 51

Edmonds, Bromberg and Griffiths JJ

16 May, 3 June 2013

Extradition — Eligibility for surrender — Proceedings for — Alleged mistaken identity — Where person on remand claims not to be person convicted of the extradition offence in the extradition country — Where notice of extradition request omits reference to person's alias — Whether magistrate can determine identity dispute — Whether identity a jurisdictional fact — Extradition Act 1988 (Cth), ss 12, 15, 16, 19.

Agostin Lleshaj (AL) was convicted of crimes in Albania, but subsequently escaped imprisonment, entered Australia illegally and become an Australian citizen with the name of Valentin Marku (VM). The Republic of Albania made an extradition request for "AL alias VM". The Attorney-General gave the requisite notice under s 16 of the *Extradition Act 1988* (Cth) (the Act) stating that the request had been received in relation to AL, *but making no reference to the alias*. A magistrate then issued an arrest warrant for "AL alias VM" on the basis that he was an extraditable person in relation to Albania and remanded him in custody, pursuant to ss 12 and 15 of the Act respectively. Finally, the Deputy Chief Magistrate issued a notice under s 19(9) of the Act determining that "AL alias VM" was eligible for surrender. The appellant admitted he was VM, but disputed that he was AL.

Section 19 of the Act provided relevantly that where a person was on remand under s 15 of the Act and the Attorney-General had given a notice under s 16 in relation to the person, a magistrate should conduct proceedings to determine whether the person was eligible for surrender to the extradition country in relation to the extradition offence. The central issues on appeal were: (i) whether the magistrate conducting the s 19 proceedings could determine if the person on remand was the person convicted of the offences evidenced in the authenticated documents (the identity question), and (ii) whether identity was a jurisdictional fact which should be determined by the Court in judicial review proceedings.

Held: It is not part of a magistrate's function under s 19 of the Act to determine the identity question. The magistrate is required to assume (and not independently determine) that the person on remand is validly remanded and is an extraditable person. [61]-[62]

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

Federal Republic of Germany v Parker (1998) 84 FCR 323, considered.

Obiter: Identity is not a jurisdictional fact. [69]

Appeals from decisions of Dodds-Streeton J, [2012] FCA 804 and [2012] FCA 1182, dismissed.

Cases Cited

Germany, Federal Republic of v Parker (1998) 84 FCR 323.
Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628.
Immigration and Citizenship, Minister for v SZMDS (2010) 240 CLR 611.
Marku v Minister for Home Affairs [2013] FCA 561.
Marku v Republic of Albania (2012) 293 ALR 301.
Marku v Republic of Albania (No 2) [2012] FCA 1182.
Public Prosecutions, Director of (Cth) v Kainhofer (1995) 185 CLR 528.
Quinn v Robinson 783 F (2d) 776 (1986).
R v Secretary of State for Home Affairs; Ex parte Budd [1942] 2 KB 14.
Shalom v Health Services Commissioner [2009] VSC 514.
Thompson, Re (1888) 5 Times 540.
Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55.
Von Arnim v Federal Republic of Germany (1999) 107 A Crim R 529.
Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707.

Appeal

L De Ferrari and *K Argiropoulos* (pro bono), for the appellant.

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

Cur adv vult

3 June 2013

The Court

Introduction

1 The parties are agreed that the appeals raise the following issues:

(a) whether, in proceedings under s 19 of the *Extradition Act 1988* (Cth) (the Act), the magistrate performing the function under that provision can determine whether the person on remand is the person convicted of the offences evidenced in the authenticated documents (the identity question);

(b) whether identity is a jurisdictional fact which should be determined by the Court in proceedings for judicial review of the magistrate's determination under s 19 of the Act;

(c) whether the primary judge erred in refusing the appellant leave to amend his originating application for judicial review to allege that a notice under s 16 of the Act had not been given in respect of the appellant (in circumstances where the only notice had been given in respect of a person called Agostin Lleshaj); and

(d) whether the primary judge erred in admitting into evidence affidavit material filed by the first respondent (Albania) or, if the affidavit was properly admitted, in using the material to establish that the Minister had given the notice in respect of Valentin Marku, even though the notice refers only to Agostin Lleshaj.

Factual background

2 The central issue of disputed fact is whether the appellant is in fact Agostin Lleshaj. Other relevant primary facts are not disputed. They may be summarised as follows.

3 On 16 December 1994, Agostin Lleshaj was convicted in the District Court of Mirdita in Albania of intentional homicide and attempted homicide. He was sentenced to life imprisonment. On 5 April 1995, his sentence was reduced on appeal to 25 years' imprisonment.

4 In March 1997, Agostin Lleshaj escaped from prison in Albania. At that time he had served three years and one month of his sentence. On 18 April 1998, the appellant entered Australia travelling on a false passport in the name of "Bujar Hasani". He subsequently advised the relevant Commonwealth department that his name was "Valentin Marku". In due course he was granted a protection visa and later became an Australian citizen.

5 On 12 September 2008, the Ministry of Justice of the Republic of Albania made an extradition request for the extradition from Australia to Albania of "Agostin Lleshaj (Lleshi) alias Valentin Marku". As the result of some clerical or spelling errors, some earlier Albanian records used the name Agustin Lleshi, but the position was subsequently rectified. The appellant does not take issue with the spelling of the names Agostin Lleshaj or Agustin Lleshi: he simply says those names have no application to him because he is not that person.

6 On 8 January 2009, the Commonwealth Attorney-General's Department (the Department) prepared a briefing memorandum to the Minister for Home Affairs advising him as to the matters he was required to consider in the exercise of his discretion under s 16 of the Act. The appellant says that the briefing memorandum failed to include:

(a) the extradition request in its entirety;
(b) any part of the request which indicated that Albania considered Valentin Marku to be an alias of Agostin Lleshaj;
(c) any mention of Valentin Marku at all; or
(d) any reference to the fact that Albania considered Valentin Marku to be an alias of Agostin Lleshaj.

It is convenient to interpolate at this point that these matters of alleged omission and their effect if any of the validity on the s 16 notice are hotly disputed and are raised in separate judicial review proceedings under s 39B of the *Judiciary Act 1903* (Cth) which were commenced by the appellant on 16 November 2012 and are pending (see *Marku v Minister for Home Affairs* VID 907 of 2012).

7 On 14 January 2009, the Minister for Home Affairs signed a notice under s 16 of the Act. The notice records that an extradition request had been received from Albania in relation to Agostin Lleshaj. There is no reference in the notice to any aliases.

8 The appellant emphasises that it was only after that s 16 notice had been issued that the steps under ss 12 and 15 of the Act took place.

9 On 3 March 2009, Albania made an ex parte application for the issue of a provisional arrest warrant under s 12 of the Act. The application was supported by an affidavit by a Detective Senior Constable Kerry Gassner (DSC Gassner) sworn 3 March 2009. The affidavit wrongly asserted that Albania had provided fingerprints of Agostin Lleshaj. It also stated that those fingerprints of Agostin Lleshaj had been matched to fingerprints taken from Valentin Marku in

Australia. The appellant emphasises that, in fact, both sets of fingerprints had been taken from him when he was in Australia, and Albania had no fingerprints of Agostin Lleshaj (a point which was apparently conceded by Albania prior to commencement of the s 19 hearing).

