TRUONG.. ..... APPELLANT;

AND

THE QUEEN.. ..... RESPONDENT.

[2004] HCA 10

ON APPEAL FROM THE SUPREME COURT OF VICTORIA

HC of A 2003-2004

May 5; *Dec* 3 2003

March 4 2004

Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ

Extradition — Speciality rule — Accused surrendered to Australia for offences other than those for which tried and convicted — Whether offences for which accused tried and convicted were offences of which he could be convicted on proof of conduct constituting any offence for which surrendered — Extradition Act 1988 (Cth), ss 10(2), 42(a)(i).

Extradition — Abuse of process — Speciality — Whether breach of Commonwealth law enacting speciality restriction abuse of process — Extradition Act 1988 (Cth), s 42.

Courts — State court — Jurisdiction to try person present in jurisdiction accused of offence against law of State — Commonwealth law providing that person surrendered to Australia shall not be tried for any offence other than offence for which surrendered or an offence of which he could be convicted on proof of conduct constituting any offence for which surrendered — Whether Commonwealth law deprived State court of jurisdiction or provided special plea — Extradition Act 1988 (Cth), ss 10(2), 42 — Constitution Act 1975 (Vic), s 85(1) — Crimes Act 1958 (Vic), ss 390A, 391.

Criminal Law — Murder — Kidnapping — Conspiracy to murder — Conspiracy to kidnap — Liability as principal offender by procuring commission of kidnap and murder — Crimes Act 1958 (Vic), ss 63A, 321, 321A, 323.

Section 42(a)(i) of the *Extradition Act 1988* (Cth) provided that, where an extraditable person in relation to Australia was surrendered to Australia, the person should not, unless the person had either left or had the opportunity to leave Australia, be detained or tried in Australia for any offence that was alleged to have been committed, or had been committed, before the surrender, other than any offence in respect of which the person had been surrendered or any other offence of which the person could be convicted on proof of the conduct constituting any such offence. Section 10(2) of that Act provided that a reference to conduct constituting an offence was a reference to the acts or omissions, or both, by virtue of which the offence had been, or was alleged to have been, committed.

An accused person was extradited to Australia from the United Kingdom. He was indicted in the Supreme Court of Victoria on two counts, kidnapping and murder, and was tried and convicted on both counts. No issue was raised at the trial in respect of his extradition to

Australia. Before the Court of Appeal, it was contended there had been a miscarriage of justice because the trial had been in contravention of the speciality rule enacted by s 42 of the *Extradition Act*. Contravention of s 42 was said to have occurred because the accused had been surrendered to Australia for the offences of conspiracy to kidnap and conspiracy to murder, not for kidnapping and murder. It was contended that to try him for kidnapping and murder had been an abuse of process or, alternatively, that the trial court had no jurisdiction to try him for offences for which he had not been surrendered.

Held, (1) by Gleeson CJ, McHugh, Hayne and Heydon JJ, Gummow, Kirby and Callinan JJ dissenting, there had been no breach of s 42(a)(i) of the *Extradition Act*.

Per Gleeson CJ, McHugh and Heydon JJ. The acts or omissions by virtue of which an offence was alleged to have been committed, as the expression "conduct constituting an offence" was defined by s 10(2), lay at a level of abstraction between a formal statement of the element of the offence and an account of the evidence relied on to prove the relevant conduct. Those acts or omissions were to be identified by reference to what was alleged in support of the request by Australia for the surrender of a person in respect of identified Australian offences in the light of Australian criminal law. Although the offences for which the accused had been surrendered included conspiracy to kidnap and conspiracy to murder but not kidnapping and murder, in the light of the cases of conspiracy that had been alleged against him the conduct constituting the conspiracy offences was such that, on proof of it, he could be convicted of kidnapping and murder.

Per Hayne J. Section 42(a)(i) does not direct attention only to the evidence that would suffice to establish the elements of the offence for which an accused was surrendered but must be read in conjunction with the requirement of s 10(2) to consider the acts or omissions of the accused by virtue of which it is alleged that he committed the offence for which he was surrendered.

