FEDERAL COURT OF AUSTRALIA

Santhirarajah v Attorney-General (Cth)

[2012] FCA 940

North J

14-16 May, 31 August 2012

Extradition — Political offence — Surrender for — Respondent determined to surrender applicant to United States — Whether s 22(2) of the Extradition Act 1988 (Cth) prescribes a time by which the power to make a determination must be exercised — Whether offences alleged against applicant were "political offences" — Review of authorities — Whether respondent erred in forming satisfaction that applicant would not be subjected to torture on surrender — Misunderstanding of obligation of US under Art 3(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 — Whether respondent's discretion to make determination miscarried — Where respondent relied on assurance by US as adequate protection against applicant being returned to Sri Lanka — Consideration of best interests of applicant's child — Extradition Act 1988 (Cth), ss 5, 7, 22.

The United States of America requested Australia to surrender the applicant, who was a Sri Lankan citizen, to answer charges that he was involved in a conspiracy to export military weapons from the US for the Liberation Tigers of Tamil Eelam (LTTE), to be used in the ongoing war against the government of Sri Lanka in support of a claim for a separate Tamil state. US law had designated the LTTE as a terrorist organisation, and had prohibited the provision of material assistance to the organisation. The respondent Attorney-General made the requested determination to surrender the applicant, and the applicant challenged the validity of that determination on numerous grounds.

Section 22(2) of the *Extradition Act 1988* (Cth) (the Act) provided that the Attorney-General should, as soon as was reasonably practicable in the circumstances, after a person became an eligible person, determine whether the person was to be surrendered in relation to a qualifying extradition offence. Section 22(3) then provided that the eligible person was only to be surrendered if, relevantly: (a) the Attorney-General was satisfied that there was no extradition objection in relation to the offence; (b) the Attorney-General was satisfied that, on surrender to the extradition country, the person would not be subjected to torture; and (f) the Attorney-General, in his or her discretion, considered that the person should be surrendered in relation to the offence.

In relation to s 22(3)(a) of the Act, s 7(a) of the Act provided that there was an "extradition objection" if the extradition offence was a political offence in relation to the extradition country. "Political offence" was further defined in s 5 to mean an offence against the law of the country that was of a political character (whether

because of the circumstances in which it was committed or otherwise, and whether or not there were competing political parties in the country), but expressly excluded certain offences that were not relevant to this case.

In relation to s 22(3)(b) of the Act, Art 3(1) of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*, done at New York on 10 December 1984 (CAT) provided that no state party would return a person to another state where there were "substantial grounds for believing" that he or she would be in danger of being subjected to torture. Although both Australia and the US were parties to the CAT, the test used by Australia to determine the scope of the obligation under Art 3 was whether there was a foreseeable, real and personal risk of torture, while the US interpretation adopted a higher standard of proof for an affected person, requiring the danger to be more likely than not.

In relation to s 22(3)(f) of the Act, Australia was bound in the circumstances by Art 7 of the *International Covenant on Civil and Political Rights 1966*, done at New York on 16 December 1966 (ICCPR) not to extradite the applicant to the US without some protection that he would not be sent back to Sri Lanka after the criminal proceedings had been completed. To this end, Australia relied on an assurance negotiated with the US, whereby it would be given 30 days' notice in which to determine whether to accept the applicant if the US made an order to remove the applicant to Sri Lanka. In addition, in exercising her discretion under that subsection, the Attorney-General considered the best interests of the applicant's child by asking whether his separation from his father was so exceptionally compelling that it outweighed the public interest in giving effect to the US's request for extradition.

Held: (1) On the proper construction of s 22(2) of the Act, once the time stipulated therein has passed, the Attorney-General no longer has the power to make a determination to surrender a person. [73]

(2) The offences with which the applicant was charged are "political offences" within s 5 of the Act. The actions alleged against him were taken in support of the political struggle of the LTTE, with the applicant being at odds with the US over the political issue of support of the LTTE against the government of Sri Lanka in the civil war. The Attorney-General's misconstruction of the expression "political offence" is a jurisdictional error in wrongly concluding that the offences were not political offences. [255], [256], [262]

Consideration of the meaning of "political offence". [148]-[220]

(3) The Attorney-General's power miscarried in relation to the assessment required under s 22(3)(b) of the Act, in that she mistakenly regarded the interpretation of Art 3 of the CAT by the US as the same as the interpretation by Australia. [282]-[283]

(4) The reliance by the Attorney-General on the 30-day assurance as satisfying Australia's obligation under Art 7 of the ICCPR was an error, so that the decision to exercise the general discretion to surrender the applicant was outside the limits of the power conferred by s 22(2) of the Act. [292]-[296]

(5) The law in the UK which was used by the Attorney-General in making a determination requires the best interest of a child to be formulated and then balanced against the importance of extradition, and does not require the decision-maker to ask whether the interests of the child are exceptionally compelling. In asking the wrong question, the Attorney-General committed a jurisdictional error. [320], [323]

Norris v United States (No 2) [2010] 2 AC 487, followed.

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Zentai v O'Connor (No 3) (2010) 187 FCR 495.

ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148.

Application

D Mortimer SC, *G Gilbert*, *M Costello* and *M Albert*, for the applicant.

N Robinson SC and *L De Ferrari*, for the respondent.

Cur adv vult

31 August 2012

North J.

Introduction

1 On 21 February 2012, the respondent, the Attorney-General for the Commonwealth, made a determination under s 22(2) of the *Extradition Act 1988* (Cth) (the Act) to surrender the applicant, Thulasitharan Santhirarajah, who is often referred to in the documents as Mr Santhirajah, to the United States of America. At the same time the Attorney-General issued a warrant under s 23 of the Act for the surrender of the applicant to the US.

2 The applicant is a Sri Lankan citizen. The US requested Australia to surrender the applicant to answer charges that he was involved in a conspiracy to export military weapons from the US. The weapons were to be acquired for the Liberation Tigers of Tamil Eelam (LTTE) to be used in the ongoing war against the government of Sri Lanka in support of a claim for a separate Tamil state. US law designated the LTTE as a terrorist organisation and prohibited the provision of material assistance to the organisation.

Jurisdiction and relief sought

3 The application is brought under s 39B of the *Judiciary Act 1903* (Cth). The applicant seeks an order in the nature of certiorari quashing the determination to surrender.

4 He also seeks an order in the nature of prohibition preventing the Attorney-General from executing the surrender warrant, or an order permanently staying the surrender warrant.

5 Further, the applicant seeks declarations that the determination to surrender was not authorised by the Act, that the surrender warrant is invalid and of no effect, that the Attorney-General is required to direct the release of the applicant, that the warrant of imprisonment under s 19(9) of the Act be permanently stayed, and that the applicant's detention from 5 August 2010 was unlawful.

The extradition process from July 2008 until February 2012

6 A concerning aspect of this case is that the applicant has been in detention for more than four years since the first steps were taken against him under the Act. A short description of those actions will now be set out, but, so far as is necessary, they will be more fully considered in relation to specific grounds of the application later in these reasons.

7 On 11 July 2008, the US made a provisional request to Australia for the extradition of the applicant for six offences against US law.

8 On 14 July 2008, the applicant was provisionally arrested in Australia in response to the request of the US and remanded in custody pending receipt of a formal extradition request.

9 On 5 September 2008, the US presented a formal extradition request, and on 10 September 2008, the Attorney-General signed a notice under s 16 of the Act stating that a formal request for the extradition of the applicant had been received from the US.

10 Then, on various dates between 24 February 2009 and 12 May 2009, a Victorian magistrate, Mr B FitzGerald, conducted a hearing under s 19 of the Act to determine whether the applicant was eligible for surrender in relation to the six offences.

11 On 10 June 2009, the magistrate found that the applicant was eligible for surrender for four of the six offences.

12 The applicant decided not to challenge the s 19 decision of the magistrate. He waited from 10 June 2009 for a decision from the Attorney-General whether to surrender him to the US.

13 At that time, and for the next two and a half years, Mr Robert McClelland was the Attorney-General. On 14 December 2011, the present Attorney-General, Ms Nicola Roxon, took office.

14 The applicant sent written submissions and other correspondence to the Attorney-General on or about 17 July 2009, 24 July 2009, 7 August 2009, 2 September 2009, 26 February 2010, 1 April 2010 and 12 August 2011.

Through this correspondence, the applicant repeatedly sought an indication of when the surrender determination would be made. In the absence of a decision from the Attorney-General, on 14 December 2011, the applicant filed an application for mandamus to compel the Attorney-General to make a determination whether to surrender the applicant to the US. Within that proceeding, an application for interlocutory release was to be heard by the Court on 22 February 2012. However, on the day before the anticipated hearing, the recently appointed and present Attorney-General determined to surrender the applicant. The mandamus proceeding was then discontinued, and this proceeding challenging the determination to surrender was filed by the applicant.

The relevant legislative provisions

15 Section 22(2) of the Act provides:

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

(Emphasis added.)

16 Section 22(3)(a), (b) and (f) of the Act provides:

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

(Emphasis added.)

17 Section 7(a) of the Act provides:

> For the purposes of this Act, there is an *extradition objection* in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:
>
> (a) the extradition offence is a *political offence* in relation to the extradition country;

(Emphasis added.)

18 Section 5 provides the following definition:

> *political offence*, in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

Then follows a list of offences which is set out later in these reasons at [237]. These offences are thus expressly excluded from being regarded as political offences.

The grounds of the application

19 The applicant contends that the Attorney-General fell into jurisdictional error by:

a. making the determination after the time when, under s 22(2), it was "as soon as is reasonably practicable" to do so. On the proper construction of s 22(2) there was no power to make the determination to surrender the applicant after that time.

   This ground will be referred to as *the power to determine issue*.

b. forming her satisfaction under s 22(3)(a) that there was no extradition objection in relation to the four offences when there was an extradition objection in relation to the offences because they are political offences within the meaning of ss 7(a) and 5.

   This ground will be referred to as *the political offence exception issue*.

c. forming her satisfaction under s 22(3)(b) that the applicant will not be subjected to torture in that she misunderstood that the obligation of the US under Art 3 of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*, done at New York on 10 December 1984 (CAT) was different from the obligation undertaken by Australia.

   This ground will be referred to as *the torture issue*.

d. relying, in the exercise of her general discretion under s 22(3)(f), on the assurance given by the US that it would give Australia 30 days notice of the applicant's removal when that assurance did not address the dangers of torture and/or cruel, inhuman or degrading treatment or punishment faced by the applicant.

   This ground will be referred to as *the 30-day assurance issue*.

e. asking the wrong question in considering the best interests of the applicant's son in the exercise of her general discretion under s 22(3)(f).

   This ground will be referred to as *the best interests of the child issue*.

f. denying the applicant procedural fairness.

   This ground will be referred to as *the procedural fairness issue*.

20 After explaining some matters concerning the evidence which was before the Court on the application, each of these grounds will be addressed.

Issues concerning the evidence before the Court

21 Two affidavits sworn, one on 7 March 2012 and the other on 2 May 2012, by Marie Costa, the solicitor for the applicant, were filed on behalf of the applicant. The affidavits mainly annex documents relied upon by the applicant which were disclosed by the Attorney-General to the applicant in compliance with orders for discovery made by the Court.

22 An affidavit affirmed on 11 May 2012, by Anastasia Harmer, Assistant Secretary of the International Crime Cooperation Central Authority in the Attorney-General's Department (the Department), was filed on behalf of the Attorney-General.

23 Two issues arise from the annexures to Ms Costa's second affidavit. Each of these issues will be dealt with later in these reasons in connection with the ground to which it relates.

24 One issue is an objection by the Attorney-General to the use of certain documents on the ground that the particular document is not relevant to any issue before the Court because it was not before the Attorney-General when she made the determination to surrender.

25 The other issue concerns annexure MAC12, which is one of the discovered documents referred to in [21] above. It is a briefing paper dated 15 February 2012, prepared by the Department. The briefing paper has an introductory page and nine attachments. Attachment E is a 53 page legal advice (the legal advice) explaining the Department's view of the legal issues to be addressed by the Attorney-General. On the single introductory page, which outlines the facts in a general way, there is a paragraph referring to the departmental advice as follows:

> *Attachment E*. The Department considers that it is open to you to be satisfied that the requirements of section 22 for surrendering Mr Santhirajah to the US are met and that you may consider that Mr Santhirajah should be surrendered to the US for the extradition offences.

26 At the foot of the introductory page the author, Ms Harmer, wrote under the heading "Recommendation":

> I recommend that:
>
> (i) you read the advice at Attachment E and determine under subsection 22(2) of the Act that Thulasitharan Santhirajah be surrendered to the US;

27 Immediately beneath the recommendation, the document provides the Attorney-General with three options, namely, "Approved / Not Approved / Discuss". The Attorney-General has circled the word "Approved" and signed and dated the page where provided.

28 On 21 February 2012, when the Attorney-General made the determination to surrender the applicant, and also a few days later, the solicitor for the applicant requested that the Attorney-General provide reasons for her determination to surrender the applicant. Ms Harmer responded, first on 21 February 2012, by observing that s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which permits a person to request reasons for an administrative decision, does not apply to the determination to surrender by virtue of the operation of para (r) of Sch 1 to that Act. Then, in a letter dated 27 February 2012, Ms Harmer advised the solicitors for the applicant that the Attorney-General was not obliged by any statute or the common law to provide reasons for her determination to surrender the applicant, and that the practice of the Attorney-General was not to provide detailed reasons for her decision.

29 The issue which arises is whether the Court can infer that the briefing paper, and in particular, the reasoning in the legal advice, represents the reasoning of the Attorney-General. The applicant contended that the Attorney-General's approval of the legal advice, in the absence of evidence that it was questioned or discussed, supported an inference that the recommendations and reasons it contained had been wholly accepted. This follows from the circumstance that the briefing paper was discovered pursuant to orders of the Court made on 15 March 2012 which required the Attorney-General to disclose all material on which she had made her decision. It was common ground that the inference to be drawn was a question of fact: *Brock v Minister for Home Affairs* [2010] FCA 1301 (Foster J at [73]); *Zentai v O'Connor (No 3)* (2010) 187 FCR 495 at [92].

30 Because any inference depends upon the contents of the advice which are considered in detail in respect of each ground, that question will be addressed in the context of the particular grounds to which it relates.

The power to determine issue

The applicant's submissions

31 This issue involves a question as to the proper construction of the phrase "shall, as soon as is reasonably practicable, having regard to the circumstances … determine" as used in s 22(2). On the applicant's argument the issue also raises a question of fact, namely, whether the Attorney-General made the determination as soon as was reasonably practicable having regard to the circumstances.

The construction question

32 The applicant submitted that the phrase "shall, as soon as is reasonably practicable, having regard to the circumstances" in s 22(2) prescribes a time by which the power conferred by that section must be exercised. In order to determine the consequences of a failure to exercise the power within that time the Court must consider the purpose of the provisions, having regard to the language of the section and the scope and object of the Act: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) at [93]. Applying that approach, the section should be construed to mean that compliance with the time prescribed is a condition of the exercise of the power. The time limitation constrains the way in which the power must be exercised. Consequently, so it was submitted, if a determination is not made at the prescribed time then the power to make a determination ceases. The power cannot be exercised after the time when it was as soon as was reasonably practicable having regard to the circumstances.

33 The power in s 22(2) is an example of the type of authority described by Brennan CJ in *Project Blue Sky* at [34]:

> … The authority conferred on the repository of a general power cannot be exercised in conflict with a provision which governs the manner of its exercise; the constraint on the exercise of the power defines the ambit of the power granted. A purported exercise of a power in breach of the provision which governs the manner of its exercise is invalid, since there is no power to support it.

(Footnotes omitted.)

34 The applicant referred to an example of such a construction in *David Grant & Company Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265. The provision under consideration in that case was s 459G(1) of the *Corporations Law* which provided that an application to set aside a statutory demand served on a company "may only be made within 21 days after the demand is so served". Gummow J (with whom Brennan CJ, Dawson, Gaudron and McHugh JJ agreed) said at 277:

> Here, the phrase "[a]n application may only be made within 21 days" should be read as a whole. The force of the term "may only" is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s 459G. An integer or element of the right created by s 459G is its exercise by application made within the time specified.

35 The applicant also argued that by reason of the delay the Attorney-General had abdicated or abandoned the exercise of the power to make a determination. Counsel relied on the following statement made by Gummow J in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [41] (*NAIS*):

> Delay may be such as to show that there has been an abdication or abandonment of the statutory function to proceed in the matter.

36 This argument seems conceptually different from the argument that the power is conditioned upon exercise at a particular time. This argument was not developed and it is not, at first sight, clear how it applies to the circumstances of this case.

37 The applicant also contended that the time when it was as soon as reasonably practicable to exercise the power must be assessed objectively. The phrase "having regard to the circumstances" is a reference to the circumstances assessed objectively. The Attorney-General cannot delay a determination simply because it suits her to make the determination later, if, objectively assessed, there was an earlier time at which it was as soon as reasonably practicable to make the determination. The applicant relied on the judgment of Tadgell JA (with whom Ormiston JA agreed) in *Royal Society for the Prevention of Cruelty to Animals (Vic) Inc v Marson Constructions Pty Ltd* (2000) 1 VR 274 (*RSPCA v Marson Constructions*), where it was said at [5] in relation to an arbitration clause in a building contract:

> I cannot agree in any event that an obligation such as that imposed by the arbitration clause to take a step as soon as reasonably practicable contemplates that the step may be taken as soon as may be reasonably practicable for the convenience of the person bearing the obligation.

38 The applicant contended that this construction reflects the purpose of the Act. The process of extradition under the Act affects the liberty of the person and, where a person is surrendered, the operation of the Act results in an alteration in the course of the person's life. A construction should be adopted which limits the restriction on the liberty of the person and the intrusion into the course of the person's life.

39 The applicant argued that the intention of Parliament to limit the restriction on the liberty of a person sought for extradition is demonstrated by the limited periods of time stipulated by the Act for the taking of steps in the extradition process. Further, where expressions similar to the expression under consideration are used, the context shows that the period in mind is short. Thus, at the start of the process where a person is arrested under a provisional arrest warrant that person must be brought before a magistrate as soon as practicable (s 15(1)). This, it was said, would not be intended to refer to a period of years. The process commences with the requirement of swift action.

40 Section 16(3) then provides that as soon as practicable after a person is remanded under s 15 or a notice is given by the Attorney-General stating that an extradition request in relation to the person has been received, whichever is later, the person is to be provided with a copy of the notice and supporting documents such as the arrest warrant or proof of conviction.

41 Further, unless the period is modified under the regulations, a person remanded in custody for 45 days and in relation to whom a notice under s 16(1) has not been given by the Attorney-General must be brought back before a magistrate to consider whether the person should be released (s 17(2)).

42 The magistrate must give the parties a reasonable time to prepare for the hearing under s 19 which is held to determine whether the person is eligible for surrender (s 19(1)(d)).

43 Any review of the magistrate's order must be made within 15 days after the

date of the order (s 21(1)). No appeal from the review may be made more than 15 days after the date on which the order concluding the review is made (s 21(4)), and no grant of special leave to appeal may be given by the High Court if the application is made more than 15 days after the judgment on appeal.

44 The next step in the process is the Attorney-General's consideration whether to surrender the person. It is here that the limit prescribed by s 22(2) presently under consideration operates.

45 Finally, where a surrender warrant is issued in relation to a person and that person, having been held in custody for more than two months under the warrant applies to this Court or the Supreme Court of the State or Territory in which they are detained, the Court must order that person's release from custody unless there is reasonable cause to continue the detention (s 26(5)).

46 The applicant contended that this review of the statutory scheme, of which s 22 is part, demonstrates that when each stage of the extradition process is completed the next stage is engaged without delay.

47 The applicant then argued that the construction of s 22(2) urged by the Attorney-General does not reflect the purpose of the section having regard to the language of the section and the scope and object of the Act. The Attorney-General's construction postulates that the phrase in question establishes the time from which mandamus becomes available to a person to bring proceedings in court to enforce the duty of the Attorney-General to make a determination. Counsel for the applicant observed that in order to bring mandamus proceedings people held in custody need to know of the right to bring the proceeding, have contact with lawyers to represent them, and have funds to engage that professional assistance. The circumstances which result in people being in custody mean that often they will not have the knowledge or means to bring mandamus proceedings. Consequently, in the applicant's submission, it is more likely that the power to surrender was intended to cease if not exercised as soon as was reasonably practicable having regard to the circumstances.

The issue of fact

48 The applicant contended that the following facts established that the Attorney-General did not make the determination as soon as was reasonably practicable having regard to the circumstances.

49 On 11 June 2009, which was the day after the magistrate remanded the applicant following the s 19 hearing, the Department wrote to the applicant setting out his right to apply for a review of the magistrate's decision. That letter also stated that, if no review was instituted, then, by 3 July 2009, the applicant was to provide any representations to the Attorney-General explaining why the applicant should not be surrendered. On 16 June 2009, the solicitors for the applicant wrote back complaining about the shortness of time allowed to provide representations. On 26 June 2009, the applicant's solicitors notified the Department that the applicant would not be instituting a review of the magistrate's decision, and they reiterated their complaint about the short period of time to provide representations to the Attorney-General. They asked for six weeks in which to make those representations. The Department replied on the same date, in part saying:

> Section 22(2) of the *Extradition 1988* (Cth) Act requires the Attorney-General to

> determine whether a person is to be surrendered as soon as is reasonably practicable. You have not provided any reasons why you consider an additional six weeks is required to make representations. In these circumstances, and given that your client has been in custody since 14 July 2008, any representations should be provided by close of business Friday 17 July 2009; that is three weeks from today.

50 On 17 July 2009, the applicant's solicitors forwarded to the Department a lengthy written submission together with a statement from the applicant's wife. The written submission stated that if the applicant was returned to Sri Lanka by the US he would be subjected to torture. Consequently, the Attorney-General could not be satisfied as required by s 22(3)(b) that he would not be subjected to torture and could not determine to surrender him to the US. On 24 July 2009 and 7 August 2009, further material was provided by the applicant's solicitors to the Department, including an ongoing petition from members of the Tamil community in Australia in support of the applicant. The remainder of the petition was forwarded to the Department on 2 September 2009, together with a statement of the applicant and submissions in support of that statement.