10 At the conclusion of the ex parte application made on 3 March 2009, Magistrate Reynolds issued a provisional arrest warrant under s 12 of the Act. The warrant recorded the magistrate's satisfaction, based on information provided in DSC Gassner's affidavit, that "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku) was an extraditable person in relation to Albania". The warrant authorised the arrest of "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)".

11 On 11 March 2009 the appellant was arrested and brought before a magistrate who remanded him in custody pursuant to s 15 of the Act. At that hearing the appellant disputed that he was either Agostin Lleshaj or Agustin Lleshi but admitted that he was Valentin Marku.

12 On 3 May 2010, the second respondent (then a Deputy Chief Magistrate, now the Chief Magistrate, of Victoria) commenced hearing Albania's application under s 19 of the Act to determine eligibility for surrender. As matters stood at that time:

(a) the Minister had given a notice under s 16(1) of the Act in relation to Agostin Lleshaj on 14 January 2009; and

(b) on 11 March 2009, Valentin Marku (the physical person present in the Magistrates' Court) had been remanded under s 15 of the Act based on the magistrate's satisfaction under s 12 that Valentin Marku was an alias of Agostin Lleshaj.

13 In the s 19 proceedings, the Deputy Chief Magistrate accepted Albania's submission that it was not part of his function under s 19 of the Act to determine whether the appellant is the person requested by Albania. Although not determining the identity question, the Deputy Chief Magistrate nevertheless expressed his view 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 and went beyond material going to identity which had been provided by Albania in support of its extradition request dated 12 September 2008), that the appellant is Agostin Lleshaj. He gave detailed reasons for that view. Although he commented that a "remarkable feature of this case is the lack of identifying material from Albania", the following primary matters grounded his view that the appellant is in fact Agostin Lleshaj:

(a) identification evidence using photoboards compiled by a member of the Victorian Police Force;

(b) similarities between the information provided by the appellant in his protection visa application concerning the names and birthdates of his wife and daughters and information from Albania setting out the members of the family of Agostin Lleshaj, as well as similarities in information concerning the extended family compositions of the appellant and Agostin Lleshaj; and

(c) evidence given by Arben Lleshaj (who is the brother of Agostin Lleshaj), denying that the appellant is Agostin Lleshaj was not accepted on credibility grounds because it was found that Arben Lleshaj had a

"history of persistent lying and duplicity", including by pretending on several occasions involving Australian immigration matters to be the brother of Valentin Marku.

14 On 28 May 2010, the Deputy Chief Magistrate issued a notice under s 19(9) of the Act determining that "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)" is eligible for surrender to the Republic of Albania and ordering that he be remanded in custody to await surrender or release under s 22(5) of the Act.

Procedural matters

15 The proceedings have a complicated history. They may be summarised as follows. By a notice of appeal dated 10 June 2010, the appellant appealed to the Supreme Court of Victoria under s 21 of the Act against the Deputy Chief Magistrate's orders dated 28 May 2010. The notice of appeal raised various grounds of appeal in respect of the following questions of law:

1. Was the learned Magistrate entitled to consider the issue of identity of the individual sought to be extradited by the Respondent/Applicant?
2. What was the correct test to be applied by the learned Magistrate in assessing that the prisoner "was the identical person" sought by the State making the requisition?
3. Was there sufficient admissible evidence or material to entitle the learned Magistrate to be "satisfied" that the Respondent/Appellant was Agostin Lleshaj?

16 On 9 August 2011, by originating motion the appellant issued a related common law proceeding in the Supreme Court of Victoria ("the common law proceeding") in order to address what were said to be the limitations of a s 21 appeal. The common law proceeding was in the nature of a judicial review.

17 The originating motion in the common law proceedings raised the following grounds:

1. As at 28 May 2010:
   (1) the First Defendant (*Albania*) was an "extradition country" seeking the surrender of the Plaintiff in relation to two "extradition offences" (*the extradition offences*), in both cases within the meaning of the *Extradition Act 1988* (Cth) (the Act);

   Particulars

   The two extradition offences were (1) intentional homicide and (2) attempted homicide, in both cases contrary to the law of Albania. On 16 December 1994, a man named Lleshaj was convicted of the extradition offences in Albania. He was sentenced to life imprisonment. On appeal, his sentence was reduced to 25 years imprisonment. Lleshaj escaped from Albanian custody in about 1997;

   (2) the magistrate was conducting proceedings under section 19 of the Act (*the section 19 proceedings*) to determine whether the Plaintiff was eligible for surrender in respect of those extradition offences; and
   (3) the Plaintiff was:
      (i) a person on remand under section 15 of the Act, within the meaning of section 19(1)(a) of the Act; and therefore:
      (ii) for the purposes of section 19 of the Act, "the person" within the meaning of that expression used elsewhere throughout the section.

2. The Plaintiff is not the man who was convicted of the extradition offences.
3. In consequence:
   (a) neither of the extradition offences is or ever has been an offence of which the Plaintiff has been convicted, within the meaning of section 19(3)(b) of the Act; and therefore:
   (b) no "supporting documents", within the meaning of sections 19(3)(b) and therefore 19(2)(a) of the Act, were (or could possibly have been) produced to the magistrate at the section 19 proceedings in relation to the extradition offences; and therefore:
   (c) by virtue of section 19(2) of the Act, the Plaintiff was not (and could not possibly have been) eligible for surrender in relation to the extradition offences; and therefore:
   (d) the magistrate had no jurisdiction under section 19 of the Act to determine that the Plaintiff was eligible for surrender in relation to the extradition offences; and therefore:
   (e) the magistrate had no jurisdiction to make orders or take any steps under section 19(9) of the Act.
4. On 28 May 2010, without jurisdiction to do so, the magistrate:
   (a) purported to determine under section 19 of the Act that the Plaintiff was eligible for surrender in respect of the extradition offences; and
   (b) purported to make an order by warrant under section 19(9) of the Act, committing the Plaintiff to prison to await surrender.
5. By reason of the matters pleaded in paragraphs 1-3 above, the magistrate was obliged by law to make an order under section 19(10) of the Act, that the Plaintiff be released.

18 The appeal proceeding and the common law proceeding were transferred to the Federal Court on 21 September 2011 by order of Dixon J, on the motion of the appellant, which was unopposed. The proceedings were given the file numbers VID 1242 of 2011 and VID 1241 of 2011 respectively. Both proceedings were allocated to the docket of Dodds-Streeton J (the primary judge).

19 On 2 December 2011, the primary judge ordered that the following two questions be decided separately from and before the trial of any remaining questions in both proceedings:

> Whether the Magistrate was correct in holding that it was not part of his function in conducting the proceeding under s 19 of the *Extradition Act 1988* (Cth) to determine the identity question.
>
> Whether in these proceedings for judicial review of the magistrate's determination made under s 19 of the *Extradition Act 1988* (Cth), the identity question is a question of jurisdictional fact determinable by this Court.