Re Tracey; Ex parte Ryan (1989) 166 CLR 518, distinguished.

(2) By Gummow, Kirby, Hayne and Callinan JJ, that there had been no abuse of process in the extradition and subsequent trial of the accused.

Levinge v Director of Custodial Services, Department of Corrective Services (1987) 9 NSWLR 546 and *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42, considered.

R v Hartley [1978] 2 NZLR 199, referred to.

Per Gummow, Hayne and Callinan JJ, Kirby J contra, Gleeson CJ, McHugh and Heydon JJ expressing no opinion. Section 42(a) of the *Extradition Act* does not operate to withdraw jurisdiction from a State court to try an accused for offences against the law of the State. On arraignment, the accused might have entered under s 390A of the *Crimes Act 1958* (Vic), a special plea based on federal law that the trial would contravene s 42(a). But, it had not been open for him to plead the general issue and after conviction to seek to impeach that conviction for breach of s 42(a).

Decision of the Supreme Court of Victoria (Court of Appeal): *R v Truong* (2002) 5 VR 1, affirmed.

APPEAL from the Supreme Court of Victoria.

On 14 July 1997, Hong Phuc Truong, a Vietnamese national residing in the United Kingdom, was charged in the State of Victoria on charges of murder, kidnapping, conspiracy to murder, conspiracy to kidnap, blackmail, making a demand with a threat to kill, conspiracy to import a prohibited import (a commercial quantity of heroin), and being knowingly involved in the importation of a prohibited import (a commercial quantity of heroin). A warrant was issued for his arrest. He was arrested in London on 22 August 1997. On 25 September 1997, a request was made on behalf of the Attorney-General for the Commonwealth to the United Kingdom that Truong be returned to Australia to be dealt with according to law. The request stated the eight offences with which he had been charged in the State of Victoria. The materials furnished with the request included a long affidavit sworn by a detective of the Victoria Police Force which set out the results of the investigation into the kidnapping and death of Le Anh Tuan and explained the nature of the evidence against Truong.

On 2 October 1997, the Secretary of State for Home Affairs certified that an arrangement had been made with Australia in respect of Truong which satisfied the speciality rule as enacted in s 6(4) of the *Extradition Act 1989* (UK). On that date, the Secretary of State gave authority to proceed with the procedures for surrender by issuing a certificate under s 7 of that Act. The authority to proceed specified the offences which would be constituted by equivalent conduct if it had taken place in the United Kingdom: murder, false imprisonment, conspiracy to commit murder, conspiracy to commit blackmail, kidnap, conspiracy to kidnap, threats to kill, conspiracy to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug.

At the committal, counsel for Australia stated to the magistrate the eight Australian offences for which Truong was wanted by the Australian Government and listed five draft United Kingdom charges in respect of which extradition was sought: four conspiracy charges (to commit murder, to commit blackmail, to kidnap and to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug), and a charge of blackmail. On 30 September 1998, the magistrate made an order under s 9(8) of the *Extradition Act* committing Truong to await the decision of the Secretary of State as to his return to Australia. On 1 October 1998, the magistrate issued a certificate, in accordance with the dual criminality requirement in s 9(9) of the *Extradition Act*, that the conduct alleged within the jurisdiction of the Australian Government would amount to four offences against the law of the United Kingdom, being the four conspiracy offences. On 16 November 1998, the Secretary of State signed a surrender warrant ordering that Truong be returned to Australia in respect of the offences for which the magistrate had committed him. The warrant identified the offences of which Truong

was accused in terms of United Kingdom offences.