51 On 10 August 2009, and again on 10 September 2009, the Department wrote to the US Department of Justice and apparently raised the claimed danger of torture faced by the applicant if he were returned to Sri Lanka. The US Department of Justice sent a reply dated 14 September 2009 which included:

> I hope that this response provides adequate assurance that Mr. Santhirajah will be afforded all protections provided under the laws of the United States should he be extradited as ordered.
>
> First, Mr. Santhirajah contends that should he be extradited to the United States to stand trial on the charges brought against him, he will ultimately be sent back to Sri Lanka, where he will be subject to torture and reprisal. This contention is speculative at best. There has been no indication from Sri Lankan authorities to date of any interest in Mr. Santhirajah. The hostilities between the Sri Lankan government and the Liberation of Tigers of Tamil Eelam [sic] ("LTTE") have ended, and a period of reconciliation has begun. Mr. Santhirajah, if he is brought to the United States, faces a lengthy sentence of incarceration should he be convicted. He would not be deported until the completion of his sentence. Should he be acquitted, his return to Sri Lanka would occur much sooner.
>
> Prior to any deportation from the United States to Sri Lanka, Mr. Santhirajah would be afforded administrative review of his status. The regulations governing administrative review of alien removal proceedings is found in 8 U.S.C. Section 1228 of the Immigration and Naturalization Act (INA). Among the rights afforded an individual pending removal is an opportunity to present evidence of "credible fear." Mr. Santhirajah would be permitted an opportunity to establish that he would be subjected to torture if returned to Sri Lanka. If he establishes a valid claim of "credible fear," his removal from the United States could be deferred under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") and Section 241(b)(3) of the INA. Mr. Santhirajah would also have the opportunity to seek permission from a country other than Sri Lanka to accept him after he is deported from the United States.
>
> In summary, there exist safeguards and due process rights within the deportation process to protect aliens subject to removal from the United States. Mr. Santhirajah will be afforded these protections if he is extradited to the United States as requested. His concerns would be fairly adjudicated before he is subject to deportation after his case and/or sentence has been completed.

52 In the submission dated 17 July 2009, the applicant's solicitors also referred to Australia's obligation under Arts 6 and 7 of the *International Covenant on Civil and Political Rights 1966*, done at New York on 16 December 1966 (ICCPR) which respectively provide that every human being has a right to life and no person shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. On 9 November 2009, the US Department of State advised the Department that the US did not regard the ICCPR as creating any non-refoulement obligation on the US.

53 In March 2010, on advice from his Department, the Attorney-General wrote to, Senator Evans, who was then the Minister for Immigration and Citizenship, in the following terms:

> … Santhirarajah has made detailed representations to me as to why he should not be surrendered to the United States. In particular, Santhirarajah submits that if he is surrendered to the US, he will eventually be deported to Sri Lanka, as he has no right of entry to the US or Australia. Santhirarajah argues that Australia has a *non-refoulement* obligation not to surrender him to the US, as he will face a real risk of torture (contrary to Article 3 of the *Convention Against Torture*), as well as a risk of cruel, inhuman and degrading treatment (contrary to Articles 6 and 7 of the *International Covenant on Civil and Political Rights*) upon his eventual deportation to Sri Lanka.
>
> Australia's *non-refoulement* obligations extend to considering the risk of impermissible treatment in any State to which Santhirarajah may subsequently be expelled, returned or extradited from the US. [Text redacted] Santhirarajah's representations raise an issue which may preclude his surrender under section 22 of the Extradition Act. It is therefore necessary to address this issue prior to my determination as to whether to surrender Santhirarajah to the United States.
>
> [Text redacted] I am seeking your agreement on the text of this assurance as any decision regarding an appropriate visa on which Santhirarajah will be able to re-enter Australia will rest with the Minister for Immigration and Citizenship.

(Redacted in the copy in evidence.)

54 On 5 August 2010, Senator Evans agreed with the proposal suggested by the Attorney-General. The text of the draft assurance agreed to by Senator Evans was redacted in the material before the Court.

55 It seems that on 9 September 2011, the US provided a diplomatic note assuring Australia that the US would fully comply with any applicable US international legal obligations, including the obligation under Art 3 of the CAT not to return a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

56 On 14 December 2011, the applicant filed an application for mandamus to compel the Attorney-General to make a determination under s 22(2). An application for interlocutory relief in that proceeding, including a claim for release from custody, was fixed for hearing for 22 February 2012.

57 On 1 February 2012, the US agreed to provide a further assurance (the 30-day assurance), the terms of which were set out in a departmental advice dated 3 February 2012 as follows:

> [T]he United States assures Australia that it will notify Australia when the United States files a charging document in immigration court, to initiate immigration proceedings, with respect to Mr. Santhirajah. Further, upon entry of a final order of removal for Mr. Santhirajah, the United States will request that Australia accept Mr. Santhirajah's return to Australia. The United States will afford Australia a period of 30 days in which to consider whether Australia will accept

> Mr. Santhirajah's return to Australia. If Australia agrees to accept Mr Santhirajah's return within that time period, the United States will return Mr Santhirajah to Australia. If Australia does not provide a response by the conclusion of the 30-day period, the United States will take Australia's silence as a refusal to accept Mr. Santhirajah's return to Australia.

58 This assurance was conditional upon Australia providing a reciprocal assurance the terms of which were also set out in that departmental advice as follows:

> Australia assures the United States that, upon notification by the United States of a final order of removal with respect to Mr. Santhirajah, Australia will determine within 30 days whether or not to accept Mr Santhirajah's return. Australia understands that it will make a determination of whether or not to accept Mr Santhirajah without the United States stating whether Mr. Santhirajah sought or obtained protection or relief from removal, to any country, in U.S. immigration court.

59 The written advice provided by the Department to the Attorney-General on 3 February 2012 recommended that she agree to the exchange of the proposed assurances. The advice also recommended that the Attorney-General undertake to the Court at the forthcoming interlocutory hearing in the mandamus proceeding that she would make a determination under s 22(2) by 21 March 2012, that is, four weeks after the date of the proposed interlocutory hearing. The Attorney-General accepted that advice. Having taken up office on 14 December 2011, the present Attorney-General, not surprisingly, wrote on the departmental advice "Given this case is complex and has been running for over three years, I don't appreciate being told it is now urgent. Please ensure significant assessment time for the final submissions".

60 On about 15 February 2012, the Department provided the Attorney-General with the legal advice which she accepted on 21 February 2012, and which was the basis for her determination under s 22 made on that day.

61 Against that background of events, the applicant contended that 5 August 2010 was the time when it was as soon as was reasonably practicable to make the determination. This was the date on which Senator Evans agreed that his Department would entertain any request by the US that Australia accept the applicant back from the US either at the end of any period of imprisonment if he were convicted and imprisoned, or, earlier, if he were acquitted.

62 The applicant contended, alternatively, that 9 September 2011 was the time when it was as soon as was reasonably practicable to make the determination. This was the date when the US provided the note assuring Australia that it would honour its international legal obligations including under Art 3 of the CAT. Indeed, the US had indicated this same position as early as 14 September 2009 when it wrote to the Department outlining the immigration process which would apply to the applicant.

63 Then, in reply, the applicant argued that where there is unreasonable delay in the process leading to the making of a determination it cannot be said that the determination was made as soon as was reasonably practicable. In September 2009, it was known that the US would comply with its obligations under the CAT, and by November 2009, it was known that the US disclaimed any non-refoulement obligation under the ICCPR. Despite this knowledge the agreement of Senator Evans was not sought until March 2010. There was no evidence that the Department had pressed the Department of Immigration and

Citizenship for a response to its letter before the reply was received in August 2010. It was argued that the delay between November 2009 and August 2010 was unreasonable. The applicant compared that period of time with the 30-day period in which Australia would, in accordance with its assurance to the US, respond to any request by the US to admit the applicant into Australia. The delay also stood in contrast to the speed with which the determination was made in the face of the impending interlocutory application in the mandamus proceeding scheduled for 22 February 2012. Seen against the capacity to act expeditiously in those circumstances, the delay in making the determination under s 22(2) demonstrates that it was not made as soon as was reasonably practicable having regard to the circumstances of this case.

The Attorney-General's submissions

The construction question

64 The Attorney-General submitted that the power to make a determination under s 22(2) does not cease after the time when it was as soon as was reasonably practicable having regard to the circumstances to make the determination. After that point, a determination may be made at any time. The power to do so remains. If the power is not exercised after that time, an application for mandamus is available to enforce the exercise of the power.

65 The Attorney-General argued that the applicant's construction requires the Court to read into s 22 a further provision such as:

> If, as a matter of fact at a particular time, it had become reasonably practicable, having regard to the circumstances, to make a determination whether to surrender the person, and the Attorney-General had not made a determination, the Attorney-General is taken to have made a determination not to surrender the person.

66 The Court, it was said, should not read words into the provision. The task of the courts is to ascertain what Parliament meant by the words it used, not to determine what Parliament intended to say: *R v Young* (1999) 46 NSWLR 681 at [5] per Spigelman CJ.

67 Further, the Attorney-General contended that the applicant's construction would frustrate one purpose of the Act, namely, to give effect to Australia's obligations under extradition treaties.

68 The Attorney-General submitted that what Gummow J said in *NAIS* does not assist the applicant because his Honour postulated that mandamus would be available in cases where a power had been abdicated or abandoned. Further, in *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service* [1980] 1 WLR 302 to which Gummow J referred, the House of Lords made declarations which assumed the continued existence of the power.

The issue of fact

69 If, contrary to the Attorney-General's construction, it is necessary to establish that the determination was made as soon as was reasonably practicable having regard to the circumstances, then the Attorney-General contended that it only became reasonably practicable for her to make the determination when she received the briefing paper from the Department following the exchange of reciprocal assurances which occurred on 10 February 2012.

70 The circumstances in which Australia and the US agreed to reciprocal

assurances were set out in the 3 February 2012 advice from the Department which sought the agreement of the Attorney-General to the reciprocal assurances as follows:

> 4. … On 1 February 2012 officer-level discussions concluded on a formula for diplomatic assurances which ensure Australia would be afforded an opportunity to assess its obligations to Mr Santhirajah at the conclusion of the US criminal process while remaining compatible with US immigration processes. If the US gave Australia an assurance in the terms proposed, it would enable you to be satisfied the [sic] Mr Santhirajah's surrender would not be in breach of Australia's international law obligations and facilitate your consideration of the substantive extradition issue.
> 5. It has not been possible to finalise the matter for your consideration earlier due to the *non-refoulement* issues noted above. If you agree to the exchange of the proposed diplomatic assurances, the Department anticipates that the exchange of the assurances may be completed by 8 February 2012.

71 Counsel for Attorney-General also relied on the assertion in Ms Harmer's affidavit that "the respondent was not in a position to make a decision prior to receipt of advice from the Department". That advice was received on 15 February 2012.

72 In order to demonstrate the reason for the delay Ms Harmer also listed approximately 150 communications between the US and Australia between 10 August 2009 and 14 February 2012 in respect of the determination to surrender the applicant. Public interest immunity was claimed over the substance of these listed communications.

Consideration

The construction question

73 It must be acknowledged that the contending constructions of the phrase "shall, as soon as is reasonably practicable, having regard to the circumstances … determine", raise a finely balanced question. In the end, the preferable construction is that advanced by the applicant, namely, that once the time stipulated by the section has passed, the Attorney-General no longer has the power to surrender a person under s 22(2).

74 The starting point for the consideration of the construction is the ordinary and natural meaning of the language of the section. There are four elements in the expression of the section which point to a meaning that if the power is not exercised within time it ceases to exist. First, the section specifies a time limitation. Second, that limitation is expressed emphatically — "as soon as". Third, the limitation is provided with a degree of flexibility — "reasonably practicable". By providing the Attorney-General with some leeway, this element suggests that the power is intended to be exercised without delay once circumstances, objectively assessed, render it reasonably practicable to do so. Finally, the word "shall" construed in the context of the Act, ought to be given its ordinary prescriptive meaning. As Byrne J said in *Re Griffiths* [1991] 2 Qd R 29 at 33:

> In legislation, "shall" ordinarily signifies must. But like all words, its meaning takes colour from its context. A general disposition in favour of construing "shall" as obligatory cannot prevail over other considerations plainly evidencing a contrary legislative intent.

The purpose, scope and object of the Act discussed below at [76] support the view that "shall" is used to oblige the Attorney-General to exercise the power within the stipulated time and at no other time.

75 Contrary to the Attorney-General's submission, this construction does not depend on adding words to the section to the effect that, after the expiration of the period stipulated, the power may not be exercised. Rather, the construction advocated by the Attorney-General would require the addition of words such as "failure to comply with the time limit does not invalidate any exercise of the power to surrender". Such saving clauses are not uncommon, but no such clause is included in this section. An example of such a saving clause is found in s 175 of the *Income Tax Assessment Act 1936* (Cth) which was considered in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 and which provides:

> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

76 The purpose, scope and object of the Act also support the construction of s 22(2) advanced by the applicant. The extradition process intrudes into the life and liberty of people sought for surrender. The applicant's submissions highlight the attempts made in the Act to ensure the process is speedy. One purpose of this approach is to provide a reasonable limit on the intrusion into the life and liberty of people sought for surrender. In respect of an earlier form of s 21 which limited the time for commencement to apply for a review of a decision of a magistrate on eligibility under s 19 to 15 days, Wilcox J in *Prevato v Governor, Metropolitan Remand Centre* (1986) 8 FCR 358 (*Prevato*) said at 363:

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

(Emphasis added.)

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

78 Of course, the Act has more than one purpose. It also aims to promote compliance with Australia's extradition relationships with other states in order to ensure that criminal conduct subject to the jurisdiction of the requesting state is dealt with under the processes of that state. The Attorney-General argued that this purpose is weakened if the power to surrender ceases to exist after the timeframe limit specified in s 22(2) has passed. On the construction advocated by the Attorney-General, the time "as soon as is reasonably practicable, having regard to the circumstances" marks the moment from which the Attorney-General has a duty to make the determination and from which time mandamus

will lie to enforce that duty at the suit of the person sought. In that way, so it was said, the rights of people sought for surrender are protected whilst the purpose of cooperating in countering criminal conduct is also served.

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

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

80 Against this potential injustice must be balanced the consequence to Australia's extradition arrangements with other states which might result from the Attorney-General losing the power to make a determination as a result of failing to act as soon as was reasonably practicable having regard to the circumstances. That consequence, however, is in the hands of the Attorney-General. It may be avoided by the Attorney-General acting in accordance with the time limitation stipulated in s 22(2).

The issue of fact

81 It must now be determined whether, as the applicant contended, the Attorney-General lost the power to determine whether to surrender the applicant because the determination was not made as soon as was reasonably practicable having regard to the circumstances after the applicant became an eligible person.

82 It was common ground that the assessment whether the determination was made within time is to be determined objectively.

83 It should also be accepted, as the applicant contended, that an unreasonable delay between the date when a person is found by a magistrate to be an eligible person and the date when the Attorney-General makes a determination to surrender the person is evidence that the determination to surrender was not made as soon as was reasonably practicable having regard to the circumstances within the meaning of s 22(2).

84 Using this approach, the following findings of fact are made. On 10 June 2009, the magistrate found the applicant to be an eligible person. On

21 February 2012, the Attorney-General determined to surrender the applicant to the US. This was a period of about two years and eight months. The applicant was in custody throughout this period.

85 Immediately after the magistrate's decision, the Department pressed the applicant to provide any representations to the Attorney-General explaining why he should not be surrendered, and forced him to respond within tight time limits contrary to the requests of his solicitors. In compliance, his solicitors submitted a lengthy submission and other material on 17 July 2009, and further material on 24 July 2009 and 7 August 2009.

86 The Department acted quickly to obtain the response of the US to the applicant's representations. By 9 September 2009, the US Department of Justice responded that it would comply with its obligations under the CAT including its non-refoulement obligation under Art 3, and by November 2009, the US Department of Justice indicated that the US did not accept that it had a non-refoulement obligation under Arts 6 and 7 of the ICCPR.

87 On 14 December 2011, the applicant filed the mandamus proceeding in this Court. An interlocutory application was listed for hearing on 22 February 2012. On 1 February 2012, the US agreed to the two assurances. On 3 February 2012, the Attorney-General was provided with advice from the Department which recommended that she accept the assurances. On the same day she agreed to accept the assurances.

88 On 15 February 2012, the Department provided the legal advice to the Attorney-General. She accepted that advice on 21 February 2012, and on the same day made the determination to surrender the applicant to the US. That was the day before the interlocutory application was to be heard.

89 Thus, more than two years — from November 2009 to February 2012 — went by between the time that the Department became aware of the US position in relation to its obligations under the CAT and ICCPR and the time when the Attorney-General made the determination to surrender. At the end of that period the only developments were that the undertaking concerning the US obligations under the CAT was transformed into an assurance rather than a diplomatic note, and, in relation to the ICCPR issue, a formal assurance was given that the US would give Australia notice of the commencement of immigration proceedings and 30 days notice of its intention to remove the applicant from the US.

90 Then, in the approximately two months between 14 December 2011, when the mandamus proceeding was filed, and 21 February 2012, when the determination to surrender was made, the US had offered the assurances, the Attorney-General had agreed to them, the Department had provided a very substantial briefing paper including the legal advice relating to the making of the determination, and the Attorney-General had accepted that advice.

91 Once the applicant established these facts, the evidentiary onus shifted to the Attorney-General to show that the determination was made within time. The evidence of Ms Harmer of the list of 150 communications between the US and Australia in this period prove only that they happened. They were described to be "in respect of the determination" but there was no evidence of the subject matter of the exchanges. The limited evidence concerning the communications was not capable of rebutting the evidence of delay. The only other rebutting evidence was the conclusory statement in the affidavit of Ms Harmer that the Attorney-General was not in a position to make a decision prior to the receipt of advice from the Department. But that assertion only provokes the question why

the advice was not available two years earlier. This evidence did not displace the evidence of delay and did not discharge the evidentiary onus which then rested on the Attorney-General.

92 On the facts found it should be concluded that there was unreasonable delay by the Attorney-General in making the determination to surrender the applicant. As early as 9 September 2009, Australia knew the US view on its obligations under Art 3 of the CAT. The 30-day assurance provided on 1 February 2012 was purely procedural and did not sufficiently enhance the protection afforded to the applicant to justify a delay of around two years. The swiftness with which the events moved between December 2011 and February 2012, against the background of the impending mandamus hearing, is testament to the pace which was available when the Attorney-General was prepared to act as soon as reasonably practicable.

93 On the evidence before the Court, in or about November 2009, was the time when it was as soon as reasonably practicable having regard to the circumstances for the then Attorney-General, Mr McClelland, to make the determination whether to surrender the applicant. The ordinary meaning of the expression "as soon as" is immediately after. The period of time within which the requisite immediacy exists is not precisely expressed and is a matter to be determined on the facts of each case. As Tadgell J observed at [2] in *RSPCA v Marson Constructions*, "there will in any case be room for debate as to when that point has been reached". In the present case, the evidence supports a finding that the determination whether to surrender was made some two years after it first became reasonably practicable to do so. In those circumstances, it is not necessary to determine exactly when the period of immediacy came to an end. It had long passed when the determination was made.

Conclusion

94 On the proper construction of s 22(2) the power to make a determination to surrender an eligible person ceases if it is not made as soon as is reasonably practicable having regard to the circumstances. As a matter of fact in this case the determination to surrender the applicant to the US was not made as soon as was reasonably practicable having regard to the circumstances. Hence, the Attorney-General did not have power on 21 February 2012 to make the determination to surrender the applicant to the US. The applicant is entitled to a declaration to that effect.

The political exception issue

Introduction

95 It will be recalled that an eligible person may only be surrendered if the Attorney-General is satisfied that there is no extradition objection in relation to the offence (s 22(3)(a)). There is an extradition objection if the extradition offence is a political offence in relation to the extradition country (s 7(a)). A political offence in relation to a country means an offence against the law of the country that is of a political character, whether because of the circumstances in which it is committed or otherwise and whether there are competing political parties in the country (s 5).

96 The issue raised in this section is whether the four offences with which the applicant was charged are political offences and if so, whether the Attorney-General made a jurisdictional error in arriving at her satisfaction under s 22(3)(a) that they were not political offences.

The legal advice

97 The legal advice provided by the Department to the Attorney-General explained that the magistrate who conducted the s 19 proceeding found the applicant eligible for surrender for the four following offences:

- one count of conspiracy to violate the *Arms Export Control Act*, in violation of 18 United States Code (U.S.C.) section 371 and 22 U.S.C. section 2778 (Offence 1)
- one count of conspiracy to provide material support to a foreign terrorist organisation, in violation of 18 U.S.C. section 2339B(a)(1)(Offence 2), and
- two counts of money laundering, in violation of 18 U.S.C. section 1956(a)(2)(A)(Offences 3 and 4).

98 The legal advice summarised the conduct for which the US sought the extradition of the applicant as follows:

> 32. Mr Santhirajah's extradition has been sought by the United States for prosecution for alleged terrorism offences relating to his involvement in a conspiracy to purchase military weapons and night-vision goggles in the United States for export. The alleged purpose of such purchases was to provide those weapons and items to the Liberation Tigers of Tamil Eelam (LTTE), a separatist group in Sri Lanka. The weapons and items were to be exported from the United States without the requisite licence.
>
> 33. US authorities allege that, in furtherance of this conspiracy, Mr Santhirajah and his co-conspirators:
>
> - met or communicated with each other to discuss the acquisition of weapons
> - communicated with potential suppliers of weapons
> - communicated on a number of occasions with undercover United States investigators purporting to be representatives of a weapons supply business in order to acquire weapons for provision to the LTTE in Sri Lanka and arrange for their delivery
> - submitted a purchase order to the undercover business for weapons to the value of US$3,000,000
> - met with the undercover United States investigators to discuss the purchase and delivery of the weapons
> - inspected and test-fired weapons, and.
> - provided maritime navigation coordinates for the delivery of weapons.
>
> US authorities also allege that Mr Santhirajah paid money to his co-conspirators as reimbursement for expenses in relation to their activities in acquiring the weapons. They further allege that, on two occasions, Mr Santhirajah electronically remitted funds totalling US$702,000 to the undercover business for the purchase of the weapons.
>
> 34. Between 1983 and 2009 the LTTE were involved in a civil conflict with the Government of Sri Lanka. The LTTE advocated the overthrow of the Sri Lankan Government and the establishment of a separate state for the Tamil population in northern Sri Lanka and pursued a military campaign against the Sri Lankan Government in furtherance of these goals.
>
> 35. The LTTE have been identified by the United States Department of State as a Foreign Terrorist Organisation since 1997. A consequence of this designation is that it is an offence in the United States to provide material support or resources in support of the LTTE in the United States.

99 The discovered documents referred to earlier in these reasons at [24] included the indictments for the four offences (annexure MAC6), an affidavit in support

of the request for extradition, sworn on 2 September 2008 by John C Burgess, a Senior Special Agent with the US Immigration and Custom Enforcement (annexure MAC7), and a second supplementary affidavit in support of the extradition, sworn on 5 February 2009 by James G Warwick, Assistant US Attorney for the District of Maryland employed by the US Department of Justice (annexure MAC8). These documents were presumably part of the material upon which the summary of the applicant's conduct was based. These documents, although referred to in various parts of the briefing paper, were not provided to the Attorney-General as part of the briefing paper. In themselves these documents are not relevant to the application because they were not before the Attorney-General. However, their contents were summarised in the briefing paper.