20 The "identity question" was defined as "the question whether the person on remand is the person convicted of the offences evidenced in the authenticated documents".

21 Shortly before the hearing of the separate questions on 8 May 2012, the appellant sought to amend the originating motion in the common law proceedings by inserting new paragraphs 1A and 1B as follows:

> 1A. At no time had the Attorney-General (Cth) given a notice under section 16(1) of the Act in respect of the Plaintiff, within the meaning of section 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). The Plaintiff is not the man named Lleshaj.
>
> 1B. In consequence, the magistrate had no jurisdiction to conduct proceedings in relation to the Plaintiff under section 19(1) of the Act, or therefore to make orders or to take any steps under section 19(9).

22 By consent, the primary judge ordered that the application seeking leave to amend be stood over until the delivery of judgment on the separate questions. Judgment on the separate questions was delivered on 31 July 2012 (*Marku v Republic of Albania* (2012) 293 ALR 301 (*Marku (No 1)*). The hearing of the appellant's application for leave to amend took place on 4 October 2012 and judgment was delivered on 26 October 2012 (*Marku v Republic of Albania (No 2)* [2012] FCA 1182 (*Marku (No 2)*). Her Honour's determination of the two separate questions and refusal of the proposed amendments resulted in the common law proceedings being dismissed by an order made on 15 November 2012. The appeal proceeding remained on foot as there were other issues to be considered notwithstanding the determination of the separate questions.

23 The appellant brings three appeals against the primary judge's orders concerning the determination of the separate questions, the refusal to grant leave to amend and the primary judge's related ruling on the admissibility and use of certain evidence.

Summary of primary judge's reasons

24 It is convenient first to summarise the primary judge's reasons for judgment in respect of the separate questions, before summarising her Honour's separate reasons for judgment in *Marku (No 2)* concerning the proposed amendments and the admissibility and use of certain evidence.

(a) The separate questions

25 Her Honour found that the s 19 magistrate may not determine whether the person on remand is the person convicted of the relevant offences and she also held that, in any event, identity is not a jurisdictional fact.

26 The primary judge's reasons concerning the two separate questions may be summarised as follows, dealing with each question in turn.

27 *Was it part of the magistrate's function under s 19 to determine the identity question?:* Her Honour answered this separate question "no" for the following primary reasons:

- although the question of disputed identity did not arise for determination in *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 (*Kainhofer*), the High Court nevertheless clearly recognised that the s 19 magistrate must assume that the s 15 order of remand and the s 16 notice are valid and must proceed on the footing that the person on remand is an extraditable person. The High Court emphasised the limited function of the s 19 magistrate under s 19(2)(a) of the Act. The reasoning in *Kainhofer* precluded a s 19 magistrate from determining the identity question;
- merely because the s 12 magistrate and the Attorney-General acting under s 6 were satisfied that a given person, "AB", is an extraditable person, does not mean that a particular person who is identified as "AB" who is arrested and brought before the s 15 magistrate is in fact

"AB". The s 15 magistrate must nevertheless be satisfied that the person he or she remands is "AB", ie the person named in the s 12 warrant, because otherwise "AB" would not be the person arrested under the provisional warrant;

- while the s 15 magistrate might therefore order the release of an arrested person who is able to establish that he or she is not the person the subject of the s 12 warrant, that outcome is likely to be "extremely rare" and the s 15 hearing would not constitute an effective forum for a contested hearing on the identity question;
- it is implicit that the s 15 magistrate in remanding a person in custody or on bail accepts that the person thus remanded is the person arrested under the s 12 warrant and, accordingly, is the extraditable person accused or convicted of the extradition offences;
- in *Kainhofer*, the High Court held that the s 19 magistrate must not only proceed on the basis that the person on remand is an extraditable person, but must also assume (unless there is *ex facie* invalidity) that both the s 15 remand order and s 16 notice are valid;
- the appellant's construction of s 19 would be stronger if the s 19 magistrate was not required to assume the validity of the remand order and was only required to assume that a particular person ("AB") is an extraditable person, but that argument is precluded by *Kainhofer*;
- the assumption that the person on remand has been validly remanded under s 15 is an extraditable person, necessarily incorporates the underlying assumption that the person who is on remand is, in accordance with s 6 of the Act, either a person accused or convicted of an extradition offence; and
- the person the subject of proceedings under s 19 is necessarily the person remanded under s 15 who, in turn, is necessarily the person: (a) who has been arrested under the s 12 warrant; and (b) in respect of whom the Attorney-General has given a notice under s 16. The nexus between the person on remand and the extraditable person incorporates a nexus between the person on remand and the person who has been either accused or convicted of an extradition offence.

28 *If determination of the identity question is part of the s 19 magistrate's task, is identity a jurisdictional fact?:* In the light of the primary judge's answer to the first separate question, the second separate question did not strictly arise. For completeness, however, her Honour considered and determined the matter, concluding in obiter dictum that identity is not a jurisdictional fact. The reasoning underpinning that conclusion may be summarised as follows:

- after discussing some relevant caselaw on identifying a jurisdictional fact (including Spigelman CJ's influential decisions in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 and *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, as well as Kaye J's decision in *Shalom v Health Services Commissioner* [2009] VSC 514), her Honour concluded that identity was not a jurisdictional fact primarily because:
  - — in the context and structure of s 19, the identity question (assuming it to be incorporated in s 19(3)(a) and (b)) would

more plausibly be a consideration in the exercise of the magistrate's power, rather than occurring in the statutory formulation of the power;

— while s 19(1) specifies a number of matters essential and preliminary to the power and obligation to conduct s 19 proceedings, the matters specified in s 19(2) appear more in the nature of matters to be considered (even though there is a lack of a uniform requirement for the magistrate to be satisfied on all those matters);

— that conclusion is strengthened because the factors in s 19(2) are apparently the only factors relevant to a determination of eligibility and are thus not matters preliminary to other factors to be considered;

— there are indications in the plurality judgment in *Kainhofer* that the conditions of the s 19 magistrate's power are set out in s 19(1) rather than s 19(2) (referring in particular to pages 537 and 539 of the plurality judgment);

— the existence of the right to a merits review in s 21 of the Act (which was restricted to the material before the magistrate) suggested that identity was not a jurisdictional fact;

— the determination of identity was substantially an evaluative exercise involving diverse evidence; and

— the distinct form and sequential placement of s 19(1) and (2) suggest that the matters in the former subsection confer jurisdiction. The language in s 19(2) may be less significant because that provision appears exhaustively to prescribe the matters to be considered.

29 For all these reasons, the primary judge concluded that if, contrary to her Honour's determination of the first separate question, the s 19 magistrate is empowered to determine identity, identity is not a jurisdictional fact but is rather a matter to be considered in the exercise of the s 19 power.

(b) The proposed amendments and the admissibility of Ms Folie's affidavit

30 The primary judge's reasons for refusing leave to amend, as well as her reasons for admitting into evidence and relying on an affidavit of Ms Alexandra Folie, to which was attached the extradition request received by the Attorney-General and other documents, may be summarised as follows.