On 24 January 2000, Truong was presented in the Supreme Court of Victoria on only two counts, murder at common law and kidnapping contrary to s 63A of the *Crimes Act 1958* (Vic). He pleaded not guilty to both counts. On 9 May 2000, at his trial before Vincent J and a jury, he was convicted on both counts and was sentenced to life imprisonment on the count of murder and to fifteen years on the count of kidnapping, with a non-parole period of twenty-three years and eight months. He applied for leave to appeal against conviction on the ground of miscarriage of justice said to arise because the trial had been in contravention of s 42 of the *Extradition Act 1988* (Cth). The Court of Appeal (Winneke P, Ormiston and Buchanan JJA) dismissed his application for leave to appeal (1). Gleeson CJ and Hayne J granted special leave to appeal to the High Court from the judgment of the Court of Appeal. Notice was given that the appeal involved a matter arising under the *Constitution* or involving its interpretation.

28 May 2003. The Court was constituted by six Justices. Hayne J did not sit.

O P Holdenson QC (with him *J B McDougall*), for the appellant. The word "offence" in s 42 of the *Extradition Act 1988* (Cth) refers to an offence with specific elements (2). The appellant was not tried for the offences in respect of which he was surrendered (first limb of s 42(a)(i)). He was not tried for offences of which he could be convicted on proof of the conduct constituting the offences in respect of which he had been surrendered (second limb of s 42(a)(i)). On the count of kidnapping, it was necessary for the Crown to prove that the victim was kidnapped and that there was a causal nexus between the procuring by the appellant of the kidnapping and the actual kidnapping. On the count of murder, the Crown's case was that the appellant, having been a party to the kidnapping, knew or was aware that it was a realistic possible consequence that the victim would be murdered and that the victim was murdered (3). In the circumstances, it was unnecessary for the Crown to prove that the appellant was a party to an agreement to murder the victim or that he intended that a murder be carried out, and it did not seek to prove those matters. The phrase in s 10(2) of the *Extradition Act*, "the acts or omissions, or both, by virtue of which the offence … is alleged to have … been committed", refers to the elements of the offence, including the requisite mental element, not to the particular evidence relied upon to prove those acts or omissions (4). The provisions of the Act are to be construed strictly (5). The rule of speciality in the second limb of s 42(a)(i), read with

(1) *R v Truong* (2002) 5 VR 1.
(2) *R v Nicholl; Ex parte Boog* (1973) 21 FLR 469 at 473.
(3) *Johns v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108.
(4) See, eg, *Wiest v Director of Public Prosecutions* (1988) 23 FCR 472 at 519; *South*

s 10(2), does not mean offences of which the accused could be convicted on proof of the factual material on which the surrender had been sought, or on which the committal order was based, or on which the surrender was grounded or granted. Having regard to s 321 of the *Crimes Act 1958* (Vic), on proof of the acts by which the offence of conspiracy to murder was alleged to have been committed, the appellant could not be convicted of the offence of murder because it would have been necessary to prove the actual killing of the victim. Hence the offence of murder was outside the second limb of s 42(a)(i) and the trial was conducted contrary to the command in s 42 and thus contrary to law.

The conviction for murder was not lawful (6). [GUMMOW J. Apart from *R v Davies*, is there any authority treating a speciality provision such as s 42 as conferring what might be called private rights, as distinct from breach of speciality being an international injury?] No. Where there has been a fundamental irregularity going to the root of the proceeding, the proviso is not applicable (7). Either the presentment was a nullity or the trial an abuse of process. The point about fundamental irregularity may be taken by an accused on appeal and cannot be waived (8). There is no issue of waiver in this case. Moreover absence of jurisdiction cannot be waived. [GUMMOW J. The notion of waiver is not quite right because the constriction of jurisdiction in s 42(a)(i) is subject to the consent of a foreign country being given: s 42(a)(ii).] There can be no retrospective consent (9) and no consent was given here. Similar reasoning applies to the conviction for kidnapping. [MCHUGH J. *Levinge v Director of Custodial Services, Department of Corrective Services* (10) shows that once a person is within the jurisdiction then, unless you can point to some law, the authorities can do what they like in terms of charging. How or where does the Commonwealth get the power to confine the jurisdiction of a State court?] It would be easier if one could rely on s 109 of the *Constitution*. However, an indirect effect of s 42 is that the Supreme Court does not have a certain jurisdiction. Section 77(iii) of the *Constitution* deals with jurisdiction of State courts and if investing with jurisdiction contemplates not investing that is the effect of s 42.