100 What was produced to the Attorney-General as attachment G to the briefing paper was the letter from the US Department of Justice dated 14 September 2009, which responded to a number of matters which had been raised by the applicant in the course of representations made by him to the then Attorney-General, Mr McClelland, concerning his consideration whether to surrender him to the US. In part that letter explains why the US did not regard the offences as political. It stated:

> Mr. Santhirajah further alleges that there exists a political dimension which taints the request for extradition made by the United States. This is not the case at all. He has been indicted for criminal offenses based on the fact that his conduct has violated the laws of the United States. The crimes alleged are neither artificial nor are they the product of entrapment.
>
> As you may recall, Mr. Santhirajah initiated the criminal chain of events herein when he engaged, as early as February of 2006, the use of brokers and middlemen to secure weaponry for use by the LTTE. He sponsored trips by these brokers to China and Indonesia, all in furtherance of acquiring weapons for a designated foreign terrorist organization. These brokers or middlemen reported directly on the fruits of their efforts to Mr. Santhirajah. A credible source of weapons was identified in Indonesia, which caused Mr. Santhirajah to travel to Jakarta in May of 2006 in order to closely monitor the negotiations and further his illicit goals. The Indonesian arms dealer, Haji Subandi, had a source of weapons in the United States. By chance and fortune, this American source was the undercover operation run by Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security of the United States.
>
> In the months that followed, Mr. Santhirajah directed the negotiations for the weapons through Haniffa Bin Osman, one of his middlemen. Mr. Santhirajah repeatedly voiced his preference for American-made weapons over sources of supply in other countries. He sponsored a trip by Osman to the United States in the summer of 2006. The purpose of this trip was for Osman to examine the weapons Mr. Santhirajah sought for the LTTE. Osman both inspected and test-fired assorted automatic weapons. When he reported satisfaction with the weapons to Mr. Santhirajah, a wire transfer in the amount of $250,000 was sent from an account controlled by Mr. Santhirajah in Malaysia to the undercover agents as a down payment for assorted weaponry priced at $900,000.
>
> Through August and September of 2006, Mr. Santhirajah closely monitored the deal through Osman. Mr. Santhirajah sent Osman and a LTTE arms expert, Thirunavukarasu Varatharasa, to the United States Territory of Guam in September of 2006 in order to conduct a final inspection of the weapons and oversee the transfer of the weaponry to a vessel destined for the waters of Sri Lanka. Once Osman and Varatharasa satisfied Mr. Santhirajah that the shipment was in order,

> he sent via wire transfer an additional $452,000 from Malaysia to the undercover bank account.
>
> As evident from the facts outlined above, Mr Santhirajah was not subjected to entrapment in any form. He was not subjected to any duress, as he remotely maintained control of matters through Osman and Varatharasa. He merely pursued an opportunity he believed would lead to the acquisition of powerful weaponry for the LTTE. Unfortunately for him, the arms dealer in the United States was an undercover law enforcement operation. Had, by fate, Mr Santhirajah not been able to acquire weaponry through Subandi in Indonesia, he would have continued in his efforts to acquire arms elsewhere. The encounter with the undercover operation may, in a sense, be artificial in that no arms changed hands. But it in no way diminishes the seriousness of the offenses committed by Mr. Santhirajah.
>
> It is the foreign policy of the United States to deter the illicit transfer of weaponry to organizations engaged in terrorism. When the transfer of weapons is sought from the United States, clearly the laws of the United States constitute a proper mechanism for prevention and punishment of such illegal transfers. There exist no political or exceptional circumstances herein to justify Mr. Santhirajah's request that he not be extradited to the United States.

101 The legal advice then set out the applicant's argument to the Attorney-General that the offences were political offences, as follows at [39]:

> In support of the argument that there exists a political offence extradition objection in this matter, Mr Santhirajah asserts the following matters as being relevant to your determination:
>
> - that he is a member of the LTTE
> - that the LTTE was founded in 1976 and controls most of the Northern and Eastern coastal areas of Sri Lanka, and advocates the violent overthrow of the government of Sri Lanka as well as the creation of a separate state for the Tamil population in Northern Sri Lanka
> - the Sri Lankan government has been involved in armed conflict with the LTTE since approximately 1983
> - the LTTE is highly organised and contains components responsible for political activities, intelligence, operations and procurement
> - the object of the conspiracy in which it is alleged Mr Santhirajah was engaged was to export weapons from the United States to the LTTE operating in Sri Lanka (directly or through intermediary countries) for the purpose, inter alia, of their use against the Sri Lankan Air Force and by the Sea Tigers, the marine branch of the LTTE, and
> - the LTTE has been designated in the United States as a Foreign Terrorist Organisation (FTO), pursuant to s 219 of the *Immigration and Nationality Act*, which involves the formation of an opinion by the United States Secretary of State that:
>
> i. the organisation is a foreign organisation
> ii. it engages in terrorist activity, and
> iii. the terrorist activity threatens the security of nationals of the United States or the United States itself.

102 The briefing paper attached, as attachment F, the written submission made by the applicant to the Attorney-General on 17 July 2009, which included the following information concerning the political conflict in Sri Lanka:

> 57. Sri Lanka has been in civil war for more than 20 years. The LTTE has been the driver behind a true, and until recently highly successful, insurgency. As the materials referred to in this submission show, the LTTE for many many years ran a de facto government in the North of Sri Lanka,

running schools, hospitals, social services, the military, and a navy. To do business or make a living in the north one had to do business with the LTTE. They controlled who entered and left there. This includes people like Mr Santhirarajah's family.

58. From the materials referred to earlier [which were reports accessible on the internet from the UK House of Commons Library, Amnesty International, Human Rights Watch, and Medecins Sans Frontiers], there can be no doubt that Tamils in Sri Lanka have suffered enormously in the 20th and 21st centuries. They have been subjected to systematic and institutionalized discrimination, and to countless extremely serious human rights abuses, including torture and forced disappearances and extra judicial executions. They are intimidated and oppressed by their own government. They are killed by their own government. Every respected human rights organization around the world recognizes this. Since January 2009 alone, the United Nations estimates 7000 Tamil civilians were killed in the North of Sri Lanka. Australia recognizes these circumstances through the way it grants, on a regular basis, protection visas to Tamils who have fled Sri Lanka.
59. Of course the same international organizations recognize and condemn the role of the LTTE in some of those killings and in perpetrating its own serious human rights abuses. This submission urges no defence of the way the LTTE has conducted its insurgency, but it does urge the Minister to recognize frankly and honestly the plight of the Tamil people in Sri Lanka, to recognize why there is such a large international Diaspora, including in Australia, to acknowledge that all members of that Diaspora (Mr Santhirarajah included) have close family living in the North of Sri Lanka who have had to live under the LTTE, and endure the conduct of the Sri Lankan government (both military and non military) [sic] human rights.
60. The situation in Sri Lanka, the true picture of the oppression of the Tamil people, the role of the LTTE in the North, the power they have wielded, the role of the Sri Lankan government and the ways in which the Tamil people have sought to pursue their struggle for self determination and the right to live in peace without discrimination and oppression, are far more complex (and have far more justifiable perspectives) than the United States Department of State's "war on terror" propaganda on its website would suggest.

103 Then the legal advice provided a legal analysis of the nature of a political offence. It first drew the distinction between pure political offences and relative political offences as follows:

26. It is well accepted that there are two distinct types of political offence:
    - the "pure political offence", consisting of conduct violating laws designed to protect the political institutions of a state, for example, treason, espionage and sedition, and
    - the "relative" political offence, consisting of conduct violating the criminal law of a state, but which acquires a political character from the political purpose sought to be achieved by an offender in committing it.

(Footnote omitted.)

104 The advice then continued:

26. In the case of *Re Wilson; Ex parte Witness T*, a majority of the High Court of Australia adopted the view of Viscount Radcliffe of the United Kingdom House of Lords in the matter of *Schtraks v Government of*

> *Israel*, that "the idea that lies behind the phrase 'offence of a political character' is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country".
>
> 27. The Federal Court of Australia, in the case of *Prevato v Governor, Metropolitan Remand Centre and Others; Prevato v Miszalski and Another*, accepted that it is not an essential requirement of a political offence that the alleged conduct be directed against a national government; conduct directed against a provisional or local government may constitute a political offence. Further, the alleged conduct need not be part of a campaign to change a government; it is sufficient that there be a concerted campaign to change government policy. The Federal Court also provided guidance on the minimum that will be required to demonstrate that an offence is of a political character, stating that:
>
> (a) there must be an organised, prolonged campaign (directed against a government) involving a number of people
>
> (b) the action which constitutes the offence must be directed solely to the purpose of that campaign and must not involve the satisfaction of private ends, and
>
> (c) the action which constitutes the offence must be committed in the direct prosecution of the campaign.

(Footnotes omitted.)

105 The legal advice then analysed the High Court's consideration of what constitutes a "political crime" in the case of *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 (*Singh*), and said at [28]:

> … The following points may be drawn from the judgments of the Court as relevant in determining whether an offence will constitute a political crime:
>
> (a) is the significant (not exclusive) purpose of the offence to alter the practices or policies of those who exercise power or political influence in the country in which the offence is committed?
>
> (b) is there a sufficiently close connection between the criminal act and the political purpose?
>
> (c) are the means used to achieve the purpose proportionate or reasonably adapted to the purpose? In considering this, it may be relevant whether the "target" of the crime is a public official or a government agent as distinct from unarmed civilians targeted indiscriminately. It will also be necessary to consider the objectives of any organisation involved and the person's connection with that organisation.

(Footnotes omitted.)

106 The legal advice then continued at [29]:

> The approach taken by the High Court in *Singh* has been applied in the Federal Court [*W275/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 773] and can be considered to be authoritative in assessing whether an offence will constitute a political offence.

107 In relation to the applicant's primary submission that offence 1 was a relative political offence and offences 2, 3 and 4 were pure political offences, the legal advice responded at [54]:

> The Department is of the view that offences 2, 3 and 4 cannot be conceived of as pure political offences, because the conduct constituting these offences was not carried out in violation of laws designed to protect the political institutions of the United States. The Department does not accept Mr Santhirajah's submission that

> an offence, an element of which is providing support to an FTO [Foreign Terrorist Organization], is analogous to the offences of treason, sedition or espionage, which the courts have held to be pure political offences. Generally, laws proscribing the provision of financial or material support to an FTO may be characterised as laws directed at contributing to international counter-terrorism measures, protecting international peace and protecting national security. In some circumstances, it may be said that because of the aims or actions of a particular FTO, the designation of that FTO may be designed to protect the political institutions of the United States Government. However, with particular reference to the designation of the LTTE as an FTO and the proscription of the provision of material or financial support to the LTTE, the Department notes that the aim of the LTTE was to overthrow the Sri Lankan Government and accordingly, its actions were directed at the Sri Lankan Government, not against the political institutions of the United States. In these circumstances, it is apparent that the designation of the LTTE as an FTO and the proscription of the provision of support to the LTTE was not designed to protect the political institutions of the United States, as the political institutions of the United States are not the target of LTTE actions.

108 In relation to the alternative submission of the applicant that all four offences were relative political offences, the legal advice repeated the three criteria which it had extracted earlier from *Singh* and then applied those criteria as follows:

> 59. The Department emphasises that, in order for an extradition objection to arise under paragraph 7(a), an extradition offence must be a political offence in relation to the United States. This is consistent with the requirement at paragraph (a) above, that the significant purpose of the offence be to alter the practices or policies of those who exercise power or political influence *in the country in which the offence is committed.*
>
> 60. The Department notes Mr Santhirajah's submission that, in so far as the extradition offences were committed in support of the LTTE, the extradition offences had a political object in relation to the United States, namely, to "threaten and undermine its national security and the security of its citizens, whether in the United States or abroad." While it is open to you to consider that this asserted political object has a purpose of altering the practices of those who exercise power or political influence in the United States, the Department does not consider that the conduct alleged against Mr Santhirajah had the *significant* purpose of altering practices or policies of those who exercise power or political influence *in the United States*. The significant purpose of the conduct was to supply arms to the LTTE, whose aim is to overthrow the Sri Lankan Government and establish a separate Tamil state. The actions of the LTTE are not directed towards effecting change in the United States.

(Original emphasis.)

109 The legal advice concluded at [62]:

> It is the Department's view that the extradition offences do not constitute political offences in relation to the United States and that you may be satisfied that the extradition objection at paragraph 7(a) does not arise. This is so, because:
>
> - The conduct constituting offences 2, 3 and 4 was not carried out in violation of laws designed to protect the political institutions of the United States. Accordingly, these offences may not be considered pure political offences, and
> - The conduct constituting all of the extradition offences was not part of an organised, prolonged campaign directed against the Government of the United States, the requesting country, and accordingly, the extradition

> offences do not have a political character in relation to the United States. Therefore, these offences may not be considered relative political offences.

(Footnote omitted.)

Submissions of the applicant

110 The applicant's argument commenced by noting the accepted distinction between pure political offences and relative political offences.

111 Treason, espionage, sabotage, subversion and sedition are examples of pure political offences. They are directed solely against the public order. Their purpose has been described, variously, as to protect the political institutions of the State, the State itself, or the sovereign or public order. Relative political offences, in contrast, are common crimes which acquire their political character from the political purpose sought to be achieved by the offender in committing them: *Dutton v O'Shane* (2003) 132 FCR 352 (*Dutton*) at [186] per Finn and Dowsett JJ.

112 The applicant then argued that offences 2, 3 and 4 are pure political offences and all the offences can be seen as relative political offences.

113 From the analysis in *Dutton* of what constitutes a pure political offence, the applicant focused on the criterion that a pure political offence is one designed to protect the political institutions of the State.

114 The applicant's written submissions filed in this proceeding developed the argument thus at [34]:

> In the case of Counts 2, 3 and 4, all of which rely expressly on the prescription of the LTTE as a "foreign terrorist organization" (or FTO) pursuant to s 219 of the INA [US Immigration and Nationality Act], they are in their express terms as well as in their context, offences designed to protect the political institutions of the United States:
>
> i. The third and mandatory criterion for designation is that an organization's terrorist activity or terrorism must "threaten the security of U.S. nationals or the national security (national defence, foreign relations, or the economic interests) of the United States".
>
> ii. The identification of a particular organization as a terrorist organization clearly involves an executive judgment by the United States Secretary of State about the kind of political objects that organization espouses, and the way it goes about achieving them. In some cases, such as with the LTTE, it also involves a governmental choice to support one side of a civil war in another sovereign state over another.
>
> iii. Offences involving an executive choice about who is a foreign terrorist organization (and therefore, who is a terrorist) are in the same conceptual category as offences involving an executive choice about who is a traitor. They depend upon an executive analysis of the national and political interests of the State. The United States offences in Counts 2, 3 and 4 arise *only* because of that executive choice, via designation.
>
> iv. The rationale for the majority approach in *Cheng* [*R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931] — that the conduct was "not hostile to the United States" does not apply here. The very criteria for designation involve a political judgment about which foreign organizations do act in a manner which is "hostile" to the United States. The third criterion in s 219 of the INA makes that an express and integral feature of the process.

115 The applicant's written submissions then referred to material to be found on the US Department of State website which was drawn to the attention of the

Attorney-General. In this material the US Department of State explained that the designation of a foreign terrorist organisation is part of the US fight against terrorism and that "[t]errorist networks currently pose the greatest national security threat to the United States". The fact that Congress is notified of the Secretary's intent to designate a particular organisation and given seven days to review the designation was said to illustrate the political character of the designation.

116 At [39] the applicant's written submissions concluded:

> These websites make it absolutely clear, if it was not already so from the express terms of s 219 of the INA, by the use of the term "enemy" that offences relying upon FTO [Foreign Terrorist Organisation] designation, or the activities of a FTO, are of the same character as treason, espionage and sedition. That is, the United States considers that the criminal conduct constitutes a threat to the "political order" of its country. It is for that reason that the conduct has been criminalised. The designation is not undertaken to protect the interests of Sri Lanka. Had the United States' government considered the conduct to be a threat only to Sri Lanka's political order, there would have been no reason for the charges to be laid (or s 219 enacted).

117 Ms Mortimer SC, who appeared with Mr Gilbert, Mr Costello and Mr Albert as pro bono counsel for the applicant, summarised the argument as follows:

> The political element of these offences is the choice made by the Secretary of State. … These offences have been, in that sense, given a political character and that is what, in our submission, makes counts 2, 3 and 4 pure political offences, because the designation is a key element of each of those offences. The offence doesn't exist without them. And in relation to the first one, the munitions charge, it is only there because the circumstances of that offence relate to supply to the designated organisation. So the factual circumstances are that you were conspiring to buy arms for an organisation that we, the United States, have decided threatens our national security.

118 In relation to offence 1, the applicant contended that it is a relative political offence. As an alternative to the argument that the other three offences are pure political offences, the applicant contended that they are also relative political offences. All four offences are relative political offences because they were committed for a political purpose.

119 The offences involve allegations that the applicant conspired with others to export military weapons from the US. The weapons were to be supplied to the LTTE in support of its cause. The applicant made two money transfers as part of the process of procuring the weapons.

120 The LTTE was designated by the US Secretary of State as a foreign terrorist organisation. When the alleged offences were committed the LTTE and the government of Sri Lanka were political opponents. The alleged offences were committed as part of a political campaign to establish an independent Tamil state in the north of Sri Lanka and oust the Sri Lankan government from control over the area.

121 The applicant accepted that the offences must involve hostility to the requesting state, the US. The reason these offences are relative political offences is that they exist only because the executive in the US designated the LTTE as a foreign terrorist organisation. That is to say, the US determined that the LTTE was an organisation the activities of which were hostile to the political interests of the US and which threatened its national security. The US Department of

State described the LTTE as an enemy. So far as the US was concerned, the offences had a political object directed against the US. The conduct threatened its national security and the security of its citizens within the US or abroad.

Submissions of the Attorney-General

122 Mr Robinson SC, who appeared with Ms De Ferrari, as counsel for the Attorney-General argued that in order to constitute a pure political offence the offence must:

> (a) be directed against the political order — to subvert or overthrow the government (political control) or change its policy;
> (b) have a sufficiently close and direct link between the crime and the alleged political purpose; and
> (c) be in relation to the requesting State.

123 The elements of pure political offences such as treason, sedition, and espionage contain a requirement that the offender intend to harm the government of the state. For this reason pure political offences do not require the demonstration of purpose by the alleged offender.

124 As to elements (a) and (b) referred to in [122] above, the written submissions filed by the Attorney-General relied on the conclusion of Lord Lloyd in *T v Home Secretary (UK)* [1996] AC 742 (*T v Home Secretary*). The case concerned the construction of the phrase "serious non-political crime" in Art 1F(b) of the *Convention Relating to the Status of Refugees 1951*, done at Geneva on 28 July 1951 as amended by the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967 (the Refugees Convention), but it was accepted that those words bear the same meaning as in extradition law. After an extensive review of the authorities, Lord Lloyd said at 786:

> Taking these various sources of law into account one can arrive at the following definition. A crime is a political crime for the purposes of article 1F*(b)* of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

125 The written submissions then at [63], although without reference to particular passages in the judgments, drew attention to the reasoning of the High Court in *Singh*, which also concerned the construction of Art 1F(b) of the Refugees Convention, as follows:

> … an offence was of a political character if the significant (rejecting that it need be exclusive) purpose of the offender was to effect change to the practices or policies of the government or political control in the country where the crime is committed. Further that there needs to be a sufficiently close connection between the offence and the political purpose and the means used must be reasonably proportionate to the purpose.

126 The requirement in (c), referred to in [122], that the offence be in relation to the requesting state was said to apply to both pure and relative political offences. The requirement derives from the terms of s 7(a) of the Act, from

Dutton and from *Cheng v Governor of Pentonville Prison* [1973] AC 931 (*Cheng*). Section 7(a) of the Act provides that there is an extradition objection if the extradition offence is a political offence "in relation to the extradition country". In the context of this section the reference to the extradition country is a reference to the requesting state.

127 In response to the applicant's submission that offences 2, 3 and 4 were pure political offences, the Attorney-General relied on the decision in *Dutton*, where the majority of the Full Court regarded a pure political offence as one directed at protecting the political institutions of the requesting state. The appellant in that case was found eligible for surrender to face 14 counts of fraud in relation to foreign currency transactions in South Africa. The majority determined that even if the offences with which the appellant had been charged were characterised as exchange control offences, rather than fraud, they were not, as the appellant had argued, offences directed at protecting the political institutions of South Africa. The Attorney-General also relied on *Cheng*, where the majority held that the attempted assassination in the US of the vice-premier of the Chinese nationalist government in Taiwan by a member of a Formosan independence movement was not a political offence for the purpose of UK extradition law because the action of the offender was not directed to the US. The US was simply enforcing its criminal law.

128 The written submissions of the Attorney-General relating to pure political offences concluded at [67] thus:

> The offences are clearly not solely directed against the political order; they are not crimes that strike at the political structure of the United States. Notwithstanding the requirement that the offence applies only where a foreign organisation has been relevantly proscribed, and even accepting the Applicant's assertion that the proscribing of an organisation may involve a political choice by the Government of the United States, the crimes are ordinary crimes. To the extent any of the relevant laws has the effect of protecting political institutions of the United States, it does not have that sole purpose. It is a law contributing to international counter-terrorism, protecting international peace, and protecting national security.

129 Then, in relation to the applicant's contention that all four offences are relative political offences, the Attorney-General argued that relative political offences are ordinary offences committed for a political purpose. That purpose must be directed to the requesting state: *Cheng* and *Dutton*. The significant motive or purpose of the alleged offender is relevant to the characterisation of an offence as a relative political offence. Without such a purpose an ordinary offence does not have a political character. The applicant was bound to show the necessary political purpose. In this endeavour, so it was submitted, the applicant failed on two counts. First, the offences are not directed at protecting the political order of the US, but, second, even if they were, the applicant did not demonstrate that his purpose was directed to altering the government, practices, or policies of the US. Rather, it is to be inferred that his purpose in procuring weapons was directed against the government of Sri Lanka.

130 Finally, a relative offence must have a close and direct link with the political purpose: *Singh*. The written submissions of the Attorney-General concluded at [75] that:

> None of the four extradition offences suggests a sufficiently close connection between the alleged conduct and the political institutions of the United States as to

> support a conclusion that the offences were political. There is no sufficient nexus between the alleged offences and a political objective with respect to the United States.

Consideration

Introduction

131 The applicant's contention that the political nature of the offences under consideration derives from the designation by the executive government of the US of the LTTE as a body which threatens the national security of the US is not an argument that has previously been dealt with by the authorities.

132 The test proposed by each of the parties to determine whether the offences are political offences greatly oversimplified the task by selecting a particular approach from the authorities without any stated reason for excluding the variety of the other competing approaches.

133 The following discussion starts by collecting the many judicial views which hold that there is no all embracing definition of the expression political offence. Then there is a review of the authorities to examine the fact situations which have arisen and the attempts which have been made to provide a yardstick to work out what constitutes a political offence. Next, the discussion analyses the reasons why the term has defied a principled approach to construction. That is followed by an attempt to ascertain the rationale for the political exception in order to see if this might aid in understanding the meaning of the term. There is then a discussion of the recent developments in the legislative approach to the political exception. And finally, the facts of the present case are addressed.

Is there a test to determine whether an offence is political?

134 It is a recurring theme in all the significant authorities that there is no bright line test for determining whether an offence is a political offence.