31 The application for leave to amend was refused on the basis that the proposed new grounds (see [21] above) did not have reasonable prospects of success, primarily because:

• the proposed new grounds were directed to s 19(1)(b) (which created a precondition to the s 19 magistrate's power to conduct his or her task under other subsections, including s 19(2)), but s 19(1)(b) cannot be construed without a means of identifying "the person" to whom it refers. Construed in context, "the person" is clearly "the person on remand under s 15" referred to in s 19(1)(a). Accordingly, s 19(1)(b) requires that the Attorney-General has given a notice under s 16(1) in relation to the person on remand under s 15;

- having regard to both the statutory scheme and relevant authority, including *Kainhofer*, "the person on remand under s 15" is the person who is the subject of proceedings under s 19 and who, in turn, is necessarily both the person who has been arrested under the s 12 warrant and in respect of whom the Attorney-General has given a notice under s 16;
- although the appellant argued that the proposed amendments were not inconsistent with *Kainhofer* because s 19(1)(b) was a jurisdictional fact and therefore not subject to the strictures and assumptions imposed in *Kainhofer* on the s 19 magistrate under s 19(2), the High Court in *Kainhofer* did not expressly distinguish between s 19(1) and (2). The general statements made in that decision on the proper authority and function of the s 19 magistrate applied to both subsections;
- the High Court's findings in *Kainhofer* that the s 19 magistrate may not determine whether the person on remand is an extraditable person and must assume that the person on remand has been validly remanded means that "the person on remand under s 15" in s 19(1)(a) (who is, by implicit incorporation, "the person" referred to in s 19(1)(b)) is, in this case, the person remanded pursuant to the provisional arrest warrant under s 12 denominating him "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)";
- the jurisdictional fact in s 19(1)(b) is that the s 16 notice was given in relation to the person on remand under s 15 as thus identified, with the consequence that the appellant's claim that he is in fact Valentin Marku (a different person altogether, who has been wrongly identified with Agostin Lleshaj), cannot affect the conclusion that he is the person remanded under s 15;
- the proposed amendments arose from the alleged "dissonance" created by the s 16 notice and its omission to state any of the aliases, but because there was admissible evidence before the Court establishing that the person the subject of the s 16 notice was the person on remand under s 15, the "dissonance" did not exist; and
- accordingly, the proposed amendments did not have reasonable prospects of success and leave to amend was refused.

32 As to the primary judge's decision to admit Ms Folie's affidavit into evidence, her Honour reasoned in *Marku (No 2)* that the evidence exhibited to Ms Folie's affidavit was apt to establish that the person in relation to whom the s 16 notice was given was the person on remand under s 15 and, as the appellant was said to have acknowledged, the evidence was admissible for that purpose.

Summary of parties' arguments on the four main issues

33 By reference to the four main issues in the appeals, the parties' respective arguments may be summarised as follows.

(a) The identity question

34 The appellant complains that, despite the crucial importance of the identity issue, at no stage in the extradition proceedings to date has Albania's allegation that the appellant is the convicted person Agostin Lleshaj been able to be tested by him or been determined on the merits. He complains that, on the basis of the

primary judge's reasons, that issue can never be determined on the merits in an independent forum where the appellant is able to advance evidence and submissions.

35 The appellant further argues that the language of s 19(2) dictates that the magistrate had to consider the identity question and that that question involves a jurisdictional fact.

36 The appellant says that *Kainhofer* is neither expressly nor implicitly against his arguments because the identity issue did not arise in *Kainhofer* and that case was concerned with a different question, namely whether the person named in a foreign arrest warrant was a person "accused" of having committed the offences referred to in the warrant.

37 The appellant accepts that the reference in s 19(1) to "the person" must be to the person who is the physical individual before the s 19 magistrate. He also accepts that that person is before the magistrate as a consequence of having been remanded under s 15. For this part of the argument, he also accepts that the s 16 notice was given in respect of the person remanded under s 15. He argues, however, that the physical individual is only eligible for surrender if, as required by s 19(3)(b), there are duly authenticated documents which provide evidence of the person's conviction. This requires the s 19 magistrate to be satisfied that there are duly authenticated documents evidencing the conviction of the physical individual before the magistrate.

38 Albania argues that the appellant's case rests on the proper construction and effect of s 19(2)(a) and (3)(b), but *Kainhofer* stands directly in the path of the appellant's case that the identity question forms part of the function of the s 19 magistrate. While acknowledging that *Kainhofer* did not directly address the identity question, Albania argues that the High Court's central reasoning applies equally to the construction and operation of s 19(2)(a) and (3)(b). Accordingly, applying that reasoning, the s 19 magistrate is required to proceed on the footing that the person on remand is an extraditable person within s 6(a)(ii) and neither s 19(2)(a) nor s 19(3)(b) require or authorise the s 19 magistrate to determine whether the person on remand is the person who was convicted of the extradition offence evidenced in the authenticated documents.

39 Albania further argues that confirmation of the primary judge's approach does not leave the appellant without any alternative avenues to raise the identity questions. Those alternative avenues include the Attorney-General's discretionary power to cancel a provisional arrest warrant under s 12(3), to release a person from remand under s 17(1), or to decide not to surrender the person under s 22(5). Further, both the issue of a provisional arrest warrant under s 12 by a magistrate and the Minister's decision to give a notice under s 16(1) are said to be amenable to judicial review in which the satisfaction or opinion that the person is an "extraditable person" may be challenged for legal error. Finally, Albania points to the option of the person who is arrested and remanded in custody under s 15 seeking a writ of habeas corpus on the ground that he or she is not in fact the person referred to in the s 12 warrant and that his or her detention is consequentially unlawful.

40 The appellant denies that habeas corpus is an available form of relief because of the form of the s 12 arrest warrant. That warrant was issued for the arrest of "Agostin Lleshaj (also known as Agustin Lleshi and Valentin Marku)". The appellant does not deny that he is Valentin Marku. The appellant says that the authority of the gaoler detaining him on that warrant could not be challenged

without that challenge amounting to a collateral review of the status satisfaction of the s 12 magistrate. The appellant adds, however, that if the Court disagrees with that assessment it should expressly find that habeas corpus is an available remedy and the appellant says that he would then seek that relief.

(b) Is identity a jurisdictional fact?

41 The appellant argues that identity is a jurisdictional fact under s 19 because:

(a) the s 19 magistrate is only empowered to make an order under s 19(9)(a) in respect of the correct person because it is an order *in personam*;

(b) there is no other satisfactory designated forum under the Act for determination of the identity issue; and

(c) a wrong determination of the identity question would undoubtedly infringe the person's fundamental rights.

42 Albania argues that because the identity question is not part of the s 19 magistrate's function, it must follow that that issue cannot be a jurisdictional fact.