(cont)
Africa v De Bruyn (1999) 163 ALR 161; *De Bruyn v South Africa* (1999) 96 FCR 290.

(5) *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 955; *Government of Canada v Aronson* [1990] 1 AC 579 at 590, 618; *Cabal v United Mexican States [No 3]* (2000) 186 ALR 188 at 238-241.

(6) *R v Davies* (1983) 76 Cr App R 120; *AB v The Queen* (1999) 198 CLR 111; cf *R v Hamzy* (2001) 53 NSWLR 726.

(7) *R v Harrison* [1957] VR 117 at 120; *R v Hall* [1971] VR 293; *R v Parker* [1977] VR 22; *R v Tait* [1996] 2 VR 662; *R v Arundell* [1999] 2 VR 288 at 254.

(8) *R v Davies* (1983) 76 Cr App R 120; *AB v The Queen* (1999) 198 CLR 111.

(9) *McDonnell v Smith* (1918) 24 CLR 409.

(10) (1987) 9 NSWLR 546.

D M J Bennett QC, Solicitor-General for the Commonwealth, (with him *M M Gordon*), for the Attorney-General for the Commonwealth, intervening. The constitutional issue raised by the Court is that raised in *Re Tracey; Ex parte Ryan* (11), as to whether a law otherwise within s 51 is excluded by the words "subject to this *Constitution*" when the law has the effect of directing a State court what to do. A broader notice of a constitutional matter would be required.

The basis of extradition is for a requesting State to provide a statement of conduct to a foreign State. The foreign State determines whether the conduct alleged in that statement would constitute an offence under its own law. If it does (and it is neither trivial nor political), the requirement of double criminality is met and the person is eligible for surrender. On surrender, the requesting State considers the offences on which surrender was sought and granted, not the foreign offences. The only correlation between the two countries is the statement of conduct.

The first limb of s 42(a)(i) of the *Extradition Act* identifies the offence or offences on which the surrender process was initiated and concluded. A surrender warrant issued by the requested State almost always specifies the Australian offences for which extradition has been granted. The surrender warrant here specified United Kingdom offences. Hence Australia was entitled to conclude that the United Kingdom was satisfied of the requirement of double criminality and had surrendered the accused in respect of each offence on which the Australian request had been made. Alternatively, the accused was surrendered for offences other than those for which he was tried and convicted, but the offences of which he was convicted came within the second limb of s 42(a)(i). What is required is a broad conduct-based approach, by reference to the statement of conduct put forward by Australia in respect of the request for surrender (12). The second limb does not require a comparison between the constituent elements of the Australian offences for which the accused was surrendered and those of the offences for which he was tried. The appellant's construction is unworkable. The correct, broad conduct-based, construction acknowledges and deals with differences between the criminal law systems of Australia and the foreign States (13). The authorities on which the appellant relies (14), and their consideration of "conduct constituting the offence" are concerned with the requirement of double criminality in Australia in s 19(2) of the *Extradition Act*. The problem is foreign States providing insufficient acts and/or omissions to enable the magistrate to determine the basis on which the surrender is sought, that

(11) *R v Hamzy* (1989) 166 CLR 518.
(12) (2001) 53 NSWLR 726 at 744-745.
(13) *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 558.
(14) eg, *Wiest v Director of Public Prosecutions* (1988) 23 FCR 472; *De Bruyn v South Africa* (1999) 96 FCR 290.

double criminality is established, and that there is no extradition objection. As a condition of obtaining extradition of a person from Australia, the *Extradition Act*, in s 22(3)(d) and (4), imposes an obligation on extradition countries to give a speciality assurance to Australia expressed in identical terms to s 42(a)(i).