135 The early UK authorities examined in this section were concerned with the construction of the phrase "offence of a political character" in the *Extradition Act 1870* (UK). This Act was one of the three Imperial Acts that contained the extradition law which was in force in Australia until 1966. Section 3 of the Act provided:

> The following restrictions shall be observed with respect to the surrender of fugitive criminals:
>
> (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character …

136 The Act reflected the recommendation of the Select Committee which had considered the matter in July 1868. In the Second Reading Speech (House of Commons Hansard 16 June 1870 at p 302), the Attorney-General said:

> It was right to state the safeguards by which the principle of extradition was surrounded in the Bill. First, there was a distinct provision that no criminal should be surrendered for any political offence. They had found it more difficult to define a political offence than to define the Ulster Custom, and they had finally given up the attempt, and had left the matter to the Courts.

137 Thus, clarification of what was meant in the *Extradition Act 1870* (UK) by the expression "offence of a political character" did not get off to a good start. The first UK case to consider the construction of the section was *Re Castioni* [1891] 1 QB 149 (*Castioni*) where Denman J said at 155:

> We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher.
>
> …
>
> I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character.

138 It was more than 60 years before the next case in the UK considered the meaning of the phrase "offence of a political character" in the *Extradition Act 1870* (UK). In *R v Governor of Brixton Prison; Ex parte Kolczynski* [1955] 1 QB 540 (*Kolczynski*) Lord Goddard (with whom Devlin J agreed) observed at 551 that:

> The court in *Castioni's* case were careful to say that they were not giving an exhaustive definition of the words "of a political character."

(Footnote omitted.)

139 In *Schtraks v Government of Israel* [1964] AC 556 (*Schtraks*) Viscount Radcliffe said at 589:

> What then is an offence of a political character? The courts, I am afraid, have been asking this question at intervals ever since it was first posed judicially in 1890 in *In re Castioni*, and no definition has yet emerged or by now is ever likely to.

(Footnote omitted.)

140 Lord Hodson in the same case said at 611:

> In *In re Castioni* it was pointed out in argument that Parliament, in using the words "of a political character," had probably intentionally used a vague expression, and that it seemed as if the legislature had purposely abstained from attempting to find an exhaustive definition, leaving it to the courts to decide in each case, as it were, whether the exceptions applied.

(Footnote omitted.)

141 Over a decade later, in *Cheng*, Lord Hodson at 942 referred to the:

> … undoubted fact that the words "of a political character" have so far defied precise definition.

142 In that case, Lord Simon said at 951:

> In advisedly refraining from defining a crucial phrase in the statute, Parliament left it to the courts to apply the statutory words to forensic situations as they arose, in the expectation that they would be so applied in their ordinary, natural and literal sense, without addition or omission. The difficulty of providing a definition of crimes which were to be non-extraditable because they were of a political character was already notorious.

143 Lord Salmon at 961 similarly observed:

> No exhaustive definition of an offence of a political character is possible and none has been attempted.

144 In *T v Home Secretary* Lord Lloyd surveyed the UK, US and Canadian

authorities and sought to draw from them a formulation of the elements of the concept of a political offence. When he described his formulation as a definition, he explained at 787:

> Although I have referred to the above statement as a definition, I bear in mind Lord Radcliffe's warning in *Reg v Governor of Brixton Prison, Ex Parte Schtraks* … that a question which was first posed judicially more than 100 years ago in *In re Castioni* … is unlikely now to receive a definitive answer. The most that can be attempted is a description of an idea. But to fall short of a description would, in Lord Radcliffe's words, be to abdicate a necessary responsibility, if the idea of a political crime is to continue to form part of the apparatus of judicial decision-making.

145 Then, in Australia, in *Singh* Gleeson CJ said at [21]:

> Once it was accepted that the concept of a political crime was not limited to offences such as treason, sedition, and espionage, and could extend to what would otherwise be "common" crimes, including unlawful homicide, then it became necessary to find means of avoiding the consequence that any crime could be political if one of the motives for which it was committed was directly or indirectly political. There is no bright line between crimes that are political and those that are non-political.

146 Kirby J said at [64]-[67]:

> 64. Defining a "serious non-political crime" has been described as a problem that presents "the gravest difficulties". In an earlier manifestation of the phrase, it was said to present one of the "most acute" dilemmas of extradition law. So far as the Australian law on refugees is concerned, the scope of offences "of a political character" is not fixed. This is the first time that this Court has had to consider Art 1F(b).
>
> 65. The difficulties of definition derive, in part, from the absence of any settled international consensus about the expression and the changing views of national courts and tribunals about its meaning. The content of the expression depends on an almost infinite variety of factors. It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the global political order, and the increased vulnerability of modern societies to violent forms of political expression.
>
> 66. Long before the Convention was adopted, Grotius wrote that asylum was accepted by international law as available for those fugitives who suffered undeserved enmity but not for those who had done something injurious to human society. Since that distinction was propounded, first in the field of extradition law and more recently in the Convention, courts have struggled to find a point that will allow decision-makers to differentiate between fugitives accused of a serious political crime and those in respect of whom there are "serious reasons for considering" that they have committed a serious *non*-political crime.
>
> 67. Given that this kind of differentiation has troubled courts for more than a hundred years, there is wisdom in Viscount Radcliffe's warning, that it is now unlikely that the point of distinction will receive a definitive answer accepted by everyone as universally applicable.

(Footnotes omitted; emphasis in original.)

147 Thus in *Dutton* Finn and Dowsett JJ said at [185]:

> The words "political offence" in the Act have been defined by reference to a formula (ie an offence "of a political character") that itself has "so far defied precise definition": *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 942.

The UK and Australian authorities

148 A review of the major UK and Australian authorities on the meaning of the expression political offence bears out the observations just referred to that the courts have not found a defining characteristic or set of characteristics which identify those offences which are political offences. Rather, the courts have more or less instinctively responded to the facts of each case and assessed them within the particular historical circumstances in which the offences were committed.

149 In *Castioni* the citizens of the canton of Ticino in Switzerland were dissatisfied with the local government. A group of citizens, including Angelo Castioni stormed the municipal palace. That occurred in 1890 on 11 September, a day which coincidently 121 years later has a special significance for political offending. In the course of forcing their way inside the municipal palace, Castioni shot and killed Luigi Rossi, a State Councillor. The crowd then occupied the palace, imprisoned members of the government and assumed the government of the canton. Afterwards, Castioni fled to England and the Swiss government subsequently sought the extradition of Castioni from the UK. Reversing the decision of the local magistrate that Castioni's extradition was justified the Queen's Bench determined that Castioni should be discharged on the ground that the murder was a political offence. In reaching this decision, Denman J said, at 156, that to qualify as a political offence:

> … it must at least be shewn that the act is done in furtherance of, done with intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.

150 Hawkins J, agreeing with the reasons of Denman J, at 165-166, adopted the meaning of political crime which was proposed by Stephen J in his then recently published *A History of the Criminal Law of England, Vol II*, as follows:

> The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requestion would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, *if those crimes were incidental to and formed a part of political disturbances.*

(Emphasis added.)

151 Unsurprisingly Stephen J, as the author of *A History of the Criminal Law of England*, the third member of the Court, agreed. *Castioni* is regarded as the foundation of the Anglo-American approach, often called the political incidence test, to determine whether particular offences are political. However, as discussed at [154]-[155] below, the requirement it established that there be a

political uprising or two-party dispute was later modified in favour of a more liberal construction, particularly where the requesting state was a totalitarian regime.

152 In the case of *Re Meunier* [1894] 2 QB 415 (*Meunier*) the French government successfully sought the surrender of Meunier, an anarchist, for offences including wilfully causing an explosion at a military barracks. Cave J, with whom Collins J agreed, said at 419:

> The last point taken is, that, so far as regards the outrage at the barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts; for it is said that the outrage was an attack on Government property, and was an attempt to destroy the quarters occupied by the troops of the French Government. *It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.* In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens … I am of the opinion that the crime charged was not a political offence within the meaning of the Extradition Act.

(Emphasis added.)

153 *Kolczynski* concerned a claim by Poland for the extradition of some crew members of a trawler in the Polish fleet operating in the North Sea. The evidence was that Poland was a one party communist police state. It was treason to leave Poland to go to England without permission. The political leanings of the crew members of the trawler were monitored by a party secretary on board the vessel. News was received by the crew members that Kolczynski's brother had fled to England. From the actions of the party secretary on board some of the crew members feared that they would be punished on their return to Poland. They therefore overpowered the other crew members and the captain and took the trawler to an English port. They resisted extradition on the ground that they would be tried in Poland for a political offence for fleeing to England.

154 The Court found that the crew members had established that the extradition request had been made with a view to trying or punishing them for an offence of a political character. However, the test established in *Castioni* for determining whether an offence was a political offence could not apply to the circumstances of this case because Kolczynski was not engaged in a civil disturbance. Castles J said, at 549:

> The words "offence of a political character" must always be considered according to the circumstance existing at the time when they have to be considered. The present time is very different from 1891, when *Castioni's* case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew of a small trawler engaged in fishing were under political supervision and they revolted by the only means open to them. They committed an offence of a political character, and if they were surrendered there could be no doubt that,

> while they would be tried for the particular offence mentioned, they would be punished as for a political crime.

(Footnote omitted.)

155 Lord Goddard said, at 551:

> The court in *Castioni's* case were careful to say that they were not giving an exhaustive definition of the words "of a 'political character'." They applied a formula taken from Stephen's History of the Criminal Law, Vol. II, p. 71, as sufficient for the facts of that case, and no doubt when that work was written, about 1882, no better definition could be given. No doubt the conception of what is commonly called nowadays a "police state" was not unknown in the middle years of the nineteenth century. One need only recall the vigour of Mr. Gladstone's language and some of Lord Palmerston's dispatches as to the state of affairs prevailing in Naples, then a part of the Kingdom of the Two Sicilies, under the despotic rule of a monarch usually referred to as King Bomba. But all that had passed by the time Sir James Fitzjames Stephen wrote, though no doubt political police were still very active in Czarist Russia. The evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

(Footnote omitted.)

156 In *Schtraks* Israel sought the extradition of the appellant on charges of child stealing and perjury. The appellant was the uncle of a 10 year old boy whose grandparents were concerned that he would not get a proper Jewish religious education. The appellant assisted the grandfather to keep the boy from his parents. The appellant also gave perjured evidence in proceedings brought by the boy's parents to have the boy returned. The evidence was that religion in Israel was a political issue. A well attended political meeting addressed by a member of the Knesset supported the boy being kept from his parents. The Rabbi of Jerusalem also made a public statement in support of that position. There were debates and question in the Knesset about the case.

157 Lord Reid first explained that certain limitations on the ambit of the idea of political offence could not be sustained. He said at 583-584:

> Moreover, I do not think that the application of the section can be limited to cases of open insurrection. An underground resistance movement may be attempting to overthrow a government and it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character. And I do not see why the section should be limited to attempts to overthrow a government. The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugee's party should have been trying to achieve power in the State. It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it.
>
> I do not get any assistance from the statements in some of the cases that there must be "disturbance" or "political disturbance." If this merely means that the political atmosphere must be disturbed that may be so, but it gets one nowhere. The political atmosphere was disturbed in Israel over religious education. But if it

> means that there must have been some disturbance of public order I would not agree that that is an essential element in a political offence.

158 In rejecting the appellant's claim to the benefit of the political exception, Lord Reid said at 584:

> With an expression so vague as "an offence of a political "character" there must be many borderline cases, for example, actions against a turbulent group trying to seize power which the government is too weak to suppress. But the present case appears to me to be beyond any possible extension of that category. I am willing to assume that the accused did what he believed to be right, and that many people, and even a whole political party, agreed with him, but I cannot find any political character in the alleged offences. *There is nothing to indicate that he acted as he did in order to force or even promote a change of government, or even a change of government policy, or to achieve a political objective of any kind.* I do not say that every act done for such purposes would necessarily be of a political character, but without any such purpose it could only be in some exceptional case which I cannot foresee that the act could, in my view, be said to be of a political character.

(Emphasis added.)

159 Viscount Radcliffe in *Schtraks* referred to the emphasis in *Castioni* and *Meunier* on the need for a disturbance to render an offence a political offence, but observed that *Kolczynski* could not be explained on that basis. He then ventured his view of the characteristics of a political offence at 591-592 as follows:

> *In my opinion the idea that lies behind the phrase* "*offence of a political character*" *is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country.* The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner." It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of *In re Castioni* and *In re Meunier* when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: and in my opinion it is still necessary to maintain the idea of that connection. It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of: but it would be lost sight of, I think, if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.

(Footnotes omitted; emphasis added.)

His Lordship then concluded that the alleged offences were committed as part of a family quarrel where the appellant acted out of allegiance to certain members of his family. The actions were not taken as a demonstration against government policy.

160 Lord Evershed also accepted that there was no disturbance or insurrection which would bring the offences within the *Castioni* definition. He continued at 598:

> I do not myself attempt any definition. But it is at least clear from the evidence that the Government of Israel, so far from having attempted a forcible suppression of the orthodox Jews, has from time to time made concessions to their tenets. I am content, therefore, to say that the formula with which we are concerned cannot extend to cover the crimes here charged which, if committed, were, at most, the expression and consequence of religious belief and could not be called "political" within the meaning of the Act and the agreement merely because adherence to or pursuit of such faith might at times call for a disregard or defiance of civil law.

161 Lord Hodson saw no reason to move beyond *Castioni*. He said at 612:

> According to this test there must be either in existence or in contemplation a struggle between the State and the fugitive criminal. I prefer to adhere as closely as possible to the guidance which I find in the *Castioni* case, judgment in which was delivered in 1890, not long after the passing of the first Extradition Act. It may be that cases will arise as in the *Polish Seamen's* case, *Reg v Governor of Brixton Prison, Ex parte Kolczynski*, where special considerations have been taken into account. In some modern States politics and justice may be inextricably mixed, and it is not always easy, for example, to say what amounts to a revolt against the Government. No special feature appears to exist in this case, and I find no substance in the contention that extradition should be refused because of the political character of the offences charged.

(Footnotes omitted.)

162 In *Cheng* the House of Lords considered for the first time whether the political offence had to be directed against the requesting state. Cheng was convicted of attempted murder in the US of the vice-premier of Taiwan. The US sought his extradition from the UK. The majority (Lords Hodson, Diplock and Salmon) considered that the political exception only applied where the fugitive was opposed to the requesting state. Although Cheng was opposed to the Chinese nationalist government in Taiwan as he had no political quarrel with the US his offence was not a political offence. Lord Simon, with whom Lord Wilberforce agreed, dissented.

163 Lord Hodson relied on the idea articulated by Viscount Radcliffe in *Schtraks* that an offence is a political offence where the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. A political character of an offence connotes the notion of opposition to the requesting state.

164 Lord Diplock also agreed with the view of Viscount Radcliffe in *Schtraks* but accepted that the precise issue raised in *Cheng* had not arisen in *Schtraks*. His Lordship relied on the bilateral nature of the extradition obligation and its provision for reciprocal rights. Thus, the reference to an offence of a political character is to the relationship of conflict between the offender and the government of the state where the offence was committed, and not to any political conflict between the offender and another state. His Lordship accepted that the offender must have a political purpose. In a passage referred to in later cases he said, at 945:

> The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused had robbed a bank in order

> to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet "political." For politics are about government. "*Political*" *as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do.* No doubt any act done with any of these objects would be a "political act," whether or not it was done within the territory of the government against whom it was aimed. But the question is not simply whether it is political qua "act" but whether it is political qua "offence."

(Emphasis added.)

165 Lord Salmon broadly agreed with Lords Hodson and Diplock.

166 Lord Simon, in the dissenting view, considered that the words "of a political character" in s 3(1) of the *Extradition Act 1870* (UK) had to be read in their natural, ordinary and literal sense without the addition of words such as "against the foreign state demanding such surrender" which did not appear in the section. Such a construction is also supported by the history of the provision and by reference to the mischief to which it was directed. The historical purpose of the exception was to provide protection to political fugitives. It should be construed benevolently in conformity with this purpose. This construction is also consistent with international law. Further, his Lordship gave examples of the absurdity of the construction which would follow from holding that the exception did not apply to a political fugitive opposed not to the requesting state but to another state. For example, he said, at 957:

> Then take the hypothetical case of an attempted assassination, not of the vice-premier of Nationalist China, but of the Vice-President of the United States. Counsel for the respondent accepted that this would be "an offence of a political character" if committed solely in protest against United States support of Chiang Kai-Shek's government and if perpetrated on United States territory — say, at the United States end of the Niagara Bridge. But if the purporting assailant followed the Vice-President across the bridge, and made the attempt at the Canadian end of the bridge, it would in some extraordinary way cease to be an offence of a political character. Its correct characterisation if the attempt were made laterally as the Vice-President was actually crossing the frontier would, I think, strain the subtlety even of a scholastic metaphysician.

167 In *T v Home Secretary* the House of Lords sought to bring some clarity to the understanding of the meaning of non-political offence, a question which Lord Mustill at 764 described as then subject to "the comparatively few, and by no means consistent, decisions of the common law courts". The issue under consideration was the meaning of the phrase "serious non-political crime" in Art 1F(b) of the Refugees Convention. However, it was common ground that the words bear the same meaning as they do in extradition law.

168 The appellant was an Algerian citizen who was a member of the FIS, a fundamentalist Islamic revolutionary movement, which according to the appellant's evidence had been cheated out of success in a democratic election and had therefore resorted to violence to overthrow the ruling party. He was personally involved in the planning of a bomb attack on an airport near Algiers which killed 10 people, and an abortive attempt to steal arms from an army barracks in which one person was killed.

169 The focus of the case was particularly directed to whether offences involving

indiscriminate use of violence against civilians could be regarded as political offences. There were three judgments delivered by each of Lords Mustill, Slynn and Lloyd who each agreed in the outcome.

170 Lord Lloyd (with whom Lords Keith and Browne-Wilkinson agreed) examined the UK authorities earlier referred to in these reasons. Before considering some US and Canadian cases his Lordship drew attention to Lord Diplock's view in *Cheng* that a crime will only be regarded as a political offence if the relationship between the act and the effect on the government is sufficiently close.

171 His Lordship explained that the early US cases refused extradition of Irish Republican Army (IRA) soldiers accused of murdering British soldiers on the basis of *Castioni*. But then in *Eain v Wilkes* 641 F (2d) 504 (7th Cir 1981) (*Eain v Wilkes*), where a member of the Palestinian Liberation Organisation (PLO) planted a bomb in a crowded market place in Israel which killed two boys and injured many other people, the 7th Circuit Court of Appeals refused to apply the political offence exception and said at 521:

> The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country.

172 Lord Lloyd then referred to *Quinn v Robinson* 783 F (2d) 776 (9th Cir 1986) (*Quinn*) in which Judge Reinhardt rejected this approach saying, at 804-805:

> [I]t is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal. … We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable.

Judge Fletcher took the same approach. However, in succeeding cases, the *Eain v Wilkes* approach prevailed. Thus, in *McMullen v Immigration and Naturalization Service* 788 F (2d) 591 (9th Cir 1986) (*McMullen*), the 9th Circuit Court of Appeals held, at 598, that the terrorist crimes of the former member of the Provisional IRA were not political because:

> P.I.R.A.'s [Provisional Irish Republican Army] random acts of violence against the ordinary citizens of Northern Ireland and elsewhere … are not sufficiently linked to their political objectives and, by virtue of their primary targets, so barbarous, atrocious and disproportionate to their political objectives that they constitute "serious non-political crimes …"

For similar reasons, in *Ahmad v Wigen* 910 F (2d) 1063 (2d Cir 1990), where a member of Abu Nidal with two associates had attacked a bus in Israel, killing the driver and injuring a passenger, the 2nd Circuit Court of Appeals rejected the argument that the political offence exception applied to the case.

173 Lord Lloyd then found particular assistance from the Canadian case *Gil v Canada (Minister of Employment and Immigration)* [1995] 1 FC 508 which also

concerned the construction of the phrase "serious non-political crime" in Art 1F(b) of the Refugees Convention. The appellant in that case was a citizen of Iran and opposed the regime of Ayatollah Khomeini. He was part of a group that planted a bomb in the business premises of supporters of the Ayatollah which resulted in the death of many bystanders. Hugessen JA said, at [44], that the appellant's crime was not political for the following reasons:

> … the lack of nexus between the crimes and any realistic political objective, and the fact that the means employed are unacceptable as a form of political protest against any regime, no matter how repressive, totalitarian or dictatorial.

174 Lord Lloyd then relied on the definition of non-political crime in the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (UN Handbook). He also referred to the *European Convention on the Suppression of Terrorism 1977*, done at Strasbourg on 27 January 1977 (Cmnd. 7031) which sought to limit by agreement the offences which would be regarded as political. The European Convention was based on the idea that certain offences were so serious that their criminal element outweighed their possible political aspects.

175 From these sources, Lord Lloyd drew the formulation referred to in [124] of these reasons. Applying this approach, his Lordship, at 787, found that "[t]he means used were indiscriminate and therefore the link between the crime and the political object … was too remote". The offences committed by the appellant were therefore held to be serious non-political offences.

176 Lord Mustill in his judgment explained the problem which the appeal had to address. He said that the case of the appellant was straightforward. If the elections in Algeria had been finalised, the government would have been chosen by the people in a plainly political process. There was interference with that process and the appellant and his associates had no other course than a resort to violence to achieve the same political ends. The appellant accepted that his methods were not democratic and involved criminal acts however contended that acts may be criminal and yet still be political. It could not matter whether the methods were regarded as immoral or unethical. Nor would it assist to call the appellant a terrorist "since yesterday's terrorist is today's freedom fighter and perhaps tomorrow's head of state". The activities of the appellant's organisation, it was said, were as political after the abortive election as they were before.

177 In response to this straightforward case, Lord Mustill explained that the circumstances in which the meaning of political offence was developed have changed. He said at 755:

> This is a powerful argument, the more so because it warns against the assumption that political action should be equated with the activities permitted to rival parties or groups seeking power under a parliamentary system of government such as exists in Europe and North America, and under other systems based on the same model. This being acknowledged, I believe that the appellant's argument goes too far, for it assumes that society, and the struggles within it, have stood still for more than a century. Those who were intended to benefit from the political exception had taken up arms, having no other means, to relieve from oppression those who could not fend for themselves. The human rights of the individual who sought refuge in fear of persecution therefore coincided with those of the oppressed, and the evil of violence could be tolerated without threat to the world order in the greater interests of making the world a better place. Whether this was sound thinking no longer matters, for the scene has changed. Those who use violence

> and fear to struggle against oppression may themselves be oppressors, causing as much suffering to the defenceless as those whom they seek to displace. When they flee to a foreign country the impulse to protect them from persecution remains, but it is muted. The community as a whole has a moral right to protection, which should not be compromised by offering too ready a refuge to those who, having embroiled the population in violence, find themselves on the losing side. It must be acknowledged that although the words of the exception remain the same the world has changed round it, and tests which may in the past have sufficed to settle the comparatively few cases where a criminal act required classification as political or non-political are too inflexible, now that the motives and means of destructive violence have become so greatly enlarged.