43 Alternatively, assuming that the primary judge erred in her determination of the first separate question, Albania submits that the identity question is not a pre-condition on which the magistrate's s 19 jurisdiction depends, but rather is an issue which arises in the course of the consideration of the exercise of the power to determine whether the person is eligible for surrender. In support of that submission, Albania points to such matters as:

(a) the language and structure of s 19 of the Act, including that s 19(1) specifies the pre-conditions to the conduct of proceedings and s 19(2) defines the circumstances in which a person is eligible for surrender;

(b) the contrary construction is inconsistent with the statutory scheme which provides in s 21 for review by a court by way of rehearing of the magistrate's determination, but subject to an express restriction in s 21(6)(d) that the court shall have regard only to the material that was before the magistrate. Albania emphasises that it would be incongruous and inconsistent if the criteria in s 19(2) were to be treated as jurisdictional facts, which would open the door to fresh material being placed before the court which was not before the magistrate. Acceptance of the appellant's argument would render nugatory the limitations on the s 21 review jurisdiction; and

(c) s 15(2) implicitly recognises that, once a person is on remand, a magistrate has jurisdiction to conduct proceedings to determine whether that person is eligible for surrender and the appellant's construction is inconsistent with that proposition.

(c) Leave to amend

44 The appellant argues that, in refusing the proposed amendments, the primary judge effectively determined the dispute on a final basis and as if she had allowed the amendment. The appellant claims that the primary judge erred in concluding the proposed amendments had no reasonable prospects because the new ground was foreclosed by her Honour's determination of the separate questions and also that the factual premise for the appellant's proposed statutory construction argument was defeated by the evidence admitted on the hearing of the application for leave to amend. The appellant says that the issue raised by the proposed amendment was not resolved by the determination of the separate

questions and that the primary judge also erred in concluding that *Kainhofer* had not distinguished between s 19(1) and (2) in considering the authority and function of the s 19 magistrate.

45 Albania defends the primary judge's decision to refuse the proposed amendments arguing that the appellant's submissions were based on an incorrect premise, namely that, for the purposes of s 19(1)(b), the s 16 notice here was a notice given in relation to Agostin Lleshaj and not Valentin Marku. Because the Attorney-General was required under s 16 to form an opinion that the person to whom a extradition request relates is an extraditable person, it is therefore permissible and appropriate to examine the extradition request to identify the person in relation to whom the s 16 notice was given. Such an examination is appropriate to identify the subject of the s 16 notice and does not undermine or impeach the validity of that notice.

(d) Admissibility of evidence

46 The appellant argues that Ms Folie's affidavit was not admissible because it was not relevant. It says that the issue presented by the proposed amendments was directed to identifying the magistrate's task under s 19(1). The appellant further argues that the extradition request is irrelevant to that matter, as is also the Department's briefing memorandum advising the Minister on a s 16 notice. The appellant says that the primary judge overstated and misapplied a concession given by his counsel which was limited to the admissibility of evidence establishing that the s 16 notice and the remand order were in respect of the same person.

47 Albania supported the primary judge's decision to admit and use the evidence on the basis that it was relevant to examine the extradition request because of the relationship between the person on remand under s 15 and the person in relation to whom the s 16 notice was given.

48 Finally, the appellant argues, that even if the evidence was admissible, the primary judge misapplied the evidence because nothing in that evidence established that the s 16 notice (which referred only to "Agostin Lleshaj"), was given in respect of Valentin Marku (being the person who, after the s 16 notice was issued, found himself as the person on remand under s 15).

Consideration

49 For the following reasons, we consider that all three appeals should be dismissed. It is convenient to state the reasons by reference to the four main issues identified above.

50 Before dealing with each of those issues, we will briefly explain how the Act applies to Albania and then outline the relevant provisions of the Act.

Outline of relevant provisions of the Act and the Act's application to Albania

51 The Act applies to Albania by dint of the following matters.

52 Under s 108 of the *Constitution of the Commonwealth*, laws which applied in the colonies prior to Federation, including the *Extradition Act 1870* (UK) (the 1870 Act), continue in force until amended or repealed by Australian legislation. Several extradition treaties adopted by the United Kingdom pursuant to the 1870 Act are still in force in Australia. Their operation is preserved by ss 5 and 11(3) of the Act and s 9 of the *Extradition (Foreign States) Act 1966* (Cth).

53 The *Extradition Treaty between the United Kingdom of Great Britain and Northern Ireland and the Albanian Republic*, done at Tirana on 22 July 1926

(the Treaty) is a treaty which Australia inherited from the United Kingdom and remains in force. The Treaty became applicable to the Commonwealth of Australia on 8 March 1928.

54 Turning now to outline the relevant provisions of the Act (noting that it is common ground that the relevant provisions are those in the compilation prepared on 14 March 2012), it is convenient to start with ss 3 and 6 of the Act, which describe the Act's principal objects and the meaning of "extraditable person" respectively. Those provisions are as follows:

> 3 Principal objects of Act
>
> The principal objects of this Act are:
>
> (a) to codify the law relating to the extradition of persons from Australia to extradition countries and New Zealand and, in particular, to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence;
>
> (b) to facilitate the making of requests for extradition by Australia to other countries; and
>
> (c) to enable Australia to carry out its obligations under extradition treaties.
>
> …
>
> 6 Meaning of *extraditable person*
>
> Where:
>
> (a) either:
>
> (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country that the person is accused of having committed either before or after the commencement of this Act; 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) there is an intention to impose a sentence on the person as a consequence of the conviction; 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.

55 Section 12 deals with provisional arrest warrants. Section 12(1) and (2) of the Act provide:

> 12 Provisional arrest warrants
>
> (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.

56 Section 15 deals with the remand of a person who is arrested under a provisional arrest warrant issued under s 12. Section 15 relevantly provides:

15 Remand

(1) A person who is arrested under an extradition arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.

(2) The person shall be remanded by a magistrate in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.

57 Section 16(1) and (2) deal with the power of the Attorney-General to issue a notice:

16 Notice by Attorney-General

(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, or all of the extradition offences, for which surrender of the person is sought.

Section 16(1) uses the term "extradition request" which is defined in s 5 to mean "a request in writing by an extradition country for the surrender of a person to the country".

58 Section 19 is an important provision in the context of the appeals. It deals with the magistrate's task and function of determining the eligibility of a person for surrender. Relevantly, s 19 provides:

19 Determination of eligibility for surrender

(1) Where:

(a) a person is on remand under section 15;

(b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;

(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

(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.

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

(a) the supporting documents in relation to the offence have been produced to the magistrate;

(b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the magistrate of any other documents — those documents have been produced to the magistrate;

(c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

(d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

(3) In paragraph (2)(a), *supporting documents*, in relation to an extradition offence, means:

(a) if the offence is an offence of which the person is accused — a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;

(b) if the offence is an offence of which the person has been convicted — such duly authenticated documents as provide evidence of:

(i) the conviction;

(ii) the sentence imposed or the intention to impose a sentence; and

(iii) the extent to which a sentence imposed has not been carried out; and

(c) in any case:

(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and

(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

…

(5) In the proceedings, the person to whom the proceedings relate is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.

(6) Subject to subsection (5), any document that is duly authenticated is admissible in the proceedings.