P A Coughlan QC (with him *K E Judd*), for the respondent. The Court of Appeal was correct that the acts or omissions by virtue of which the offence is alleged to have been convicted may be given a reasonably expanded meaning for s 42 of the *Extradition Act* in the sense that one is permitted to look at the whole of the conduct alleged. An interpretation requiring a comparison of the constituent elements of the offences would be unworkable because (a) the offences in the laws of the surrendering country will not necessarily be expressed in concepts and terminology identical, or even similar, to Australia (15); (b) the extraditing magistrate cannot be expected to be expert in Australian law (16); (c) the prosecuting authorities and the trial judge in Australia cannot be expected to be expert in the law of the surrendering country. [GUMMOW J. Do you dispute that the appellant has standing, if that is the word, to raise s 42 of the *Extradition Act*? Do you contend that s 42 operates simply as between Australia and the United Kingdom?] No. The appellant does have rights under that section.

O P Holdenson QC, in reply.

Following the hearing, the Court notified the parties and the intervener that it wished to hear further argument on three questions: (a) whether the Court should accept the concession by the respondent that s 42 of the *Extradition Act* dealt with more than the conduct of external affairs by the Executive Government, and that it operated to confer rights upon those on trial; (b) whether, if that concession were accepted, s 42 validly withdrew from State Supreme Courts non-federal jurisdiction they otherwise would have; and (c) as a corollary to (a), the identification of the power of the Commonwealth Parliament to define the jurisdiction of a State court under State law. A further notice of a constitutional matter was given.

3 December 2003. The Court was constituted by all seven Justices.

D M J Bennett QC (with him *M M Gordon* SC and *L G De Ferrari*), for the Attorney-General for the Commonwealth, intervening. Section 42(a) of the *Extradition Act* does not confer a substantive right on a person in the appellant's position to seek to enforce the speciality rule. The *Extradition Act* is not a code of the law relating to the extradition

(15) *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 559; *Riley v The Commonwealth* (1985) 159 CLR 1.

(16) *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 300; *Wong v Evans* (1985) 4 FCR 228 at 232-233; *Wong v Evans* (1985) 6 FCR 95 at 102.

of persons to Australia (17). A surrendering State may complain of a breach of the speciality rule independently of s 42. The ability of a surrendering State to consent to an accused's being tried for other offences reflects that s 42 is founded in international comity. Further, the historical source of the principle of speciality and the fact that an accused cannot raise breach of it in the context of a treaty obligation (18) further indicates that s 42 does not confer a substantive right. Where a person is in the jurisdiction and before a State Supreme Court charged with an offence against the law of the jurisdiction, that Court has jurisdiction to try that accused person. However, the Court retains a discretion to stay proceedings if to try the person would amount to an abuse of its process (19). The remedy for abuse of process does not depend on s 42 being construed to confer a substantive right on an accused. *R v Davies* (20) should not be followed.

If the Court holds to the contrary, the right conferred is a federal immunity akin to a plea in bar which does not go to jurisdiction (21) and the State court exercises federal jurisdiction to determine whether it is made out. There is no ousting of the non-federal jurisdiction of the State court. The court has jurisdiction because of the presence of the accused; but once a claim for federal immunity is raised the jurisdiction is federal not State (22). Covering cl 5 of the *Constitution* dictates that the federal immunity is to be given effect by the State court (23). If the Court holds that s 42 is directed to the non-federal jurisdiction of the State court, it is a valid law with respect to s 51(xxix) of the *Constitution*, and to the extent that *Re Tracey; Ex parte Ryan* (24) is authority for a proposition contrary to validity it should not be followed. If there is any withdrawing of jurisdiction, it occurs only once a defence under a Commonwealth law is established (25). In those terms, s 42 is inconsistent with State laws conferring criminal jurisdiction on State courts; by reason of s 109 of the *Constitution* s 42 prevails. Section 106 of the *Constitution* does not contain an express or implied limit on Commonwealth power to make laws under s 51 (26). When the contention is that a federal law