178 For those reasons, Lord Mustill rejected the straightforward logic of the appellant's argument and concluded at 755-756:

> … the whole trend of the more modern decisions and writings is towards an acceptance that certain acts of violence, even if political in a narrow sense, are beyond the pale, and that they should not be condoned by offering sanctuary to those who commit them. Equally, the materials brought before the House concur in a very general ideal of where the boundary lies. The problem is to find a precise and intellectually sustainable test which will enable a line to be drawn in practice by those who are required to make decisions, often under pressure of time with meagre factual materials.

179 His Lordship then explained that the offence committed by the appellant was an incident in a political struggle between the government and an opposing group and would therefore qualify as a political offence on the authority of cases like *Castioni*, *Meunier*, *Schtraks* and *Cheng* which applied the incidence test (referred to at [150] above). But, in some of these cases, for instance in the view of Lord Diplock in *Cheng*, there is a further necessary element, namely, that there must be a causal element or the absence of remoteness between the political situation and the crime which has been committed. Lord Mustill rejected causation and remoteness as useful concepts on the basis that they simply replace "political" with another form of words. By way of illustration he said at 767-768:

> Take the case of an insurgent group which attacks an army post, as part of a campaign to overthrow the government by force. This would plainly be a political offence, and on any ordinary understanding of causation it would be said that the desire to overthrow the government caused the attack to take place. Change the case now so that the soldiers, lacking the weapons needed for the attack, steal them from an arsenal. Would not this in ordinary language be described as a political offence, all of a piece with the subsequent attack, and would not the cause of the theft still be ascribed to the wish to bring down the government by force? If one changes the case once more, so that instead of stealing arms directly the insurgents steal from a bank the money with which to buy them, I can see that if the raiders intend to keep some of the proceeds for their own personal use it could well be held that the personal element of the crime is both non-political and serious enough to bring article 1F into play. But in the absence of such mixed motives I find it hard to see why the stealing of the money and its subsequent use to buy arms would not be a continuous causal chain of which all the links are political in nature; and if the logic is not clear I can foresee great difficulties in applying this criterion in practice.

180 He concluded at 768:

> In short, to say that the political aim must cause the crime, or that the crime must not be too remote from the aim, does no more than assert that the crime must be really political in nature to fall within the exception.

181 Lord Mustill then explored whether proportionality was a reliable test. This test would ask whether the nature and degree of the crime were in proportion to its political ends. His Lordship regarded this approach as illogical and overly subjective. It is illogical, he observed, because "why should a crime which would have been political in nature be turned into one which is not political simply because the judge deems the offender to have gone too far?" His Lordship further said at 770:

> … it will be hard for the judge of the receiving state to decide whether the ends justified the means without applying the notions of his own upbringing and environment in judging whether the offender has overstepped the bounds of permissible political action. To my mind this parochial approach is wrong in principle, and would yield to absurd results. In the Western democracies the use of assassination as a political instrument is anathema; yet *In re Castioni* … shows that it falls precisely within the political exception.

182 His Lordship then addressed what he described as "the heart of the case". This was the respondent's argument that the point at which criminal conduct which would otherwise be political loses this attribute is when it can be described as "an atrocity" or "terrorism". He rejected the description "atrocity" as an appropriate marker because the international community had not defined such a concept and the application of any such concept would depend on a subjective assessment made by the decision-maker. He did however accept that terrorism was an appropriate marker of a non-political crime. He said at 772:

> I am however more persuaded by the idea of writing "terrorism" into the modern concept of the political crime. To accept this requires, as must any model which involves departure from the concept of incidence, an important step: the recognition that some characteristic of the crime can disconnect it from its political origins, using the word in its widest sense. Once this step is taken, as I believe it must be, I would prefer terrorism to atrocity as a test, because it concentrates on the method of the offence, rather than its physical manifestation. The terrorist does not strike at his opponents; those whom he kills are not the tyrants whom he opposes, but people to whom he is indifferent. They are the raw materials of a strategy, not the objectives of it. The terrorist is not even concerned to inspire terror in the victims, for to him they are ciphers. They exist only as a means to inspire terror at large, to destroy opposition by moral enfeeblement, or to create a vacuum into which the like-minded can stride. It seems to me in a real sense that a political crime, the killing of A by B to achieve an end, involves a direct relationship between the ideas of the criminal and the victim, which is absent in the depersonalised and abstract violence which kills 20, or three, or none, it matter not how many or whom, so long as the broad effect is achieved. I find it hard to believe that the human rights of the fugitive could ever have been intended to outweigh this cold indifference to the human rights of the uninvolved.

His Lordship reasoned further that terrorism has been recognised by the international community as an evil in its own right which calls for special measures to address it. Any test for the determination of a non-political crime must be capable of speedy application by decision-makers. He found the concept of terrorism to be capable of definition in a way that more subjective tests based on causation, remoteness or proportionality are not.

183 Lord Mustill concluded that the airport attack by the appellant was a terrorist attack and that the appellant's conduct was thus of a non-political nature.

184 Lord Slynn considered that the incidence theory was not a comprehensive enough test to determine whether a crime was political. A political offence may be committed even if not directed to the government of the day but directed, for instance, against the opposition. His Lordship also rejected the remoteness and proportionality tests. He referred to the approach taken by the UN Handbook which involved several elements, namely, whether the crime was due to genuine political motives, whether there was a close and direct causal link between the crime and the alleged political purpose, and whether the political elements outweighed the common law character of the crime. His Lordship said that this test might be applied easily in some cases, but in others it raised matters almost impossible to decide.

185 Lord Slynn concluded at 776 that a serious non-political crime at least included:

> … acts of violence which are intended or likely to create a state of terror in the minds of persons whether particular persons or the general public and which cause, or are likely to cause, injury to persons who have no connection with the government of the state.

186 Lord Slynn used this approach to conclude that the appellant had committed a non-political crime. However, he said that this approach was not intended as a complete definition.

187 The only case in Australia in which the High Court has considered the meaning of the expression political offence in extradition legislation is *R v Wilson; Ex parte Witness T* (1976) 135 CLR 179. A special magistrate in South Australia was authorised under the *Extradition (Foreign States) Act 1966* (Cth) to take evidence for the purpose of the prosecution of Albert Kruger in West Germany. Kruger was a resident of the Soviet Union and a member of the Special Police when the Nazis occupied the Territory in 1942-3. He was charged with murder and attempted murder arising out of acts he committed as part of a program of the occupying forces to terrorise the population in order to dissuade it from rebelling against them or disobeying their orders. Witness T was to be called to give evidence before the magistrate. The evidence was thought to exculpate Kruger. Witness T sought prohibition against the further proceeding by the special magistrate. He argued that the prosecution in West Germany was for a political offence and consequently the magistrate had no authority under the act to question him.

188 Barwick CJ with whom Gibbs, Stephen and Mason JJ agreed, rejected the argument that the offences were political offences. They relied on the view expressed by Viscount Radcliffe in *Schtraks* that a political offence exists where a person is at odds with the state that applies for his extradition. In this case West Germany was simply enforcing the criminal law in its ordinary aspect. Kruger was not acting in political opposition to West Germany.

189 Jacobs J also rejected the application but on a different basis, namely that the evidence did not disclose that the offences were of a political character. He disagreed with the application of *Schtraks* to this case. He said at 187-188:

> The offences with which the defendant is charged are offences which were committed in territory of the Soviet Union which at the time of the commission of the alleged offences was in the occupation of Germany. He was a resident of the occupied territory and the offences are alleged to have been committed against

> other residents of that territory. If it were correct to assume that all the offences were committed in the course of what is described in the documents as combat operations against partisan groups and were committed in support and as part of a campaign by the occupying power against the partisans I would have difficulty in concluding that the offences were not of a political character. The views expressed by Viscount Radcliffe in *Schtraks v. Government of Israel* would have no application in such a case. His views were expressed in a different context.
>
> Nevertheless, in my opinion it has not been proved by evidence that the offences in respect of which the defendant Kruger is charged and in respect of which it is proposed that evidence be taken are offences which are, or which are by reason of the circumstances in which they are alleged to have been committed, offences of a political character. A most significant feature of the present case is that the defendant himself does not claim that the alleged offences are of that character. Indeed he alleges that the witness who now seeks this writ is able to give evidence which would exonerate him "in significant respects" and thereby requires that the evidence be taken in Australia before a magistrate.

(Footnote omitted.)

190 Murphy J, who also agreed in the result, said at 191:

> … the applicant argued that the offences were of a political character because they were war crimes and, in particular, because the defendant Kruger acted under directions from the German Government. He relied upon a number of cases which described offences of a political character: *In re Castioni*; *Reg. v. Governor of Pentonville Prison; Ex parte Cheng*; *In re Meunier* and *Schtraks v. Government of Israel*. I am not satisfied that any of the tests in these cases should be adopted, particularly the test in *Schtraks' Case* which I do not regard as adequate. It excludes, in my opinion, some offences which are political and include some which are not.

(Footnotes omitted.)

191 In *Prevato* Wilcox J set aside a decision of a magistrate that Prevato was liable to be extradited to Italy. Prevato was a member of the Ronde Armate Proletarie (Proletarian Armed Patrols) which opposed a system called the selection in schools program. He was charged with various offences involving damage to schools and threats to teachers and other officials. One issue was whether these were political offences. That in turn raised the question whether a political offence required that the offender seek a change of government or whether it is sufficient that the offender aim to change government policy. Wilcox J relied on the speech of Lord Diplock in *Cheng* in which his Lordship said than an offence could only be characterised as political if the object to be achieved by it was to change the government *or induce it to change its policy* (emphasis added). Wilcox J said at 385-386:

> The evidence in the present case, emerging from the statements of all three witnesses, was that the acts in relation to which Prevato is charged occurred in the course of a long and bitter campaign to induce a change in education policy in government schools in Padua. The evidence does not show whether these schools were conducted by the national government or by a provincial or local government but it is not an essential requirement of a political offence that the relevant contest be with the national government. *Castioni* shows that. The early debate upon the necessity for there to be a campaign to change the government itself was decisively resolved in the negative in *Schtraks*; it is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The

> offence must be directed solely to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be.
>
> In the present case these requirements are all satisfied. … Once it is determined that there is no necessity for the relevant campaign to be one seeking a change in government, that it is enough that the campaigners seek a change of government policy, there is no valid distinction between this case and *Castioni*.

192 In Australia, the meaning of the expression serious non-political offence used in Art 1F(b) of the Refugees Convention was considered by the High Court in *Singh*. Singh was a member of the Khalistan Liberation Force (KLF) which was engaged in a violent struggle for an independent Sikh homeland in the Punjab. In his capacity as commander of information he gathered intelligence about a police officer who had tortured a KLF member. The KLF used the information to kill the policeman.

193 Singh claimed that the KLF was engaged in a political campaign for an independent state in order to prevent further oppression of the Sikhs. The Minister argued that the KLF was a terrorist organisation involved in revenge killings against people who were violent against Sikhs.

194 The Refugee Review Tribunal held that it was unnecessary to determine whether the KLF was engaged in a political struggle because the killing was an act of retribution, and an act of retribution could not found a political offence.

195 The majority in *Singh* (Gleeson CJ, Gaudron and Kirby JJ) held that the Tribunal erred in reaching this conclusion.

196 Gleeson CJ said, at [19], that whilst an unlawful killing may be regarded as political, it will not be so if the sole or dominant purpose is to satisfy a personal grudge against the victim. However, in this case there was no evidence that the police officer was killed for reasons of personal retribution. His Honour explained:

> On the respondent's account, which the Tribunal evidently accepted, the police officer became a "target" because he had tortured a KLF member. That can be described as a form of vengeance or retribution, but, if it were accepted that one of the political objectives of the KLF was to resist oppression of Sikhs, it is not vengeance or retribution of a kind that is necessarily inconsistent with political action in the circumstances which the respondent claimed existed in India. For the Tribunal to say, even by reference to the facts of the case, that such retribution cannot be political, was wrong.

197 Gleeson CJ then said at [21]:

> … there must be a sufficiently close connection between the criminal act and some objective identifiable as political to warrant its characterisation as a political act. And the achievement of that objective must be the substantial purpose of the act.

198 Gaudron J rejected, at [41], an approach of limiting the expression "a political crime" by reference to descriptions such as "atrocities", "terrorist" activities, or "crimes of revenge" because they are imprecise and may, as a result, involve oversimplification. She focused on the purpose of the offence as the defining characteristic and relied on the statement to that effect of Lord Diplock in *Cheng*. Gaudron J considered, at [43]-[44], however that his Lordship's statement was too limited in several respects. It was not necessary, in

her view, that the political purpose be the sole or even dominant purpose as long as it was a significant purpose. Further, there was no need for the act to be directed against the government of the day. Her Honour said at [45]:

> Accordingly, I would consider a crime to be political if a significant purpose of the act or acts involved is to alter the practices or policies of those who exercise power or political influence in the country in which the crime is committed.

199 At [46]-[47] Gaudron J continued:

> Once it is accepted, as in my view it must be, that political purpose is the defining feature of a political crime, references to "proportionality", "nexus" or "causal link", as made by the Tribunal, assume legal significance. A crime is unlikely to have a political purpose if it has no relevant connection with the political aims of those involved in its commission. So, too, as has been explained in other legal contexts, "proportionality" is a useful indicator of purpose. The true purpose of actions which are unnecessary or disproportionate to the end which is said to justify those actions is unlikely to be the achieving of that end but is likely to be the satisfaction of some other and different purpose.
>
> Actions which are either unnecessary or disproportionate to the political objectives which are said to justify them are, perhaps, usefully described as "terrorist" activities. But for the purposes of Art 1F(b), that description is not, of itself, determinative. The issue is whether the actions in question were undertaken for a political purpose, in the sense that that purpose was a significant purpose.

(Footnotes omitted.)

200 Kirby J summarised his approach at [141] as follows:

> (4) The precise meaning of serious "non-political" crimes in Art 1F(b) of the Convention is not conclusively elaborated, for all possible cases, by the Convention itself, municipal law or judicial authority. However, some guidance can be offered:
>
> (a) To characterise the crime as "political" or "non-political", it is necessary to consider all of the facts of the case in the context, and for the purposes, of the Convention. There is no bright line for distinguishing "non-political" from "political" crimes;
>
> (b) "Political" crimes are not confined to crimes that fall within the purely political offences such as treason, sedition and the like. "Non-political crimes" take their meaning accordingly;
>
> (c) Depending on the circumstances, murder may be a "political crime" if it is otherwise so characterised;
>
> (d) The ascertainment of the object or purpose of the crime is relevant to deciding whether it is "political" or "non-political" in character. To be "political" it must, in some appropriately close way, be linked with the purpose of changing the political environment, commonly the government, by the commission of the crime;
>
> (e) Whilst purely personal grudges or motivations for a crime may sometimes demand that the crime be classified as personal (and "non-political" for that reason), revenge and personal hatred are not, as such, inconsistent with political action. On the contrary, they may be its expression in a particular case;
>
> (f) In deciding whether a crime is "political" or "non-political" it will sometimes be relevant to consider the weapons and means used; whether the "target" of the crime is a public official or a government agent as distinct from unarmed civilians chosen indiscriminately; and whether the crime is proportionate to the political end propounded. If it is excessive and disproportionate, it

> will be easier to infer that its true character is "non-political", that is, done for the satisfaction of some other and different, possibly entirely personal ("non-political") purpose. It will usually be necessary to examine the alleged objectives of any organisation involved and the applicant's connection, if any, with that organisation; and
>
> (g) It will also be appropriate to read the exception for "serious non-political crimes" in the context of the burden that is placed by the Convention upon countries of refuge and the exceptions that are provided in the specified cases, including by Art 1F, where, in the particular case, that burden would be intolerable. The serious crimes mentioned in the exclusions in Art 1F are such that their extreme character is accepted as exempting the country of refuge from the protection obligations stated in the Convention, however much otherwise the applicant qualifies for recognition as a "refugee".

201 McHugh J would have allowed the appeal and restored the Tribunal's decision that Singh was excluded from refugee status by the operation of Art 1F(b) because the murder of the policeman was a serious non-political crime. His Honour accepted that if the Tribunal had found that a murder for revenge could never be a political offence then the Tribunal would have erred in law. But he held that the Tribunal found as a fact that this murder was motivated by revenge. Hence, his Honour did not consider the definition of the expression political crime.

202 Callinan J would have also allowed the appeal on the basis that the murder in which Singh was involved was not a political crime. He approached the issue on the basis that:

> 158 In a sense, violence, especially in its final and worst manifestation, killing, is the antithesis of political activity. Politics is the art or science of government. Murder can hardly be fairly characterisable as an activity in furtherance of, or part of the practice of, an art or science.

203 His Honour later explained at [165]:

> A crime, in my opinion, will be a political crime if, first, it is done genuinely and honestly for political purposes, that is in order to change or influence an oppressive government or its policies, and, secondly, the means employed, although of a criminal nature according to the law of the country in which they are employed, are reasonably, in all of the circumstances, adapted to that purpose. Circumstances which will be relevant to the question of reasonableness or otherwise are the nature and extent of the persecution, discrimination or oppression suffered by an applicant or a group to which he or she belongs before the commission of the crime; the availability and efficacy of measures to redress or punish such persecution, discrimination or oppression; the extent to which the applicant sought first to invoke or use such measures before embarking on the crime; the means available to the applicant or group to avoid persecution, discrimination or oppression; the nature of the government or its policies that the applicant wishes to influence or change; the process by which that government achieved power; the aims of, and means employed by any organisation to which the applicant belonged in furtherance of which the applicant claimed to be acting; the existence or otherwise of a free press in the applicant's country; the history, so far as it can be reliably ascertained, of dissension in the applicant's country; the way in which both the polity from which the applicant has departed and the polity of the country in which the applicant has sought refuge regard and punish the

> crime of the applicant, and any crime of his or her "targets" said to justify the former's crime; the respective roles of the government and the group of which the applicant is a member in the perpetuation of cycles of violence; and, the risk of indiscriminate harm to members of the public. No one of these need necessarily be decisive, except perhaps the last in some cases. As to that, its absence does not mean that the crime will necessarily be a political crime, although when it is present it will almost always be decisive as a ground of exclusion.

The political offence exception in other jurisdictions

204 The diversity of views concerning the meaning of the political offence exception is not limited to judges in the UK and Australia. The concept, even if not utilising the same wording, is used widely sometimes in legislation, and sometimes in extradition treaties between states.

205 Early French cases limited the exception to conduct which affected the organisation or main organs of the state alone. The test was purely objective. Thus, in the 1947 opinion of the Court of Appeal of Grenoble in *Re Giovanni Gatti* 14 I.L.R. 145 (Ct App Grenoble 1947), extradition was allowable where the offender killed a member of a communist group for purely political reasons. The Court ruled that the character of the offence did not depend on the motives of the offender, but on the nature of the rights injured. However, by 1967 when the case of *Da Palma Inacio*, Court of Appeal of Paris, 14 December 1967, *La Semaine Juridique*, No 15387 (1968), (cited in Van den Wijngaert C, *The Political Offence Exception to Extradition* (Kluwer 1980) (Wijngaert) at footnote 659) was decided, a subjective approach had been adopted. *Da Palma* was involved in a bank robbery in Portugal in support of a revolutionary movement. The Court of Appeal of Paris refused extradition because the conduct was undertaken for political motives and exclusively for a political purpose. Over time, this subjective approach was limited in cases of crimes of a serious nature. Thus, in 1979, the Court of Appeal of Paris allowed extradition in the case of *Piperno*, Court of Appeal of Paris, 17 October 1979, arret no 1343-79, p 14 (not published), cited in Wijngaert at footnote 665. The Court rejected the claim that in kidnapping and, many weeks later, murdering the former Prime Minister Aldo Moro, Piperno had committed a political offence. The Court said "whatever be the purpose pursued or the context in which such acts are located, they cannot, taking into account their seriousness be considered as being of a political character".

206 Courts in Switzerland developed the predominance test, which focuses on the purpose of the offender and the proportionate effect of the alleged offence: Bassiouni MC, *International Extradition: United States Law and Practice* (4th ed, Oceana Publications Inc, 2002) (*Bassiouni*) at p 646; Shearer IA, *Extradition in International Law* (Manchester University Press 1971) at pp 182-183. The test involves a balancing of the political and common elements of a crime. In the case of *Re Nappi* (1952) 19 I.L.R. 375 (as cited in Gilbert GS, "Terrorism and the Political Offence Exemption Reappraised" (1985) 34 *International and Comparative Law Quarterly* 695 at 701-702) the process was explained as follows:

> [The] political character of an offence is predominant only if the offence is in direct relation to the end sought. In order that such a relation may exist, this offence must be a really efficacious method of achieving the end, or constitute an integral part of acts leading thereto, or represent an incident in a general political movement in which the parties have recourse to such methods.

On this approach, an offence will be political if its political character is predominant, and the criminal conduct a necessary way to achieve the offender's political goal. Serious terrorist conduct is not likely to fall within the exception.

207 The US law on the political offence exception has a superficial simplicity. The courts apply an incidence test which is derived from *Castioni*. In *Quinn*, which was decided in 1986, Judge Reinhardt said at 796:

> The United States, in contrast to Great Britain, has adhered more closely to the *Castioni* test in determining whether conduct is protected by the political offense exception.

208 The test applied in the US has two limbs which ask whether the offence occurred in an uprising, rebellion, or revolution, and whether the act was in furtherance of or incidental to the uprising.

209 Thus, in one of the few cases on the political offence exception considered by the US Supreme Court an extradition request from El Salvador was refused in respect of murder and robbery committed while the offenders were attempting to thwart a revolution, but was granted in respect of certain other offences which occurred before the armed uprising had commenced: *Re Ezeta* 62 F 972 (CCND Cal 1894).

210 However, almost a century later, the apparent simplicity of this test gave way to complexity and division in judicial approaches to its formulation and application. Again, in *Quinn* Judge Reinhardt said at 801:

> Recently, the American judiciary has split almost evenly over whether the traditional American incidence test should be applied to new methods of political violence in two categories — domestic revolutionary violence and international terrorism — or whether fundamental new restrictions should be imposed on the use of the political offense exception.

211 In *Eain v Wilkes*, which was decided in 1981, the 7th Circuit Court of Appeals sitting en banc considered a request from Israel to extradite Abu Eain who was a Palestinian living in the West Bank and a member of the PLO. He was charged with murder and related offences arising from a bombing in a crowded market place in Tiberius. Two young boys were killed and over 30 injured. One argument for Abu Eain was that the offences were politically motivated and hence he was protected from extradition by the political offence exception. He argued that there was a violent conflict in Israel to which the PLO is a party and that the alleged offences were incidental to or in furtherance of that conflict. As to the first limb of the test, the uprising limb, the Court said it had to address the question whether the finding that there was a "conflict" was sufficient to establish that there was "a violent political disturbance". It addressed the question at 519-520 as follows:

> The nature of that conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception has been sustained. Those cases involved on-going, organized, battles between contending armies, a situation which, given the dispersed nature of the PLO, may be distinguished.
>
> …
>
> For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country, and thus directs its destructive efforts at a

> defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighbourhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harbouring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.