(7) A document that is sought by or on behalf of an extradition country to be admitted in the proceedings is duly authenticated for the purposes of this section if:

(a) it purports to be signed or certified by a judge, magistrate or officer in or of the extradition country; and

(b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:

(i) in any case — of the extradition country or of a Minister, Department of State or Department or officer of the Government, of the extradition country; or

(ii) where the extradition country is a colony, territory or protectorate — of the person administering the Government of that country or of any person administering a Department of the Government of that country.

(7A) Subsection (7) has effect in spite of any limitation, condition, exception or qualification under subsection 11(1), (1A) or (3).

(8) Nothing in subsection (6) prevents the proof of any matter or the admission of any document in the proceedings in accordance with any other law of the Commonwealth or any law of a State or Territory.

(9) Where, in the proceedings, the magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence or one or more of the extradition offences, the magistrate shall:

(a) by warrant in the statutory form, order that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5);

(b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under subsection 21(1); and

(c) record in writing the extradition offence or extradition offences in relation to which the magistrate has determined that the person is eligible for surrender and make a copy of the record available to the person and the Attorney-General.

(10) Where, in the proceedings, the magistrate determines that the person is not, in relation to any extradition offence, eligible for surrender to the extradition country seeking surrender, the magistrate shall:

(a) order that the person be released; and

(b) advise the Attorney-General in writing of the order and of the magistrate's reasons for determining that the person is not eligible for surrender.

59 Sections 21 and 22 are also relevant. They relevantly provide as follows:

21 Review of magistrate's order

(1) Where a magistrate of a State or Territory makes an order under subsection 19(9) or (10) in relation to a person whose surrender is sought by an extradition country:

(a) in the case of an order under subsection 19(9) — the person; or

(b) in the case of an order under subsection 19(10) — the extradition country;

may, within 15 days after the day on which the magistrate makes the order, apply to the Federal Court, or to the Supreme Court of the State or Territory, for a review of the order.

(2) The Court may, by order:

(a) confirm the order of the magistrate; or

(b) quash the order and direct a magistrate to:

(i) in the case of an order under subsection 19(9) — order the release of the person; or

(ii) in the case of an order under subsection 19(10) — order, by warrant in the statutory form, that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5).

(3) The person or the extradition country, whether or not the person or country was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.

(4) The person or the extradition country is not entitled to appeal to the Full Court more than 15 days after the day on which the order of the Federal Court or the Supreme Court is made.

(5) The High Court shall not grant special leave to appeal against the order of the Full Court made on the appeal referred to in subsection (3) if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made.

(6) Where the person or the extradition country:

(a) applies under subsection (1) for a review of an order;

(b) appeals under subsection (3) against an order made on that review; or

(c) appeals to the High Court against an order made on that appeal;

the following provisions have effect:

(d) the court to which the application or appeal is made shall have regard only to the material that was before the magistrate;

(e) if, because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has been released — the court to which the application or appeal is made may order the arrest of the person;

(f) if:

(i) because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has not been released; or

(ii) the person has been arrested under an order made under paragraph (e);

the court to which the application or appeal is made may:

(iii) order that the person be kept in such custody as the court directs; or

(iv) if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fit;

until the review has been conducted or the appeal has been heard;

(g) if the court to which the application or appeal is made determines that the person is eligible for surrender, within the meaning of subsection 19(2), in relation to an extradition offence or extradition offences — the court shall include in its judgment on the review or appeal a statement to that effect specifying the offence or offences.

22 Surrender determination by Attorney-General

(1) In this section:

eligible person means a person who has been committed to prison:

(a) by order of a magistrate made under section 18; or

(b) by order of a magistrate made under subsection 19(9) or required to be made under subparagraph 21(2)(b)(ii) (including by virtue of

an appeal referred to in section 21), being an order in relation to which no proceedings under section 21 are being conducted or available.

qualifying extradition offence, in relation to an eligible person, means any extradition offence:

(a) if paragraph (a) of the definition of *eligible person* applies — in relation to which the person consented in accordance with section 18; or

(b) if paragraph (b) of the definition of *eligible person* applies — in relation to which the magistrate referred to in that paragraph or the court that conducted final proceedings under section 21, as the case requires, determined that the person was eligible for surrender within the meaning of subsection 19(2).

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;

(b) the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;

(c) where the offence is punishable by a penalty of death — by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out;

(d) the extradition country concerned has given a speciality assurance in relation to the person;

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances — the Attorney-General is satisfied:

(iii) where subparagraph (i) applies — that the circumstances do not exist; or

(iv) where subparagraph (ii) applies — either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

(4) For the purposes of paragraph (3)(d), the extradition country shall be taken to have given a speciality assurance in relation to the eligible person if, by virtue of:

(a) a provision of the law of the country;

(b) a provision of an extradition treaty in relation to the country; or

(c) an undertaking given by the country to Australia;

the eligible person, after being surrendered to the country, will not, unless the eligible person has left or had the opportunity of leaving the country:

(d) be detained or tried in the country for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender other than:

(i) any surrender offence;

(ii) any offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the eligible person could be convicted on proof of the conduct constituting any surrender offence;

(iii) any extradition offence in relation to the country (not being an offence for which the country sought the surrender of the eligible person in proceedings under section 19) in respect of which the Attorney-General consents to the eligible person being so detained or tried; or

(e) be detained in the country for the purpose of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the eligible person's surrender to the first-mentioned country, other than any offence in respect of which the Attorney-General consents to the eligible person being so detained and surrendered.

(5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any qualifying extradition offence, the Attorney-General shall order, in writing, the release of the person.

60 Against that outline of the relevant provisions of the Act, it is now convenient to deal with each of the four main issues raised in the appeals.

(a) The identity question

61 In our view, the primary judge was correct to find that *Kainhofer* precluded acceptance of the appellant's primary argument that a s 19 magistrate had jurisdiction to determine the identity question. There is no utility in repeating her Honour's reasons and analysis set out in [93]-[115] of *Marku (No 1)*, with which we respectfully agree. We would, however, highlight the following matters.

62 First, although the identity issue did not arise in *Kainhofer*, the High Court's reasoning emphasises the limited role and function of the s 19 magistrate. As the primary judge found at [105], *Kainhofer* requires the s 19 magistrate to assume (and not independently determine) that the person on remand is validly remanded and is an extraditable person. The analysis and findings in *Kainhofer* concerning the s 19 magistrate's limited role and function cannot be reconciled with the appellant's contention that the s 19 magistrate has jurisdiction to determine whether the person on remand is the person who has been convicted or accused of the extraditable offence.

63 As the plurality observed in *Kainhofer* at 538-539 (and see also at 541 per Toohey J and at 552 per Gummow J), the question whether a person has been "accused" of an extradition offence for the purposes of s 19(2)(a) and (3)(a) forms part of the question whether the person is an "extraditable person" within the meaning of s 6. The Court held that the s 19 magistrate is neither required nor authorised to determine the issue whether that person is an extraditable

person. Instead, the s 19 magistrate is obliged to proceed on the footing that both the remand order made under s 15 and the s 16 notice, if not invalid *ex facie*, were validly made. The consequence is that, under that administrative sequence of the Act, the question whether the person is an extraditable person is an issue which is committed only to the consideration of the s 12 magistrate and the Attorney-General under s 16.