(17) Section 3 of the *Extradition Act* and *Oates v Attorney-General (Cth)* (2003) 214 CLR 496.
(18) *Bertran v Vanstone* (2000) 173 ALR 63.
(19) *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; *R v Hartley* [1978] 2 NZLR 199; *R v Raby* [2003] VSC 213.
(20) (1983) 76 Cr App R 120.
(21) See generally *R v Carroll* (2002) 213 CLR 635.
(22) *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136; *Flaherty v Girgis* (1987) 162 CLR 574 at 597-598.
(23) *Campbell v Metway Leasing Ltd* (2002) 195 ALR 271 at 279.
(24) (1989) 166 CLR 518.
(25) *Felton v Mulligan* (1971) 124 CLR 367.
(26) *Port MacDonnell Professional Fishermen's Association Inc v South Australia*

impermissibly seeks to interfere with an essential branch of State governments, the proper test is as formulated in *Austin v The Commonwealth* (27).

O P Holdenson QC (with him *J B McDougall*), for the appellant. Section 42(a) of the *Extradition Act* restricts the powers of a prosecutor with respect to the offences that may be specified in a presentment. If there is a presentment on an offence contrary to s 42(a)(i) or (ii), the count is invalid, the trial is invalid, the court does not have jurisdiction, and the conduct of the trial is an abuse of process. Section 42(a) withdraws jurisdiction and provides immunity from the court's jurisdiction or from prosecution, trial and conviction or provides a defence or something analogous to a plea in bar. The "point" can be taken at trial or on appeal. Whenever submissions can be made that an accused has been accorded immunity from prosecution, and is therefore not amenable to the local criminal jurisdiction, the point can be taken either at trial or on appeal (28); similarly when the trial court does not have jurisdiction for whatever reason to conduct the criminal trial (29). Hence s 42(a)(i) operates to confer rights on accused persons in the position of the appellant.

By the combined operation of ss 76(ii) and 77(iii) of the *Constitution*, s 39(2) of the *Judiciary Act 1903* (Cth) and s 42(a)(i) of the *Extradition Act*, federal jurisdiction was enlivened at the trial. Further, because of s 109 of the *Constitution*, the respondent did not have power to prosecute the appellant for the two counts in the presentment notwithstanding s 353 of the *Crimes Act 1958* (Vic) and provisions of the *Public Prosecutions Act 1994* (Vic). The appellant's reliance on s 42(a)(i) of the *Extradition Act* and s 109 of the *Constitution* meant that, in the conduct of the trial, the Supreme Court was exercising federal jurisdiction (30) for the entire trial (31). No question of the withdrawal of State jurisdiction arises. The appellant otherwise adopts the Commonwealth's submissions on s 42 being a valid law if it withdraws jurisdiction and on *Re Tracey; Ex parte Ryan* being wrongly decided.

(cont)
(1989) 168 CLR 340 at 381. See also *South Australia v The Commonwealth* (1942) 65 CLR 373 at 442-444; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 372.

(27) (2003) 215 CLR 185 at 224, 246, 265.

(28) *Chung Chi Cheung v The King* [1939] AC 160; *Chow Hung Ching v The King* (1948) 77 CLR 449.

(29) *Ward v The Queen* (1980) 142 CLR 308; *R v Pinkstone* (2000) 117 A Crim R 111; cf *Thompson v The Queen* (1989) 169 CLR 1; *Lipohar v The Queen* (1999) 200 CLR 485; *Re Hamilton-Byrne* [1995] 1 VR 129.

(30) *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529; *Felton v Mulligan* (1971) 124 CLR 367 at 403-404; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

(31) *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476-477; cf *Flaherty v Girgis* (1987) 162 CLR 574 at 597-598.