212 The Court also rejected the argument that the bombing was incidental to the conflict. It was said at 520-521:

> The reason that the bombing was not "incidental to" the conflict does not lie in the motivation for the act, since, for purposes of extradition, motivation is not itself determinative of the political character of any given act. Lubet & Czaczkes at 203 n.102. The definition of "political disturbance," with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

213 Thus, the Court determined that the political offence exception did not apply.

214 In the cases of *McMullen* and *Re Mackin* 668 F (2d) 122 (2d Cir 1981) extradition magistrates refused the extradition to the UK of members of the Provisional Irish Republican Army (PIRA) charged with murders respectively in England and Northern Ireland. It was held that the offences took place in furtherance of an uprising throughout the UK, and hence both limbs of the test were satisfied.

215 In *Quinn*, which was another PIRA case, Judge Reinhardt rejected the reasoning in *Eain v Wilkes*. He said that it was not legitimate for the court to rule on whether the means used by the offenders were politically justified. On his analysis the political offence exception had a limited operation but this derived from his view of the uprising limb of the incidence test which at 806 was expressed as follows:

> As we have noted, the political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity — an effort to alter or abolish the government that controls their lives — and not out of a desire to protect all politically motivated violence. …
>
> The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular

> objective. The exception does not apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil. …
>
> Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations — even to the homeland of an oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially.

216 On this analysis Judge Reinhardt said that in *Eain v Wilkes* the political offence exception did not apply because there was no relevant uprising. He said at 807:

> If follows from what we have said that an "uprising" can exist only when the turmoil that warrants that characterization is created by nationals of the land in which the disturbances are occurring. Viewed in that light, it becomes clear that had the traditional incidence test been applied in *Eain*, discussed in *supra* pp. 801-02, the result would have been identical to that reached by the Seventh Circuit. When PLO members enter Israel and commit unlawful acts, there is simply no uprising for the acts to be incidental to. The plain fact is that the Israelis are not engaged in revolutionary activity directed against their own government. They are not seeking to change its form, structure, or composition through violent means. That the PLO members who commit crimes are seeking to destroy Israel as a state does not help bring them within the political offense exception. In the absence of an uprising, the violence engaged in by PLO members in Israel and elsewhere does not meet the incidence test and is not covered by the political offense exception. To the contrary, the PLO's worldwide campaign of violence, including the crimes its members commit in the state of Israel, clearly constitutes "international terrorism".

217 Judge Reinhardt adopted a liberal approach to the incidental limb observing that the limitations arising from the uprising limb provide sufficient safeguard for the proper operation of the exception. Thus, under the liberal nexus standard there is no need for proof of the potential or actual effectiveness of achieving the political ends nor is there a need to establish the motive of the accused.

218 Judge Duniway agreed in the outcome but not with Judge Reinhardt's geographical limitation on the political offence exception. Judge Fletcher disagreed with the outcome but agreed with Judge Reinhardt's analysis of the requirements of the political exception and rejected the *Eain v Wilkes* approach of evaluating the legitimacy of certain political objectives and distinguishing between attacks on military and civilian targets.

219 The debate between the analysis in *Eain v Wilkes* and *Quinn* has not been quelled. As recently as 2005, in *Barapind v Enomoto* 400 F (3d) 744 (9th Cir 2005), the 9th Circuit en banc revisited the issue in the case of a request by India for the extradition of a leader of a Sikh separatist movement. As the crimes in this case occurred during a time of violent political disturbance in India there was no doubt that the uprising limb was satisfied, but there was a

division of view as to the formulation and operation of the incidental limb. Judge Rymer, with whom four of the 11 judges sitting en banc, dissented on the meaning of the incidental limb, said at 757:

> I believe we must overrule *Quinn*, because indiscriminate violence against innocent persons should not qualify for the political offense exception to extradition, even if politically motivated. Nor should the propriety of committing common crimes be left to the perpetrators' discretion. And civilians *are* different from the military. Overruling *Quinn* would realign us with the two circuits that have addressed attacks on non-combatant civilian targets and held them to be unprotected. See *Ahmad*, 910 F.2d at 1066 (holding that an attack on a commercial bus carrying civilians is not a political offense despite political motivation); *Eain*, 641 F.2d at 520-21 (recognizing that the civilian status of victims is of significance in considering the political offense exception.)

(Original emphasis.)

220 It is testimony to the wide diversity of views about the scope of the political exception and to the controversy over the validity of the various approaches, that the subject has also attracted a large volume of commentary by academics over a long period. Some useful examples, but only a tiny sample from a very large number, are: Wijngaert; Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law" (1962) 48 *Virginia Law Review* 1226; Ravaschiere VP, "Terrorist Extradition and the Political Offense Exception: An Administrative Solution" (1980-1981) 21 *Virginia Journal of International Law* 163; Hannay WM, "International Terrorism and the Political Offense Exception to Extradition" (1979-1980) 18 *Columbia Journal of Transnational Law* 381; Gilbert GS, "Terrorism and the Political Offence Exemption Reappraised" (1985) 34 *International and Comparative Law Quarterly* 695; Aughterson EP, *Extradition Australian Law and Procedure* (The Law Book Company Limited, 1995) at pp 89-111; Phillips S, "The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future" (1996-1997) 15 *Dickinson Journal of International Law* 337; De Fabo V, "Terrorist or Revolutionary: The Development of the Political Offender Exception and its Effects on Defining Terrorism in International Law" (2012) 2 *National Security Law Brief* 69.

The reason there is no definition of political offence

221 In some of the cases previously discussed, judges have explained the circumstances in which the quest for a definition has arisen. These observations throw some light on the reason for the many different and often opposing approaches to the meaning of the expression.

222 The genesis of extradition practice in the UK was described by Lord Diplock in *Cheng* at 943-944 as follows:

> The practice of making extradition treaties was pioneered by Belgium in 1833, three years after it had itself achieved independence — a fact which may have influenced its exclusion of extradition for offences of a political character. The Government of the United Kingdom was slow to follow this example, but nevertheless in 1842 and 1843 extradition treaties dealing with a limited number of serious crimes were made with the United States of America and France. Crimes which were on the face of them political offences, such as treason and sedition, were not included. A similar treaty was made with Denmark in 1862. Compliance with the obligations assumed by the Government under these treaties involved the arrest and detention in the United Kingdom of the fugitive criminal

> whose surrender was applied for. For this the authority of an Act of Parliament was required. Separate Acts of Parliament were passed to give effect to the provisions of the treaties with the United States of America, France and Denmark. Despite the precedent set by Belgium in 1833, none of these treaties or Acts of Parliament contained any exclusion of offences which, though falling within the description of offences for which extradition was to be granted, were nevertheless "of a political character".
>
> Such was the state of the law of extradition in this country when the Extradition Act 1870 was passed. It is relevant to recall that during the preceding 50 years new independent states had emerged in Europe and in Latin America as a result of throwing off the yoke of foreign powers and that in the immediately preceding years the risorgimento had been successful in Italy. It had attracted the enthusiastic sympathy of the public in the United Kingdom and of the Liberal Party which formed the government in power at the time when the Act was passed.

223 This background explains the approach taken, for instance, in the early cases such as *Castioni*.

224 The historical trends which later developed and which gave rise to the problems of construction were referred to by Lord Mustill in *T v Home Secretary* at 752-753 as follows:

> My Lords, during the 19th century those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats. Now, much has changed. The authors of violence are more ruthless, their methods more destructive and undiscriminating; their targets are no longer ministers and heads of states but the populace at large; and their aims and ideals are frequently no more congenial to the countries in which they take refuge than those of the regimes whom they seek to displace. The unsympathetic call them terrorists, and their presence is seen as both an affront and a danger. These fundamental changes in method and perception have not been matched by changes in the parallel, although not identical, laws of extradition and asylum. These laws were conceived at a time when political struggles could be painted in clear primary colours largely inappropriate today; and the so-called "political exception" which forms part of these laws, and which is the subject of this appeal, was a product of Western European and North American liberal democratic ideals which no longer give a full account of political struggles in the modern world. What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date.

225 And further he explained at 762:

> … in the post-war years advances in technology and transportation have made the image of the lone assassin, with pistol arm outstretched, hurling himself at the tyrant in defiance of an angry crowd, seem out of date. The weapons have become more destructive, and less discriminating; the targets, such as passenger aircraft, nuclear plants and off-shore rigs, are more vulnerable; and the risks to the perpetrator are more easily evaded. Furthermore, the simple world of the bad tyrants and the good patriots has vanished. Those who struggle against odious regimes have now come to seem, by their aims and methods, scarcely less odious than their oppressors. Yet it was (and still is) hard to see why their crimes, however distasteful and heartless, are any the less "political" than those of the heroes of the Risorgimento. International terrorism must be fought, but the vague outlines of the political exception are of no help. Something more clear-cut is needed.

The rationale behind the political offence exception

226 Lord Diplock in *Cheng*, at 946, identified the two following reasons for the political exception:

> First, to avoid involving the United Kingdom in the internal political conflicts of foreign states. Today's Garibaldi may well form tomorrow's government. And, secondly, the humanitarian purpose of preventing the offender being surrendered to a jurisdiction in which there was a risk that his trial or punishment might be unfairly influenced by political considerations.

227 Lord Salmon in *Cheng* at 961 said of the reasons for the political exception:

> The historical reason for their introduction in 1870 was not primarily fear that the fugitive would not get a fair trial in the requesting state but because as my noble and learned friend Lord Reid pointed out in *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 583:
>
> > Many people then regarded insurgents against continental governments as heroes intolerably provoked by tyranny who ought to have asylum here although they might have destroyed life and property in the course of their struggles.

Legislative history in Australia

228 Prior to 1966 the *Extradition Act 1870* (UK) applied in Australia by operation of s 108 of the *Constitution of the Commonwealth*. That section provided that after federation laws which previously applied to the colony continued to apply unless the Australian Parliament repealed or amended those laws. Consequently, the UK cases decided by 1966 including *Castioni*, *Meunier*, *Kolczynski*, and *Schtraks*, although not binding on Australian courts, provided sources for the interpretation of the provision in force in Australia.

229 In 1966 Parliament passed the *Extradition (Foreign States) Act 1966* (Cth) to deal with foreign extradition and to exclude the operation of the UK legislation. A political offence exception was included in s 13(1) as follows:

> A person is not liable to be surrendered to a foreign state if the offence to which the requisition for his surrender relates is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character.

230 The political offence exception attracted particular attention in the Second Reading Speeches. By 1966 *Castioni*, *Meunier*, and *Schtraks* had been decided in the UK. These judgments, set in the context of the Cold War, caused Mr Killen, the Member for Moreton, to propose an amendment to the Bill which was accepted by the Attorney-General, Mr Snedden, and which became s 4(4) as follows:

> For the purposes of this Act, an offence against the law of a foreign state may be regarded as being an offence of a political character notwithstanding that there are not competing political parties in that state.

231 In the second reading debate Mr Killen said:

> In other words, what I submit emerges from the two judgments I have cited [*Castioni* and *Meunier*] is that in order for a political offence to be committed there must be two political parties in the State. As one looks around the world one finds a number of countries in which there are not two political parties. There are, as we all know, one party States, and this is significant in the Commonwealth

> context. It is significant in the world context, in the world community. I refer to countries that have deteriorated or found themselves wandering away from the democratic tradition and moving towards the establishment of the one party state. This is a reality of life, and no amount of sweet soothings can take us away from that fact.
>
> …
>
> What I am putting to the House is this: There is a stream of authority which although, admittedly not binding upon the courts of Australia would nevertheless be of high persuasive significance and which would suggest that unless there were two political parties in the country you cannot commit a political offence. Again, this was considered some four years ago by the House of Lords in *Schtraks* case. The gentleman concerned was from Israel. The House of Lords did not like the authority established by the two earlier cases. There is no complete definition on the point. Nevertheless there remains a measure of doubt — it may be held to be a minor amount of doubt — as to whether or not the authority of the two earlier cases would survive in this country to the extent that if a court in Australia was called upon to consider the position of an individual seeking political asylum, and if it were a one party state that was seeking to extradite him it, of course, would not be open to the court to hold that it was a political offence. For that reason I am delighted that the Attorney-General has agreed to accept the suggestion indicated in the particular amendment.

(Australia, House of Representatives, *Debates* (1966) Vol HR 53, pp 2042-2043.)

232 Mr Bowen, the Member for Parramatta and later the first Chief Justice of this Court, said during the debate:

> In view of the remarks made by the honourable member for Moreton (Mr.Killen) on the question of political offences, perhaps I could add one or two remarks on the topic. This is a matter which a court here would have to consider if it were alleged that the extradition was sought for murder and it was claimed that this was a political offence. It is not always easy to see whether a murder is a political offence. A man may throw a bomb into a cafe as a terrorist act. He may assassinate a head of state. He may take part in an insurrection and in the course of it shoot a government soldier. There are various degrees. One may say that in one case he has a political motive, that in another he has a political purpose and that in another he is taking part in a political disturbance. A good deal of difficulty in the definition of political offence is shown by the cases.

(Australia, House of Representatives, *Debates* (1966) Vol HR 53, pp 2045-2046.)

233 After quoting Lord Reid at 584 in *Schtraks*, Mr Bowen continued:

> I believe that what flows from this is that it would be unwise to attempt to define in statute what is a political offence, and that it should be left, as it will be left in this Bill, to the good sense of our courts to determine in light of the circumstances and the political knowledge and climate of the day when any such case arises whether or not the offence alleged against a person is to be classed as a political offence.

(Australia, House of Representatives, *Debates* (1966) Vol HR 53, p 2046.)

234 Mr Killen responded to Mr Bowen's reference to *Schtraks*. He claimed support for his view from an academic article which he said concluded that:

> [T]here must be a plurality of political parties before the possibility of a political offence can come into being.

(Australia, House of Representatives, *Debates* (1966) Vol HR 53, p 2052.)

235 Then in 1988 the government recognised that the political offence exception was uncertain in scope. Courts had been unable to provide a workable definition. The government wanted to ensure that certain offences, particularly those which were the subject of international conventions such as hijacking, genocide and torture, were not regarded as political and hence not within the political offence exception.

236 The situation was explained by Mr Lionel Bowen, then Attorney-General, in the Second Reading Speech on the *Extradition Bill 1987* (Cth) which proposed adding what are now subss (a)(i) to (vi), (b), (c), and (d) in the definition of political offence in s 5 of the Act:

> Since the second half of the nineteenth century almost every extradition treaty negotiated has contained a provision which stated that extradition would not be granted for political offences. Originally, political offences were offences against the state and those who committed them were often seeking asylum in the country of refuge. Wishing to be able to grant such asylum, countries overwhelmingly recognised the concept of asylum by refusing to extradite those who had been referred to as ideologically motivated offenders. A problem then arose as to how to distinguish between types of offences and the motivation of offenders. That problem manifested itself in the decisions of courts determining the extradition cases and has led to confusion as to the real meaning of the phrase "political offence". The civilised world is now faced with the grave problem of politically-motivated terrorists whose crimes are such that they should not find a haven behind the doors of the political offence exception to extradition.
>
> The Bill seeks to clarify this difficult area of law by imposing limits on the political offence exception. It does so by excluding from that exception crimes recognised by the international community in multilateral treaties as being extremely serious. The crimes statutorily excluded from the exception are set out in the definition of "political offence" in clause 5 of the Bill. They relate to hijacking, safety of aircraft, genocide, torture, the taking of hostages and the protection of internationally protected persons. The Bill also has the effect of allowing treaties to be negotiated which add to the list of exceptions to the political offence exception.

(Australia, House of Representatives, *Debates* (1987) Vol HR 157, pp 1615-1616.)

237 The offences now excluded in s 5 are:

> (a) an offence that is constituted by conduct of a kind referred to in:
>
> (i) Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, being the convention a copy of the English text of which is set out in Schedule 1 to the *Crimes (Aviation) Act 1991*; or
>
> (ii) Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, being the convention a copy of the English text of which is set out in Schedule 2 to the *Crimes (Aviation) Act 1991*; or
>
> (iia) Article 2 of the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999; or
>
> (iii) paragraph 1 of Article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, being the convention a copy of the English text of which is set out in the Schedule to the *Crimes (Internationally Protected Persons) Act 1976*; or
>
> (iv) Article III of the Convention on the Prevention and Punishment of

the Crime of Genocide, being the convention a copy of the English text of which is set out in the *Genocide Convention Act 1949*; or

(v) Article 1 of the International Convention against the Taking of Hostages, being the convention of that title that was adopted by the General Assembly of the United Nations on 17 December 1979; or

(vi) Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, being the convention of that title that was adopted by the General Assembly of the United Nations on 10 December 1984; or

(vii) Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a copy of the English text of which is set out in Schedule 1 to the *Crimes (Ships and Fixed Platforms) Act 1992*; or

(viii) Article 2 of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, a copy of the English text of which is set out in Schedule 2 to the *Crimes (Ships and Fixed Platforms) Act 1992*; or

(ix) Article 2 of the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997; or

(x) Article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism, done at New York on 13 April 2005;

(b) an offence constituted by conduct that, by an extradition treaty (not being a bilateral treaty) in relation to the country or any country, is required to be treated as an offence for which a person is permitted to be surrendered or tried, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries;

(c) an offence constituted by:

(i) the murder, kidnapping or other attack on the person or liberty; or

(ii) a threat or attempt to commit, or participation as an accomplice in, a murder, kidnapping or other attack on the person or liberty;

of the head of state or head of government of the country or a member of the family of either such person, being an offence declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country; or

(d) an offence constituted by taking or endangering, attempting to take or endanger or participating in the taking or endangering of, the life of a person, being an offence:

(i) committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons; and

(ii) declared by regulations for the purposes of this paragraph not to be a political offence in relation to the country.

238 To complete the picture, mention should also be made of the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (Cth), which was passed by the Senate earlier this year. In its Advisory Report on the Bill, the House of Representatives Standing Committee on Social Policy and Legal Affairs explained the proposed amendments to s 5 of the Act as follows:

> 2.22 The Bill will amend section 5 of the Extradition Act to expressly exclude the following offences from the political offence definition:
>
> • an offence that involves an act of violence against a person's life or liberty

- an offence prescribed by regulations to be an extraditable offence in relation to a country, or countries, and
- an offence prescribed by regulations not to be a political offence in relation to a country or countries.

2.23 The amendments to the political offence definition are designed to streamline the political offence definition by moving all exceptions and exclusions of the definition into regulations made under the Extradition Act. Australia is party to a large number of bilateral and multilateral treaties that relate to international crime and international crime cooperation. Many of these treaties impose an obligation on Australia to ensure that certain offences are not considered political offences for the purposes of extradition. Australia currently meets these international obligations by listing relevant offences which are excluded from the definition within section 5 of the Extradition Act itself. The amendments will move the bulk of this list to regulations and make it possible to add further exceptions to the political offence definition through the amendment of regulations.

239 The *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth) received Royal Assent on 20 March 2012. The amendments set out above will come into force six months thereafter unless an earlier commencement date is fixed by proclamation. The amendments allow for the further diminution of the role of the political exception.

The contemporary meaning

240 The foregoing discussion reveals that the courts have acknowledged that it is not possible to provide an all-embracing definition of the expression political offence. The jurisprudence in the UK, Australia, US and Canada and the European countries referred to is a collection of pragmatic responses to the facts of each case influenced by the changing circumstances of the political environment.

241 The early cases refused extradition against a background of support in the requested states of the political ambitions of the offenders. Society at the time saw these offenders as worthy fighters against social oppression elsewhere. The incidence theory was generally sufficient to deal with the issues then arising. Requested states mostly supported the uprisings in which these incidents occurred. Later, decision-makers saw the need to make adjustments in the theory to take account of the emergence of one party states and the resistance in the politically opposed states to potential requests for surrender to those one party states.

242 In due course the methods used to advance political claims underwent major changes. For instance, the advent of mass air travel gave rise to hijacking as a method of promoting political causes. Mass land transport by bus or train allowed political protest to be registered by indiscriminate bombing of innocent civilians. Such violent activity was undertaken in aid of political campaigns. It is difficult to argue that offences arising out of such conduct are not political. The means used are designed to advance political ends. In the words of Lord Mustill referred to in [225] which bear repeating:

> Those who struggle against odious regimes have now come to seem, by their aims and methods, scarcely less odious than their oppressors. Yet it was (and still is) hard to see why their crimes, however distasteful and heartless, are any the less

> "political" than those of the heroes of the Risorgimento. International terrorism must be fought, but the vague outlines of the political exception are of no help. Something more clear-cut is needed.

243 However, the global community, shocked by indiscriminate violence against innocent civilians, did not accept that people using such methods should escape extradition to the place of their offending. That societal response, no doubt shared and reflected by judges, explains the next phase of understanding of the political exception. The cases in this period attempted to find ways to limit the political exception. A number of limitations were suggested. For instance, it was suggested that terrorist offences should be excluded from the exception. Or offences which were not proportionate to the political ends should be excluded. Or conduct that was too remote from the political outcome should be excluded. Or offences which were atrocious should be excluded. But no one formulation attracted general or significant judicial support.

244 The reason judges have not found an acceptable approach to the meaning of the expression political offence lies in the tension between the ordinary meaning of the term and the unwanted results which such a meaning produces. Where violent acts such as indiscriminate mass killings of civilians are carried out as part of a political campaign, offences arising from that conduct would, in the ordinary usage of language, be described as political offences. But to afford offenders protection from extradition in those circumstances was an outcome too shocking for most judges to accept. It is, however, important for the maintenance of the integrity of the judicial process that the construction of the term is not governed by subjective, philosophical or emotional responses. The judicial system cannot exempt an IRA bomber from extradition but allow the extradition of a PLO bomber on the basis that the judge favours the politics of the IRA over the politics of the PLO. Terrorist acts done in the name of and for the purpose of political causes are no less political because they are acts of great violence which cause horrendous suffering or death.

245 Some judges have thought it better to rely on the ordinary meaning of the words and to rely on the legislature to provide the limits necessary to address the new developments. Thus, in his dissent in *Cheng*, Lord Simon, with whom Lord Wilberforce agreed, said at 951 in support of the view that Mr Cheng had committed a political offence in the US:

> By reason of this primary and golden rule, therefore, the words "offence … of a political character," must be read in their natural, ordinary and literal sense, without the addition of the words "against (or 'in respect of') the foreign state demanding such surrender," which are not in the Act. Asked whether the appellant's crime was an "offence … of a political character," even the most harassed commuter from Clapham would, I think, undoubtedly answer: "Of course." Indeed, I cannot conceive that it would occur to anyone except a lawyer that the appellant's offence could possibly be described as other than of a political character.