64 The limited role and function of the s 19 magistrate is further underlined by other findings in *Kainhofer*. Thus, although s 19(2)(a) requires that supporting documents in relation to the offence be produced to the magistrate, the function of the s 19 magistrate is concerned solely with the correspondence between the supporting documents and the description in s 19(3). The s 19 proceedings have to be conducted on the footing that the person is an extraditable person, and the offence in s 19(2)(a) must be taken to be either an offence that the person is accused of having committed or an offence of which the person has been convicted. As the plurality observed at 539, the introductory words of s 19(3)(a) and (b) "merely direct the s 19 magistrate to the relevant description to be applied to the supporting documents in the case of the particular extraditable person who is the subject of the s 19 proceedings", which means that those words "are classificatory rather than having an operative effect" (see Toohey J at 541). The s 19 magistrate is neither required nor authorised by either s 19(2)(a) nor s 19(3)(b) of the Act to determine whether the person on remand is the person who was convicted of the extradition offence evidenced in the authenticated documents.

65 Secondly, we respectfully agree with her Honour's observations at [104] of *Marku (No 1)* concerning the statement made by the Full Court in *Federal Republic of Germany v Parker* (1998) 84 FCR 323 at 343-344 that natural justice may require a s 19 magistrate to consider and determine the question of identity if a person specifically denies that he or she is the person whose extradition is sought. That statement is obiter and is difficult to reconcile with the Full Court's acceptance of the limitations on the s 19 magistrate's role as identified in *Kainhofer*. We also respectfully agree with the primary judge's comments in [104] concerning the limitations in certain observations made on the identity issue in *Von Arnim v Federal Republic of Germany* (1999) 107 A Crim R 529 at [14] per Sundberg J and comments made in a submission by the Attorney-General's Department to the Joint Standing Committee on Treaties, *Inquiry into Australia's Extradition Law, Policy and Practice* (noting for completeness that the appellant placed little if any reliance upon those matters in the appeals).

66 Thirdly, we also respectfully agree with the primary judge's observations at [112]-[113] of *Marku (No 1)* concerning the availability of other remedies if a person maintains that he or she is the victim of mistaken identity. Those available remedies (which arise both under and outside the Act) include the discretionary powers of the Attorney-General to cancel a provisional arrest warrant under s 12(3), to release a person from remand under s 17(1), or to decide not to surrender the person under s 22(2) or s 22(5). We would add that judicial review under s 39B of the *Judiciary Act* is available to review both the issue of a provisional arrest warrant under s 12 and the decision to give a notice under s 16 (see *Kainhofer* at n 22 at 539 and at 541-542 per Toohey J) for jurisdictional error and, where appropriate, error of law on the face of the record.

67 Finally, as to the availability of habeas corpus, it is to be noted that in *Kainhofer* Gummow J considered that habeas corpus would be available to a person who had been wrongfully arrested. His Honour observed at 563:

> Secondly, in respect of aliens present in Australia whose surrender is sought by extradition processes, considerations of personal liberty are at stake. In the classic judgment upon extradition law delivered in the Supreme Court of the United States, the point was made:
>
> > [U]nder our system of laws and principles of government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them.
>
> *Hence, habeas corpus is available to an alien who has been wrongfully arrested, even by order of the Crown*. Is it reasonable to expect that the legislature would express clearly an intention to authorise the executive surrender of such persons, not necessarily for trial, but rather to facilitate enquiries by the proper authorities in the extradition country as to whether a prosecution should be instituted.

(Emphasis added, citations omitted.)

68 Other decisions support Gummow J's view that habeas corpus is available, at least in principle. Indeed, they go further and indicate that that remedy may be available in respect of the issue of identity. Such decisions include *R v Secretary of State for Home Affairs; Ex parte Budd* [1942] 2 KB 14 at 22-23 per Greene MR; *Re Thompson* (1888) 5 Times 540; *Quinn v Robinson* 783 F (2d) 776 at 790 (9th Cir 1986); *Re Nixon and The Queen* (1994) 7 DLR (4th) 104 at 112 per Ontario Court of Appeal; *Re Henry Garbutt* (1891) 21 OR 465 at 472 per MacMahon J and, see generally, Aughterson EP, *Extradition* (Law Book Company, 1995) pp 228 and 277 and Farbey J and Sharpe RJ, *The Law of Habeas Corpus* (3rd ed, Oxford University Press, 2011) pp 70-71.

(b) Is identity a jurisdictional fact?

69 Having regard to our rejection of the appellant's appeal concerning the identity question and the s 19 magistrate's limited jurisdiction, the question whether identity is a jurisdictional fact does not arise. For completeness, however, we respectfully agree with the primary judge's reasons at [116]-[143] for concluding that identity is not a jurisdictional fact. Again, without repeating her Honour's reasons for reaching that conclusion, we emphasise the following matters.

70 First, we agree with Albania's submission that, assuming that the identity issue can be determined by the s 19 magistrate, that issue is not a pre-condition on which the magistrate's jurisdiction to conduct the s 19 proceedings depends. Rather, the issue would arise in the course of the consideration of the exercise of the power to determine whether the person is eligible for surrender under s 19 of the Act. The language and structure of s 19 support that construction. Section 19(1) sets out four pre-conditions to the conduct of proceedings by a magistrate to determine eligibility for surrender. In contrast, s 19(2) defines the circumstances in which a person is eligible for surrender. The circumstances set out in s 19(2) provide the subject matter of the exercise of the power under s 19 and cannot be characterised as "preliminary or ancillary" to the exercise of the power to conduct the s 19 proceeding.

71 Secondly, in our opinion the appellant's argument that the identity issue is a jurisdictional fact fails to give sufficient weight to the indication provided in

s 21(6)(d) of the Act that the legislature intended to impose an evidentiary limitation on appeal proceedings under s 21 of the Act. Section 21 provides for review by a court by way of a rehearing of the s 19 magistrate's determination. Significantly, however, it is subject to an express limitation in s 21(6)(d) which confines the court conducting such a review to have regard only to the materials that were before the s 19 magistrate. We consider that that is a matter which indicates that the identity issue was not intended to be a jurisdictional fact. In our view, it would be incongruous and inconsistent with the scheme of the Act if the criteria in s 19(2) were to be treated as jurisdictional facts, the existence of which could be challenged in judicial review proceedings under s 39B of the *Judiciary Act*, on material that was not before the magistrate. It is not a case of viewing s 21(6)(d) as a kind of privative clause. Rather, consistently with the core proposition that the identification of a jurisdictional fact is fundamentally an exercise of statutory construction, s 21(6)(d) is a relevant matter. Acceptance of the appellant's contention that the identity issue is a jurisdictional fact would subsume the statutory review under s 21 of the Act and render nugatory the associated limitations on that review jurisdiction.