246 In justification of this approach, which relied on a number of principles of construction apart from resort to the ordinary and natural meaning of the words, Lord Simon said at 959-960:

> I am, my Lords, naturally conscious that this instant appeal takes place at a time when horrifying acts of political terrorism are much in the public mind. Although

> it is, perhaps, more acute today, the problem of how to reconcile a policy of asylum for political criminals with the curbing of terrorism is not new … and it has so far defied a generally acceptable solution.
>
> …
>
> Bashi-bazouks had nothing to teach the S.S. or the N.K.V.D., nor is the world yet emancipated from tyranny. In view of the increase in power of weapons of destruction and the greater likelihood of innocent persons suffering, it may well be that the time has come to seek once again a solution to the problem. *But this will be for governments in international conclave: there is no advantage in marginal and anomalous judicial erosion of tradition immunities.*

(Emphasis added.)

247 It is of course legitimate to reach beyond the ordinary or literal meaning of the words in legislation to ascertain their meaning. Courts may have regard to the purpose or object of the legislation in this task. However, one reason that no clear test emerged is that the purpose for the political exception was not easy to identify. The original reason for the exception was that requesting states generally supported the ambitions of offenders who were seen as fighters for freedom. There was also a concern that offenders may not receive a fair trial in the requesting state. But this concern was, in due course, written into the extradition law as a separate ground for refusal of surrender. Thus, in the Act, s 7 provides that there is an extradition objection if:

> (c) on surrender to the extradition country in respect of the extradition offences, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions.

248 The contemporary meaning of the term political offence should take into account the passing of the 1988 Act which was set against the background of those cases referred to earlier in these reasons which were decided before the 1988 Act was passed.

249 Parliament in Australia stepped in where the courts had proved unable to formulate a generally workable definition. The first expression of Parliamentary willingness to fill the gap left by the courts was in 1966 when Mr Killen proposed the amendment to include what became s 4(4) of the 1966 Act. More radically, in the 1988 amendments Parliament specified in great detail the offences which would fall outside the exception. And the most recent amendments take that process further again.

250 From this history, it is evident that Parliament recognised that the term political offence was an expression of wide operation. It needed to be limited in order to prevent injustice. Thus, Parliament expressly restricted the scope of the ordinary meaning of the term political offence. The fact that Parliament has expressed limitations on what amounts to a political offence recognises that the ordinary meaning of that term covers a range of conduct which today is viewed as inappropriate for exclusion from the process of extradition. Whatever the expression political offence meant in the 1870 Act, the history of the legislation in Australia has now provided the expression with an evolved meaning. Any further limitation to be imposed on the ordinary scope of the term political offence is a matter for Parliament. The political offence exception is not only found in Australian extradition law. It may tell against a particular construction if that construction depended on domestic law considerations, such as domestic

legislative history, alone. However, the Australian legislative history referred to above is consistent with the developments in many states in which the political offence exception operates.

The present case

251 The parties accept that the offences must be political offences in relation to the US. This is correct. Section 7(a) of the Act requires that an extradition offence is a political offence "in relation to the extradition country". This phrase first appeared in the 1988 Act and seems to be a response to *Cheng*.

252 The circumstances relied upon by the applicant in his representations to the Attorney-General were that the applicant was a member of the LTTE. That organisation had been engaged in a civil war in Sri Lanka since 1983. The charged conduct involved a conspiracy to supply weapons for use against government forces in that civil war. It was a critical factor that the charged conduct was in relation to the LTTE which was expressly designated by the US Secretary of State as the object of the offences. In designating the LTTE the Secretary of State formed the view that the LTTE was a foreign organisation engaged in terrorist activity which threatened the security of the US or nationals of the US.

253 No doubt the struggle in Sri Lanka was a political confrontation. The contending parties were seeking the power to govern Tamils in Sri Lanka.

254 The designation of the LTTE by the US Secretary of State was directed to that struggle. It made some dealings in support of one side of the political struggle illegal. When the US criminalised dealing with the LTTE it took a political stand.

255 When the applicant took the actions alleged against him it should be inferred from the circumstances that he did so in support of the political struggle of the LTTE. That is to say, he was at odds with the US over the political issue of support for the LTTE against the government of Sri Lanka in the civil war. These circumstances fall within the ordinary understanding of the expression "political offence".

256 This conclusion is supported by the context which has been explained earlier in these reasons. The alleged conspiracy to provide weapons to the LTTE is an incident in the political struggle no less than was the arming of Mr Castioni in preparing for his assault on the municipal buildings. If the applicant had acquired the weapons to advance the cause of the LTTE and they had been used to kill and maim innocent civilians indiscriminately the conduct would have been atrocious. However, because the actions were in furtherance of a political cause the offences are properly described as political. No satisfactory definition has been formulated in the cases that would exclude the conduct from that characterisation. That is recognised by Parliament in expressly excluding certain terrorist activities from the purview of the political exception. It is common ground that Parliament has not expressly excluded the offences with which the applicant has been charged.

257 In this view, the four offences are relative political offences. Hence, it is unnecessary to determine whether offences 2, 3 and 4 are also pure political offences.

Did the Attorney-General make a jurisdictional error?

258 The Attorney-General could only make the determination to surrender if she

was satisfied that the four offences were not political offences (ss 22(3)(a), 7(a) and 5). The exercise of the power to make a determination is conditioned on the Attorney-General reaching the requisite state of satisfaction. Thus, the satisfaction of the Attorney-General was a jurisdictional fact.

259 Relief under s 39B of the *Judiciary Act* may only be ordered if the Attorney-General made a jurisdictional error. The principles governing when the exercise of a power conditioned upon the satisfaction of a decision-maker amounts to jurisdictional error were explained in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 where Latham CJ said at 430:

> Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power.

260 Then, at 432, his Honour said:

> It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal. It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [53].

261 The Attorney-General wrongly concluded that the four offences were not political offences. She misconstrued the meaning of the expression political offence as defined in s 5 of the Act. As her expressed satisfaction was based on this misconstruction of the Act, she is regarded by the law as not having attained the necessary state of satisfaction. Consequently, the jurisdiction to make the determination to surrender the applicant was not enlivened and the purported determination to surrender is invalid.

Conclusion

262 The error made by the Attorney-General was a jurisdictional error. The Court is therefore empowered to grant relief by way of a declaration, and also by way of prohibition to prevent the Attorney-General acting on the determination to surrender. In view of this conclusion it is unnecessary to consider the applicant's alternative submission that the existence of a political offence is itself a jurisdictional fact.

The torture issue

The applicant's submissions

263 Section 22(3)(b) provides that a person may only be surrendered if the Attorney-General is satisfied that the person will not be subjected to torture.

264 Section 22(3)(b) implements Australia's obligations under Art 3(1) of the CAT which provides:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

265 It was accepted by the parties that the satisfaction in s 22(3)(b) depended on an assessment not of the risk that the applicant would be tortured in the United States but the risk that he would be refouled from the United States to Sri Lanka, where it was accepted that he faced a real risk of torture.

266 The applicant submitted that in forming her satisfaction the Attorney-General's exercise of power miscarried because she did not understand that it was harder in the US than it was in Australia for the applicant to establish a danger of torture if returned to Sri Lanka.

267 The legal advice to the Attorney-General explained that the standard of proof involved in the phrase "substantial grounds for believing" adopted by Australia in the construction of Art 3 was as follows:

> Pursuant to the non-refoulement obligation under Article 3 of CAT, Australia is precluded from surrendering a person to a foreign country where there are substantial grounds for believing that the person the subject of extradition would face a "real" or "foreseeable" risk of being subjected to torture. The risk of torture must be one that is personally faced by the individual. It is not sufficient that the risk pertains to all persons due to the prevailing circumstances in a particular country at a particular time. Whilst the risk of torture must go "beyond mere theory or suspicion", it does not need to be "highly probable."

268 The legal advice then applied that approach to the material which the Department had, and stated at [120] and [121]:

> 120. Taking into account all of the information provided in support of, or in response to, this representation, along with other available information regarding the situation in Sri Lanka, *the Department has formed the opinion that there exists a real and personalised risk to Mr Santhirajah (that is, there are substantial grounds for believing) that he would be subject to torture if he were removed to Sri Lanka.* In this regard, the Department highlights the following:
>
> - the finding of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in his report presented to the United Nations Human Rights Council in February 2008 that "torture is still widely practised in Sri Lanka"; this was despite formal steps having being taken by the Sri Lankan Government to criminalise torture (through, for example, the enactment of the Torture Act No. 22 of 1994 and legal safeguards in the Code of Criminal Procedure);
> - the specific finding by the Special Rapporteur in his report that, in the context of detention orders made under Emergency Regulations and in particular with respect to LTTE suspects, the "clear majority" of detainees he interviewed complained of a broad variety of methods of torture, some "extremely brutal"; these

methods included, *inter alia*, burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, various forms of genital torture, burning with soldering irons and suspension by the thumbs. The Special Rapporteur also noted that:

> In many cases, these allegations were corroborated by forensic evidence. The clearly established cases of torture by TID [Terrorist Investigation Department] and other security forces, together with various efforts by TID to hide evidence and obstruct the investigations of the Special Rapporteur, lead him to the conclusion that torture has become a routine practice in the context of counter terrorism operations, both by the police and the armed forces.

- the Special Rapporteur's addendum to his 2008 report, which was presented to the United Nations Human Rights Council in 2010, in which he noted (based on non-governmental sources) that emergency laws "continued to create an environment which permitted torture and cruel, inhuman or degrading treatment or punishment;"
- the findings contained in the Country Report for Sri Lanka (2010) tabled in Congress by the United States Department of State in April 2011; these included the findings highlighted by Mr Santhirajah in his representations that "military intelligence and other security personnel, sometimes working with armed paramilitaries, carried out documented and undocumented detentions of civilians suspected of LTTE connections", which were reportedly followed by interrogations that "frequently" included torture. The report also notes that there was "no indication" that the widespread practice of torture found by the Special Rapporteur in 2008 "had subsided;"
- the serious nature of Mr Santhirajah's alleged involvement with the LTTE. Mr Santhirajah is alleged to have conspired to buy weaponry for use against the Sri Lankan Government. The weapons to be purchased included sniper rifles, submachine guns with suppressors, surface-to-air missiles and grenade launchers. As this matter has attracted international media attention, it is likely that Sri Lankan authorities would be aware of the allegations against Mr Santhirajah (which may have been proven under US law by the time of his removal) and would take an interest in him should he be removed to Sri Lankan territory.

121. *The Department further accepts that the real and personalised risk of torture to Mr Santhirajah will continue into the immediately foreseeable future.* In this respect, Department highlights the findings contained in the report published by the International Crisis Group (ICG) regarding Sri Lanka in July 2011. The International Crisis Group notes that, given the decade long political violence and civil war in Sri Lanka, progress toward reconciliation was "always going to be difficult". However, reconciliation has become increasingly difficult given post-war government policies and continued "violent" repression of the media and political opponents. It is the ICG's opinion that "reconciliation will slip further out of reach if the government maintains its policies."

(Emphasis added.)

269 The legal advice then considered the obligations of the US under Art 3 and its assurances to Australia and stated:

> 122. The Department notes that the United States also has a non-refoulement obligation under Article 3 of the CAT. In accordance with this obligation, as noted at paragraph [101] above, the United States has assured Australia that the United States would comply fully with any applicable U.S. international legal obligations, including under Article 3 of CAT. Further, Mr Santhirajah will have the opportunity to raise claims regarding the risk of torture during the course of immigration removal proceedings in the United States and prior to any final deportation order.

270 Then at [129] and [132] the legal advice concluded:

> 129. Accordingly, the Department considers that you may be of the opinion that, whilst there exists a real risk that Mr Santhirajah may be subject to torture if subsequently expelled from the United States to Sri Lanka, Australia's non-refoulement obligations regarding torture are satisfied in all of the circumstances of this matter, *since there is no real risk that the United States will remove Mr Santhirajah to Sri Lanka if there are substantial grounds for believing that he will be subjected to torture there, given that the United States is bound by Article 3 of CAT.*
>
> …
>
> 132. Accordingly, the Department considers that you may be satisfied that Mr Santhirajah will not be subjected to torture on surrender to the United States for the purposes of paragraph 22(3)(b) of the *Extradition Act*.

(Emphasis added.)

271 The legal advice correctly stated the test used by Australia to determine the scope of the obligation under Art 3. It explained that Australia regards "substantial grounds for believing" as involving foreseeable, real and personal risk of torture. The risk does not have to be highly probable, but must go beyond mere theory or suspicion.

272 The US interpretation is that the danger of being subjected to torture must be more likely than not. This is correctly stated in the legal advice at [90] as follows:

> In response to Mr Santhirajah's representations regarding the risk of torture on surrender due to removal from the United States to Sri Lanka at the conclusion of criminal justice processes, United States authorities have advised as follows:
>
> …
>
> • there exist safeguards and due process rights within the deportation/removal process. Mr Santhirajah would be afforded all relevant legal protections available in accordance with United States law during this process. This includes the ability to raise claims regarding the risk of torture. If such claims were raised, they would be fairly adjudicated. *The United States would not transfer him to any country where the United States determines it is more likely than not that he would be subject to torture.*

(Emphasis added.)

273 The US interpretation places a heavier burden on the affected person than the Australian interpretation. Proof as required by the US that it is more likely than not that a person would be in danger of being subjected to torture is a higher standard than proof as required by Australia of a foreseeable, real and personal risk of torture.

274 Whilst the legal advice refers to both the US and the Australian interpretations of Art 3 it does not analyse them together or provide any

comparison between them. It does not draw attention to the fact that Australia and the US adopt different standards of proof. Rather, so the applicant argued, the legal advice ultimately treats the standard of proof in both countries as if it is the same. This was said to be evident in the conclusion at [129] of the legal advice that there is "no real risk" that the US will remove the applicant if there are substantial grounds for believing that he will be subjected to torture there.

275 The applicant contended that it was critical for the Attorney-General to understand that the US applied a higher standard of proof under Art 3. The Attorney-General needed to consider whether, even if the applicant could prove he faced a real risk of torture under the Australian interpretation of Art 3, this would not necessarily suffice under the US interpretation, and that, as a result, he would still be subject to the danger of torture in Sri Lanka if surrendered to the US.

The Attorney-General's submissions

276 Counsel for the Attorney-General, in oral submissions, contended that the legal advice at [90] drew attention to the different standards of proof by reference to the US interpretation. Thereafter, for instance in [129], the legal advice utilised the wording of Art 3. It did not thereby suggest that the standard of proof as understood by Australia and the US was the same. In other words, the vice alleged by the applicant did not exist in the legal advice.

277 Counsel for the Attorney-General also contended that the Court should be slow to infer that the difference in standards of proof was not known to the Attorney-General and, if the difference was significant, that such significance was not apparent to the Attorney-General.

Consideration

278 The legal advice explained the Australian interpretation of Art 3 of the CAT. It analysed the extensive country information about the risk of torture in Sri Lanka, the serious nature of the conduct alleged against the applicant, and the fact that the applicant's activities had attracted international media attention and are known in Sri Lanka. The legal advice came to the firm view that the applicant faced a personalised and foreseeable risk of torture if returned to Sri Lanka.

279 The legal advice accepted that Australia owed an obligation of non-refoulement to the applicant under Art 3 of the CAT. The legal advice therefore reasoned that unless the applicant was protected from return to Sri Lanka from the US, Australia would be in breach of its obligations under Art 3.

280 The legal advice, however, came to the conclusion that Australia would not be in breach of its obligations because the US promised Australia that it would comply with its obligations under Art 3 of the CAT.

281 The legal advice explained that the US interpretation of Art 3 of the CAT required the applicant to establish that it was more likely than not that he would be subjected to torture on his return to Sri Lanka. However, the legal advice did not expressly disclose that the US interpretation made it harder than under the Australian interpretation for the applicant to obtain the protection of Art 3 of the CAT. The fact of the difference in the interpretation was not mentioned. On the contrary, in the critical passages such as [129] the legal advice was expressed as if there was no difference in the interpretations adopted by the US and Australia.

282 In the absence of any other evidence, it should be inferred from the Attorney-General's acceptance of the legal advice that she acted on it. It should

also be concluded, and I so find, that the Attorney-General regarded the interpretation of Art 3 of the CAT by the US as the same as the interpretation by Australia. This misapprehension directly affected the assessment required under s 22(3)(b) whether the applicant would be subjected to torture if surrendered to the US.

Conclusion

283 The Attorney-General's satisfaction that the applicant would not be subjected to torture if extradited to the US was formed on the basis of a misunderstanding of the requirements of s 22(3)(b). For the reasons stated in [259] this error vitiated the opinion formed by the Attorney-General. Consequently, for this reason she had no power to make the determination to surrender the applicant to the US. The applicant is entitled to a declaration to that effect.

The 30-day assurance issue

The applicant's submissions

284 The legal advice accepted that there was a real and personalised risk that the applicant would be subjected to arbitrary deprivation of life or cruel, inhuman, or degrading treatment or punishment if removed from the US to Sri Lanka, and that the risk would exist into the reasonably foreseeable future. The legal advice explained that Australia was bound in the circumstances by Art 7 of the ICCPR not to extradite the applicant to the US without some protection that he would not be sent to Sri Lanka after the criminal proceedings had been completed in the US.

285 The problem for Australia was that the US did not accept a non-refoulement obligation under the ICCPR. As a result, Australia negotiated the 30-day assurance with the US. The effect of the assurance was that the US would notify Australia at the time the US commenced any proceedings to remove the applicant and, following the making of a final removal order, would afford Australia 30 days in which to determine whether to accept the applicant.

286 The legal advice concluded:

> The Department is of the view that it is open to you to consider, in your general discretion, that Mr Santhirajah should be surrendered to the United States, having regard to:
>
> - the legitimate law enforcement interest that the United States has in Mr Santhirajah
> - Australia's obligations to extradite persons who are the subject of an extradition request made by the United States in accordance with the Treaty, and
> - *the existence of an appropriate mechanism that will enable Australia to meet its non-refoulement obligations* in respect of Mr Santhirajah at the time that that [sic] the United States seeks to remove him to Sri Lanka (if the United States does so).

(Emphasis added.)

287 Counsel for the applicant contended that the 30-day assurance was a foundation on which the determination to surrender rested. But, so it was argued, the assurance was not capable of addressing the danger which the legal advice accepted did exist. The assurance simply deferred the issue to a later date and possibly to a different Attorney-General. The assurance was not a rational response to the accepted danger of cruel, inhuman, or degrading treatment or punishment which the applicant faced and hence provided no basis for the

exercise of the discretion. The existence of the 30-day assurance was a ground on which the Attorney-General exercised her general discretion under s 22(3)(f) to surrender the applicant. The exercise of that general discretion therefore miscarried.

The Attorney-General's submissions

288 The applicant's argument was recast during the hearing and hence counsel for the Attorney-General had limited time to prepare a response. In essence, counsel for the Attorney-General contended that the assurance was one factor among a number of factors which influenced the exercise of the general discretion. For example, another factor was that the assurance was discussed and agreed to by the Minister for Immigration and Citizenship.

Consideration

289 The 30-day assurance from the US gave Australia a short period to consider the action necessary to protect the applicant from the danger of return to Sri Lanka. The legal advice explained to the Attorney-General that the Minister for Immigration and Citizenship had agreed with the terms of the assurance.

290 However, the legal advice did not explain what options would be open to Australia within that 30-day period. The legal advice expressed the conclusion that the 30-day assurance was an appropriate mechanism to enable Australia to meet its non-refoulement obligations. Without any advice as to how Australia would use the 30 days to provide protection to the applicant, the legal advice was hollow. It focused exclusively on form rather than substance. Without more, the assertion in the legal advice provided no rational basis for the conclusion that the applicant would be protected from return to Sri Lanka where it was accepted he was at risk of being subjected to cruel, inhuman and degrading treatment or punishment. Thus, there was no rational basis for the determination to surrender the applicant.

291 It should be inferred that the Attorney-General accepted the legal advice that the applicant faced a real danger of torture if returned to Sri Lanka. It should also be inferred that the only protection relied on by the Attorney-General to ensure that the applicant would be not subjected to torture was the 30-day assurance. That assurance was not, on its own, capable of justifying the conclusion that the applicant would be protected and Australia would act in accordance with its obligations under the CAT and the ICCPR. Reliance on the 30-day assurance was critical to the Attorney-General's refusal to exercise her general discretion under s 22(3)(f) to refuse to surrender the applicant to the US.

Conclusion

292 The reliance by the Attorney-General on the 30-day assurance as a protection against the danger that the applicant would suffer cruel, inhuman, or degrading treatment on punishment on return to Sri Lanka was an error.

293 The applicant is only entitled to relief if the Attorney-General made a jurisdictional error. The categories of jurisdictional error are not closed. To reach a mistaken conclusion may be a jurisdictional error: *Craig v South Australia* (1995) 184 CLR 163 (*Craig*) at 179. The relevant passage from *Craig* is extracted in the discussion later in these reasons at [322]. An error of that nature will exist if the conclusion is outside the limits of the power conferred on the decision-maker: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [162].

294 The power to surrender a person requires consideration of matters under s 22(2) which potentially affect the wellbeing and life of the person. Where s 22(2)(f) confers a general discretion to surrender a person Parliament doubtless intended that the discretion would be exercised only when the Attorney-General had an actual rather than a mistaken basis upon which to act. A mistake as to the efficacy of the 30-day assurance took the conclusion to exercise the general discretion to surrender the applicant outside the limits of the power conferred by s 22(2).

295 An alternative characterisation of the circumstances is that the determination was so unreasonable that a reasonable decision-maker could not make it. That characterisation would also ground relief.

296 Thus, by reason of the Attorney-General's erroneous reliance on the 30-day assurance in the exercise of her general discretion to surrender the applicant, he is entitled to a declaration that the determination was made without power and is invalid.

The best interests of the child issue

297 The applicant argued that the exercise of the general discretion to refuse to surrender under s 23(3)(f) also miscarried because the Attorney-General adopted the wrong approach to the determination of the best interests of the applicant's son. In order to understand the parties' submissions on part of this issue it is necessary first to explain the approach taken in the legal advice to the applicant's representations and to some UK cases.

The legal advice

298 The legal advice responded to the applicant's representations concerning the impact that his extradition would have on his son, Varun, who was born in 2007 and who is an Australian citizen.

299 The legal advice accepted that the government is required to act consistently with its obligations under the *Convention on the Rights of the Child 1989*, done at New York on 20 November 1989 (CRC). Article 3(1) of the CRC provides:

> [I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

300 The legal advice then referred to the High Court's decision in the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*) which had been relied upon by the applicant in his representations. It explained that on the basis of *Teoh* the Attorney-General's determination to surrender the applicant is arguably an action concerning his son and accordingly required consideration of his son's interests as a primary consideration in the exercise of her discretion under s 22(3)(f).

301 Having noted that there had not been judicial consideration of *Teoh* in the context of extradition, the legal advice next considered three recent UK cases as illustrative of the obligations of decision-makers to treat the best interests of the child as a primary consideration. The cases each involved the application of Art 8 of the *European Convention on Human Rights 1950*, done at Rome on 4 November 1950 (ECHR) which provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

302 The legal advice explained that immigration and extradition proceedings in the UK are subject to the requirements of Art 8 of the ECHR. The legal advice then stated at [193]:

> The Department considers that the approach taken by the courts in the United Kingdom in these cases is useful guidance when considering the balance to be struck between regard by a decision maker to a particular right or expectation, against the public interests to be served by giving effect to a process such as extradition.