72 Thirdly, it is to be noted that the appellant made clear that it places no reliance on the terms of Art XI of the Treaty in support of its jurisdictional fact argument. That provision is relevantly in the following terms:

> The extradition shall take place only if the evidence be found sufficient, according to the laws of the State applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of the same State, *or to prove that the prisoner is the identical person convicted by the courts of the State which makes the requisition*, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the State applied to …

(Emphasis added.)

73 It is unnecessary for us to express any view about the relevance or otherwise to the jurisdictional fact issue of either that provision or s 11(6) of the Act (which deals with the modification of the Act in relation to certain countries). The appellant made clear that it intended to raise those matters as part of the remaining issues to be dealt with in the ongoing s 21 appeal proceeding before the primary judge.

74 Fourthly, the appellant's claim that identity is a jurisdictional fact relies heavily on the proposition that identity is an issue which implicitly arises under both s 19(2)(a) (ie the stipulation that the person is only eligible for surrender if the supporting documents in relation to the offence have been produced to the magistrate) and the identification in s 19(3) of those supporting documents (including, in particular, the requirement in s 19(3)(b) that there be duly authenticated documents as provide evidence of the conviction). The appellant argues that the reference to the conviction necessarily and implicitly refers to the conviction of the person who is physically before the s 19 magistrate. That contention gives rise to the following difficulties:

(a) it overstates the magistrate's function in respect of those provisions. That function is one which may be properly described as "classificatory" rather than operative, in the sense that the magistrate's role is simply to ensure correspondence between (i) the authenticated supporting documents which are produced, and (ii) the description of those documents in s 19(3). The s 19 proceedings have to be conducted

on the basis that the person the subject of those proceedings is an "extraditable person" within the meaning of s 6. The reference in s 19(2)(a) to "the offence" must be taken to be a reference to either of the matters specified in s 6(a)(i) or s 6(a)(ii), namely an accusation that the person has committed an offence or the person's conviction of an offence. As the plurality stated in *Kainhofer* at 539, the introductory words of s 19(3)(a) and (b) "merely direct the s 19 magistrate to the relevant description to be applied to the supporting documents in the case of the particular extraditable person who is the subject of the s 19 proceedings". They do not entitle the s 19 magistrate to undertake his or her own independent inquiries into the person's identity; and

(b) the appellant's argument treats s 19(3) as though it confers a substantive power, but its essential character is that of a definitional provision. The following observations by Barwick CJ, McTiernan and Taylor JJ in *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635 are apposite:

> The function of a definition clause in a statute is merely to indicate that when the particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense — or are to be taken to include certain things which, but for the definition, they would not include. *Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way …*

(Emphasis added.)

75 Fifthly, the following passage from the joint judgment of Gummow A-CJ and Kiefel J in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [39], although specifically directed to discretionary decision-making as opposed to the performance of the functions of a s 19 magistrate, seem generally apposite to the appellant's attempts here to introduce the notion of jurisdictional facts into s 19(2) and (3):

> Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.

(c) The proposed amendments

76 The appellant's proposed amendments are set out at [21] above. It is to be noted that the central focus of the proposed amendments was directed to the failure to provide a notice under s 16 in respect of the "Plaintiff", ie Valentin Marku, in circumstances where the s 16 notice referred only to Agostin Lleshaj. The proposed amendments did not in their terms make any reference to any connection between the person the subject of the s 16 notice and the person who had been convicted of various extradition offences. As the primary judge noted at [19] of *Marku (No 2)*, the appellant's counsel below confirmed that the proposed amendments went only to the issue of an alleged disconformity or dissonance between the person on remand under s 15 as referred to in s 19(1)(a) of the Act and the person referred to in the s 16 notice.

77 The question whether or not leave to amend should have been granted involved the exercise of a judicial discretion. The appellant needs to establish that that discretion miscarried by reference to the well known principles set out

in *House v The King*. In our view, the appellant has failed to establish any such error. Indeed, we consider that the approach adopted by the primary judge and her reasons for rejecting the proposed amendments were correct.

78 Again, without repeating the primary judge's reasons for refusing leave to amend as set out in [31]-[54] of *Marku (No 2)*, with which we respectfully agree, we would emphasise the following matters. First, as noted above, the focus of the proposed amendments was on the issue whether the s 16 notice was in respect of Valentin Marku within the meaning of s 19(1)(b) or at all. The reference to "the person" in that provision can only be a reference to the person on remand under s 15, as referred to in s 19(1)(a). Likewise, the reference to "the person on remand under s 15" can only be construed as the person who has been arrested under the s 12 warrant. As the primary judge found at [36], *Kainhofer* precludes the s 19 magistrate from determining that the person on remand has not been validly remanded and is not an extraditable person, absent the s 12 warrant being invalid *ex facie*.

79 Secondly, even if the appellant's argument that s 19(1)(b) involves a jurisdictional fact is accepted, that jurisdictional fact is that the s 16 notice was given in relation to the person on remand under s 15. This requires identification of the person on remand under s 15. In this case, the person on remand under s 15 was Valentin Marku. In that context, and for the purpose of establishing that the s 16 notice related to the person on remand under s 15, we agree with the primary judge that evidence constituting the extradition request was admissible. As Albania points out, when giving a notice under s 16, the Attorney-General must form an opinion that the person to whom the extradition request relates is an extraditable person in relation to the extradition country (see s 16(2)(a)). It is therefore permissible and appropriate to review Albania's extradition request dated 12 September 2008 to identify the person in relation to whom the s 16 notice was given for the purposes of s 19(1)(b). The person in relation to whom the s 16 notice is given is necessarily the same as the person in relation to whom the extradition request was made. Albania's extradition request was for the extradition of "Agostin Lleshaj (Lleshi) alias Valentin Marku".

80 Thirdly, the primary judge admitted evidence, which included the extradition request dated 12 September 2008, which had the effect of removing the "dissonance" upon which the proposed amended was premissed. In our view no appellable error has been established in respect of that ruling nor in the primary judge's use of that evidence. The evidence was admissible as being relevant to the question whether the s 16 notice was given in relation to the person on remand under s 15. Admitting the evidence for that purpose did not involve "going behind" the s 16 notice. Rather, the extradition request identified the subject of the s 16 notice, including the person in relation to whom it was given. The extradition request in its terms stated that the name Valentin Marku was an alias for Agostin Lleshaj (Lleshi). The primary judge relied on that evidence for a legitimate and relevant purpose.

(d) Admissibility of evidence etc

81 As noted above, the primary judge ruled that Ms Folie's affidavit and its attachments (which included the extradition request dated 12 September 2008) were admissible in the context of determining the appellant's leave to amend application. We have set out our reasons above why we consider that the

appellant has failed to establish any appellable error in respect of that ruling or the primary judge's use of that evidence in identifying the subject of the s 16 notice.

82 For all these reasons, the appellant's three appeals should all be dismissed with costs. The Court expresses its gratitude to the appellant's legal representatives, who acted *pro bono publico*.

Orders accordingly

Solicitors for the appellant: *DLA Piper*.

Solicitors for the first respondent: *Ashurst Australia*.

SARAH SOMERSET