303 Then the legal advice referred to *Norris v United States (No 2)* [2010] 2 AC 487 (*Norris*) in which all nine members of the Supreme Court considered whether Art 8 of the ECHR would prevent the extradition of Mr Norris for prosecution in the US for obstructing the course of justice. Mr Norris' wife suffered from a depressive illness and it was submitted on his behalf that if Mr Norris were to be extradited she would be unable to travel to the US and the impact on their family life would be total. The question for determination by the Court was whether that interference was "necessary in a democratic society, in the interests of … the prevention of disorder or crime". The legal advice explained at [194] that the question was said by the Court to involve a proportionality test, namely whether the interference was proportionate to the legitimate aim relied upon to justify the interference. The advice continued at [195]:

> It was submitted that the legitimate aim in this case was the need for the United Kingdom to honour its extradition arrangements. In dismissing Mr Norris' appeal, the Supreme Court held that there was a compelling public interest in extradition as part of the process for ensuring the prevention of disorder and crime and, since the likelihood of interference with family life was inherent in the process of extradition, *the consequences of interference with the right to respect for family life had to be exceptionally serious before they could outweigh the public interest in giving effect to requests for extradition so as to make the extradition of the individual disproportionate to the interference.*

(Emphasis added; footnotes omitted.)

304 Next the legal advice dealt with *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148 (*ZH*). This was an immigration case considered by three judges of the Supreme Court. It dealt with the operation of Art 8 of the ECHR as well as Art 3 of the CRC. The legal advice stated at [197]:

> … The Court noted, 'Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Accordingly, with reference to *Teoh* and a later Australian case of *Wan v Minister for Immigration and Multicultural Affairs*, the Court held that the "primary consideration" requirement of Article 3(1) of the CRC meant that, when making a decision about the separation of a parent from a child by, for example, detention, imprisonment, exile or deportation, the best interests of the child must first be identified, and then weighed against any other considerations. The Court stated, however:

> that this did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them.

(Footnotes omitted.)

305 Then the legal advice referred to *R (on the application of HH) v Westminster City Magistrates' Court* [2011] EWHC 1145 (Admin) (*HH*) as an example of the way in which the previous two cases applied when considering the best interests of the child in an extradition context.

306 In *HH*, the parents of three children, aged 10, seven, and 22 months, were sought for extradition by Italy for serious drug trafficking offences. If the parents were surrendered the worst case scenario was that the youngest child would be adopted and the two older siblings fostered out, not necessarily together. The legal advice at [200] quoted Laws LJ as follows:

> Accordingly, while the best interests of affected children are a "primary consideration" in extradition cases, they cannot generally override the public interest in effective extradition procedures. There has to be an "exceptionally compelling feature" (*Norris* paragraphs 56, 91), giving rise to "the gravest effects of interference of family life" (paragraph 82). That is not ipso facto supplied by an extradition's adverse consequences for the extraditee's children.

(Footnote omitted.)

307 The legal advice continued at [201]:

> In addition, Lord Justice Laws distinguished the extradition process from the immigration context, referring to the higher threshold to be met in the extradition context for a person to succeed in a claim that the asserted interference with Article 8 of the ECHR is disproportionate so as to require a determination that extradition be refused. Immigration policy, being a matter only of domestic policy, may be distinguished from extradition policy in that the achievement of "good immigration policy" is not always fulfilled by the deportation of the person in question — a striking of reasonable balances is an inherent feature of immigration policy. This is not, however, an inherent feature of extradition — the Court stated that "the public interest in extradition is systematically served by the extradition's being carried into effect, subject to the proper procedures." *Accordingly, only if there exist in a particular case exceptional circumstances* "*giving rise to the gravest effects of interference with family life*" *under Article 8 will the consequences of extradition be disproportionate to the legitimate public interest served by giving effect to a request for extradition.*

(Emphasis added; footnote omitted.)

308 The legal advice at [202]-[204] then concluded the issue as follows:

> 202. The Department considers that the United Kingdom authorities provide useful and relevant guidance for your consideration in balancing the best interests of an affected child as a primary consideration against other considerations relevant to the extradition process, in the exercise of your general discretion to surrender someone pursuant to an extradition request.
>
> 203. It is accepted that the extradition of a person from Australia to another country would have an impact on the person's immediate family members and other persons close to them. In Mr Santhirajah's case this impact would extend to his wife and son. Mr Santhirajah's son is an Australian citizen and is able to remain in Australia to be cared for by his mother. If

> Mr Santhirajah were to be surrendered to the United States, Varun would not be forced to leave Australia, as the representations suggest. However, the Department accepts that, in the event of his father's surrender to the United States, Varun would be separated from his father, an outcome which may not be in his best interests.
>
> 204. Adopting the principles applied in the United Kingdom, *the question to be asked, however, is whether the fact of Varun's separation from his father is so exceptionally compelling that it outweighs the public interest in giving effect to the United States' request for extradition?*

(Emphasis added.)

The applicant's submissions

309 The applicant contended that by applying the proportionality test articulated in the English authorities the Attorney-General asked herself the wrong question in the exercise of her discretion under s 22(3)(f). The applicant argued that the correct approach to determining the best interests of the child was articulated in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 (*Wan*) at [32] as follows:

> … However, it [the Administrative Appeals Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.

310 The applicant contended that this approach required the Attorney-General to take into account the fact that Varun, as a citizen of Australia, might be forced to leave Australia with his mother in order to be with the applicant and would thereby lose the value of his citizenship which included "its protection and support, socially, culturally and medically, and in the many other ways evoked by, but not confined to, the broad concept of lifestyle" as described by Burchett J in *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 26 AAR 227; 150 ALR 608. Further, the Attorney-General should have considered the potential social and linguistic disruption to Varun's childhood as well as the loss of his homeland which would result from this occurring.

311 In the written submissions it was contended that certain core aspects of Varun's interests were not taken into account as a primary consideration in any real or genuine sense. These included Varun's loss of regular contact with, and opportunity for guidance by, the applicant and the disruption to the family life which would flow from the applicant's inability to live in Australia and the tension, anxiety and confusion which would follow from the fact that the applicant would be imprisoned in the US.

312 The applicant also contended that the legal advice placed a gloss on the statutory approach required to be followed by the Attorney-General and caused her to ask the wrong question. The legal advice required the Attorney-General to ask whether the best interests of Varun were "exceptionally compelling" so as to outweigh the public interest in giving effect to the extradition request. This amounted to advice that the Attorney-General fetter her discretion. It was contended that the general discretion in s 22(3)(f) is provided to the Attorney-General within the statute governing extradition. The statutory discretion is thus given against the background of the obligations of Australia towards its extradition partners. The general discretion allows for Australia's obligations under the CRC to be taken into account. Further, the proportionality

test used in the UK cases derives from a different legal context. Article 8 of the ECHR mandates the proportionality test, but that provision does not govern the Australian situation.

The Attorney-General's submissions

313 Counsel for the Attorney-General submitted that the interests of Varun which the applicant raised in his representations to the Attorney-General were recorded in the legal advice. Consequently, there was no failure to deal with the core issues which impacted on the best interests of Varun.

314 Further, it was open to the Attorney-General to treat the UK cases as "useful and relevant guidance for [her] consideration in balancing the best interests of an affected child as a primary consideration against other considerations relevant to the extradition process". This did not amount to applying a fetter on the Attorney-General's discretion. Nor did the reference to these UK cases lead the Attorney-General to apply the wrong test.

Consideration

315 Although the interests of Varun were referred to only very briefly, that reference reflected the representations made by the applicant. The applicant's argument that his interests were not sufficiently articulated and given genuine or realistic consideration is not made out.

316 The way in which Varun's interests were addressed however, is not as clear. It may have been appropriate to use the UK cases as guidance because the exercise required when considering the best interests of the child in the extradition context is sufficiently similar in Australia and the UK despite the necessity in the UK additionally to consider the operation of Art 8 of the ECHR. The issue is whether the legal advice properly represented the state of the law in the UK.

317 The legal advice at [204] stated that the question which the Attorney-General had to ask was whether the fact of Varun's separation from his father was so exceptionally compelling that it outweighed the public interest in giving effect to the US request for extradition. Whether this was the correct question or test was an issue posed in *Norris*. The question was answered in the negative.

318 Lord Hope said at [88]-[89]:

> Mr Sumption challenged the Government's assertion that the circumstances in which the interference with article 8 rights would not be proportionate will be exceptional. In paragraph 2 of a closing memorandum on law which he provided to the district judge and made available to the court on the second day of the argument he said that it was not necessary to show exceptional circumstances in order to make out a case for refusing extradition. He referred to *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 20, where Lord Bingham of Cornhill said that "exceptionality" was not a legal test. Applying that observation to this case, he added that the law recognises that the balance will not necessarily come down in favour of extradition, and that it would not be right to treat the test as a rule of thumb with substantially the same effect. In oral argument he said that there was no such threshold that had to be crossed. As it was put in *Huang*, this may be the expectation but it is not a legal test. The phrase "only in exceptional circumstances" was used by the commission in *Launder v United Kingdom* (1997) 25 EHRR CD 67, but he said that this was an early decision and it had not been adopted by the Strasbourg court in its later case law.
>
> *I agree that exceptionality is not a legal test, and I think that it would be a mistake to use this rather loose expression as setting a threshold which must be*

> *surmounted before it can be held in any case that the article 8 right would be violated.* As Lord Phillips of Worth Matravers PSC has observed, the phrase "exceptional circumstances" says little about the nature of the circumstances: para 56, above. *It tends to favour maintaining the integrity of the system as the primary consideration rather than focusing on the rights of the individual. It risks diverting attention from a close examination of the circumstances of each case.* Although in its admissibility decision in *King v United Kingdom* (Application No 9742/07) (unreported) given 26 January 2010 it followed the commission's decision in *Launder* 25 EHRR CD 67 in using the phrase "exceptional circumstances", decisions of the Strasbourg court have repeatedly shown that an intense focus on the rights of the individual is necessary when striking the balance that proportionality requires. I do not think that there are any grounds for treating extradition cases as falling into a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life.

(Emphasis added.)

319 Counsel for the Attorney-General recognised this aspect of *Norris* when he said:

> … what the court there recognised was not that it had to be exceptional, but rather, that the reference to exceptional reflected the probabilities of most cases; that — given extradition is designed to move the extraditee from the jurisdiction to a foreign jurisdiction to face either conviction if, in fact, convicted and absconded, or a trial with the risk of detention at the end of the trial — it will always be likely that, if there are family interests, that they will be adversely affected by the granting of extradition.

320 Thus, the law in the UK requires the best interests of the child to be formulated, and then balanced against the importance of extradition as part of a system of cooperation among states to ensure that criminal acts do not go unpunished. There is no test in the UK which requires the decision-maker to ask whether the interests of the child are exceptionally compelling. And yet the legal advice erroneously stated at [204] that "the question to be asked, however, is whether the fact of Varun's separation from his father is so exceptionally compelling that it outweighs the public interest in giving effect to the United States' request for extradition".

Conclusion

321 Again, in the absence of any evidence to the contrary, it should be inferred that the Attorney-General asked the question which the legal advice suggested and the Attorney-General used the answer to that question as part of the basis on which to exercise her general discretion under s 22(3)(f).

322 The issue is whether this error was a jurisdictional error which entitled the applicant to relief. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, McHugh, Gummow and Hayne JJ with whom Gleeson CJ agreed at [82] said:

> 82 It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the Tribunal):
>
> > … falls into an error of law which causes it to identify a wrong issue, *to ask itself a wrong question*, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and

> the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.

(Footnotes omitted; emphasis added.)

323 The Attorney-General asked herself the wrong question concerning the best interests of Varun in a way which affected the exercise of power. This was a jurisdictional error which entitled the applicant to a declaration that the determination to surrender him to the US was an invalid exercise of power.

Procedural fairness

The applicant's submissions

324 The exercise of the power to surrender under s 22(2) is subject to the requirements of procedural fairness: *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at [45]. Counsel for the applicant argued that there were a number of instances in which the applicant was denied procedural fairness.

325 First, he contended that the Attorney-General failed to consider a key part of the applicant's case. On 2 September 2009, the solicitors for the applicant sent to the Department a statement made by the applicant together with a submission concerning the statement. The statement set out in detail the circumstances both of the applicant's life generally, and of the events which were said to constitute the offences charged in the US. In particular, the statement explained that the applicant felt compelled by pressure from the LTTE and by possible repercussions from refusing to cooperate to allow his bank account to be used for transferring funds in the weapons purchase transaction. For instance, the statement recorded at [52]-[54] the role of Alex who was acting on behalf of the LTTE:

> 52. I wanted to settle down with Priya, earn a dowry for my sister back in Jaffna so they could marry, have a family, run a business. I knew if I got involved in what Alex wanted, my life would be a ruin. And that is what has happened anyway.
>
> 53. He called me to come to Johor from Kuala Lumpur. I don't know how to explain to outsiders why I had to do it. It was an obligation because of the LTTE business people. They can label me in a different way if I do not help. That's the negative part of the LTTE — and if they label you like that, I can't go back to the North to see my family, and my family will suffer.
>
> 54. If labelled as traitors by the LTTE, that is the end. Their threat doesn't need to be said exactly. For example Tamil people outside Sri Lanka who

> refuse to give money, the LTTE turned them back at checkpoints if they visited the North or East and they cannot see their families. You go on a blacklist. Some people are executed as traitors, others on the LTTE hit list, they can label me as swindling LTTE, they can hurt my family.

326 The legal advice summarised this aspect of the statement, although counsel suggested that the summary was incomplete and failed to capture the entire context as explained in the statement. However, it was accepted that the full statement itself was included in the briefing paper. The substantial complaint relates to the way the statement was treated in [169]-[171] of the legal advice, and hence by the Attorney-General. The legal advice was in the following terms:

> 169. The Australian extradition process does not involve an assessment of guilt or innocence. This accords with internationally-accepted practice and was reaffirmed in the case of *Vasiljkovic v Commonwealth of Australia* [2006] HCA 40 in which Gleeson CJ said, at [34]:
>
> > Plainly, extradition has serious implications for the human rights, and in particular for the personal liberty, of the person who is the subject of a request for surrender. Those implications are not limited to the case of a person who is an Australian citizen. The interference with personal liberty involved in detention during the extradition process (if that occurs), and in involuntary delivery to another country and its justice system is not undertaken as a form of punishment. No doubt, to the person involved, some of its practical consequences may be no different from punishment, but the purpose is not punitive. *To repeat, the process involves no adjudication of guilt or innocence. It is undertaken for the purpose of enabling such an adjudication to be made in a foreign place, according to foreign law, in circumstances where Australia has no intention itself of bringing the person to trial for the conduct of which the person is accused.*
>
> [Department's emphasis]
>
> 170. As such, representations made by a person regarding the circumstances of the alleged offending are not relevant to the Australian extradition process, but rather to the substantive criminal prosecution to take place in a requesting country should a person be extradited. In any event, Mr Santhirajah does not claim he did not engage in the conduct alleged against him, but rather that he felt obliged to do so.
>
> Conclusion
>
> 171. Accordingly, the Department does not consider that the representations regarding the role allegedly played by Mr Santhirajah and the context of the extradition offences preclude the exercise of your general discretion to surrender him to the United States.

327 It was submitted that the legal advice treated the applicant's statement as irrelevant and, in effect, advised the Attorney-General to disregard it. Counsel argued that the material in the statement was in fact relevant to the exercise of the Attorney-General's discretion.

328 The second instance of an alleged denial of procedural fairness concerns the applicant's representation to the Attorney-General that the extradition request was made in exceptional circumstances such that she should exercise her general discretion in favour of the applicant. The legal advice at [173] summarised the applicant's representations which were made in the submissions

forwarded with the letter dated 17 July 2009 from the applicant's solicitors to the Department. Apparently, the Department wrote to the US Department of Justice outlining the applicant's contentions. The US Department of Justice replied on 14 September 2009 in terms set out at [51] of these reasons. The contents of this letter were summarised at [174] of the legal advice.

329 The Department's view of this material was then expressed at [175]-[178] as follows:

> 175. The Department notes Mr Santhirajah's representations regarding the artificiality of the connection between the alleged conduct and the national security of the United States. The Department notes that the weaponry at issue in this matter was to be purchased from the United States and that accordingly, this constitutes a real connection to the United States.
>
> 176. In addition, the Department notes that resolutions of the United Nations Security Council have repeatedly recognised that terrorist activity in "all forms and manifestations" constitutes a threat to international peace and security. In addition, it is only through "active participation and collaboration" of all states that this threat may be combated. As these resolutions are passed under Chapter VII of the *Charter of the United Nations*, they are formally binding at the international level on member states such as Australia and the United States. Accordingly, the Department is not of the opinion that in all of the circumstances there is an "artificial" connection between the alleged conduct and the national security of the United States.
>
> 177. With respect to Mr Santhirajah's representations regarding "entrapment" by ICE officials, the Department notes that Mr Santhirajah is not alleging that the actions of the these officials were unlawful or inappropriate so as to render the request for extradition an abuse of process. The United States has provided detailed information on Mr Santhirajah's engagement with the undercover operation and the Department considers that the operation has all the appearances of being conducted as a duly authorised and lawful undercover operation.
>
> Conclusion
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> 178. Accordingly, the Department does not consider the "exceptional" circumstances raised by Mr Santhirajah in his representations preclude the exercise of your general discretion under paragraph 22(3)(f) to surrender him to the United States.

330 It was submitted by the applicant that procedural fairness required that the applicant be informed of the risk that an adverse finding may be made against him unless the risk necessarily inhered in the subject matter to be decided, be told of any issue critical to the decision which was not apparent from its nature or the terms of the statute under which it was made, and be told of any adverse information that was credible, relevant and significant to the decision to be made.

331 The letter from the US Department of Justice contained information not otherwise known to the applicant including the US version of the circumstances leading up to the arrest of the co-accused. It was submitted that the letter from the US Department of Justice was an attempt by the US to persuade the Attorney-General to exercise her power to surrender the applicant. The applicant contended that procedural fairness thus required the Department to inform the applicant of the comments of the US Department of Justice and give the applicant an opportunity to respond.

332 Further, the applicant argued that his statement about the circumstances of the alleged offences and the US Department of Justice response were dealt with inconsistently. The applicant's statement was put aside as irrelevant because the Attorney-General was not concerned with guilt or innocence. But the US Department of Justice letter on the same subject was accepted as the basis for rejecting the argument that the circumstances of the extradition request were exceptional. This inconsistent treatment was also procedurally unfair.

333 Finally, it was said that the failure to inform the applicant of the negotiation of and proposal to accept, assurances from the US amounted to a failure to accord procedural fairness to the applicant. The assurances were critical to the determination made by the Attorney-General. The legal advice accepted that there was a real danger to the applicant of torture or cruel, inhuman, and degrading treatment or punishment if returned to Sri Lanka. Without the assurances the Attorney-General could not have agreed to the surrender of the applicant. Yet the applicant was not told of the possibility of the assurances being provided and was not given the opportunity to make representations about the efficacy of the assurances.

The respondent's submissions

334 The Attorney-General accepted that the applicant was entitled to procedural fairness. The issue was what was required in the particular circumstances of this case to satisfy the demands of procedural fairness.

335 The Attorney-General first submitted that, fairly read, the legal advice suggested that the applicant's statement was irrelevant only insofar as it addressed the guilt or innocence of the applicant. The legal advice did not counsel the Attorney-General to ignore the statement in totality. Indeed, elements of the statement of the applicant were relied upon in a number of the sections of the legal advice which followed. The legal advice was correct in stating that the Attorney-General should not consider whether the applicant was guilty or innocent of the offences. The statutory scheme requires only that a request is made in relation to an offence which falls within the legislation.

336 The Attorney-General next contended that it was not necessary for the applicant to be given the right to respond to the letters sent in reply to the Department by the US Department of Justice. Those letters answered the representations made by the applicant. In the circumstances, procedural fairness did not require that those letters be put to the applicant for a further counter-submission. There had to be an end some time. The process adopted allowed the Attorney-General to understand the position of both the applicant and the US. Furthermore, the position of the US had been articulated before the magistrate in the s 19 hearing. Consequently, the US view expressed in the letters could not have been a surprise to the applicant.

337 Finally, the Attorney-General argued that it was unnecessary as a matter of procedural fairness for the applicant to be told of the negotiations for the assurances or of the agreement reached between Australia and the US in relation to them. Questions such as the efficacy of the assurance or the manner by which it might be carried into effect were subject to the principle of non-adjudication as articulated in *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297 upheld on appeal (*McCrea v Minister for Customs and Justice* (2005) 145 FCR 269) subject to comments at [24]-[25].

Consideration

338 The applicant's argument that the Attorney-General did not consider the circumstances of the applicant's actions in that she did not give sufficient attention to the applicant's personal statement should not be accepted. This argument falters when it is appreciated that the entire statement was produced to the Attorney-General. The statement was referred to at various points in the legal advice. There was no failure to observe the requirements of procedural fairness in the legal advice rejecting parts of the statement as relevant to the one section which dealt with the guilt or innocence of the applicant for the offences charged in the US. Parts of the statement were referred to in other sections of the legal advice where they were relevant.

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

340 The final argument stands in a different position. The critical opinion of the Department in this case was that the applicant faced a real risk of torture or cruel, inhuman and degrading treatment or punishment if he was returned to Sri Lanka. The only way the Attorney-General could surrender him to the US was if this risk was addressed effectively. On this issue the applicant was entitled to be brought, and kept, in the picture. According to the Department it centrally concerned his very life. The failure to advise him of the negotiation of the assurances failed to accord him procedural fairness.

341 The principle of non-adjudication on which the Attorney-General relied is inapplicable to this situation. The applicant's argument was not directed to the efficacy of an act of the US government. Rather, it was addressed to the obligation of the government of Australia to give the applicant an opportunity to know about and respond to arrangements being negotiated to protect him from potentially life threatening harm before any agreement between the US and Australia was concluded.

Conclusion

342 As a result of this denial of procedural fairness, the determination to surrender the applicant was invalid and he is entitled to a declaration to that effect.

Disposition

343 As explained in the foregoing reasons, the determination to surrender the applicant made by the Attorney-General on 21 February 2012, was made without power and is invalid. The applicant is entitled to declarations to that effect, and the Court will make such declarations.

344 The applicant sought additional relief to ensure that the determination to surrender was not acted upon. The Court expects that the Attorney-General will act conformably with the declarations made by the Court. Any application for further orders consequential on the making of the declarations is listed for hearing at 3 pm on Monday 3 September 2012.

345 As the applicant has succeeded in the application, the Attorney-General must pay the applicant's costs of the proceeding.

Orders accordingly

Solicitors for the appellant: *Galbally & O'Bryan Lawyers*.

Solicitors for the respondent: *Ashurst Australia*.

SARAH SOMERSET