P M Tate SC, Solicitor-General for the State of Victoria, (with her *K L Emerton*), for the Attorney-General for that State, intervening. Section 42 of the *Extradition Act* does not confer a right on those on trial to seek to enforce the speciality rule; impair or restrict the jurisdiction of a State court to try a person who, physically within the jurisdiction, is amenable to the criminal process of the State regardless of the circumstances in which the person was brought there (32); or offer any more protection than a right to apply for a stay on the ground of abuse of process by reason of breach of speciality. If it were otherwise, s 42 would oust the non-federal jurisdiction of State court. That cannot be done. *Re Tracey; Ex parte Ryan* should be followed. The decision on this aspect in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (33) turned on the exceptional nature of the power in s 51(xxxviii) of the *Constitution* and the reasoning cannot be extended to other heads of Commonwealth legislative power.

While the speciality rule has been recognised in Australia to give some protection to an accused, that protection is limited (34). Where the rendition has been irregular, an accused may apply for a stay on the ground of abuse of process. [She referred to *R v Bow Street Magistrates; Ex parte Mackeson* (35) and *Herron v Attorney-General (NSW)* (36).] The United States authorities are not useful because, notwithstanding the authority of *United States v Rauscher* (37) to the effect that speciality rights described in an extradition treaty are conferred on both the extradited individual and the surrendering State, the courts have been divided on the issue and there are authorities for both the proposition that an extradited person has standing and the contrary (38). Moreover, the reasoning is based on the principle that under United States law a treaty is the law of the land and the equivalent of an Act of the legislature (39). It is inapposite to describe the limited protection given by s 42 as equivalent to the immunity conferred by a plea in bar. If it were, it would be a bar to the indictment (40) to be pleaded as soon as a count on the indictment had been read. Thus, being a matter raised and determined before issue was

(32) *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 546. See also *Ker v Illinois* (1886) 119 US 436; *Frisbie v Collins* (1952) 342 US 519 at 522.
(33) (1989) 168 CLR 340 at 381.
(34) *Barton v The Commonwealth* (1974) 131 CLR 477 at 500; *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 375; *AB v The Queen* (1999) 198 CLR 111.
(35) (1981) 75 Cr App R 24.
(36) (1987) 8 NSWLR 601.
(37) (1886) 119 US 407.
(38) See *Bertran v Vanstone* (2002) 173 ALR 63 at 102-105.
(39) *United States v Rauscher* (1886) 119 US 407 at 418.
(40) *R v Carroll* (2002) 213 CLR 635; *Conway v The Queen* (2002) 209 CLR 203; *Archbold's Criminal Pleading, Evidence and Practice* (2003), ¶4-114.

joined, it would be indistinguishable from a motion to quash the indictment for invalidity.

R J Meadows QC, Solicitor-General for the State of Western Australia, (with him *J C Pritchard*), for the Attorney-General for that State, intervening. Section 42 of the *Extradition Act* is not a valid law of the Commonwealth in so far as it withdraws from State courts their non-federal jurisdiction. This conclusion is derived from implications from Ch III of the *Constitution*. [He referred to *Le Mesurier v Connor* (41); *Russell v Russell* (42); and *Kable v Director of Public Prosecutions (NSW)* (43).] It also derives support from s 106 of the *Constitution*. For the purposes of s 106, a range of statutes may comprise the *Constitution* of a State (44) and in this case they are the *Constitution Act 1975* (Vic) and the *Supreme Court Act 1986* (Vic). The effect of s 106 is to continue those laws and to prohibit the Commonwealth Parliament from legislating to abolish the Supreme Court of Victoria. In purporting to withdraw the State jurisdiction vested in the Supreme Court, s 42 impermissibly attempts to do indirectly what the Commonwealth Parliament cannot do directly (45). *Re Tracey; Ex parte Ryan* is consistent with this submission. It may be that s 51(xxxviii) of the *Constitution* permits the Commonwealth Parliament to legislate so as to interfere with State constitutional processes (46), as it did in enacting the *Australia Act 1986* (Cth) at the request of the States (47). But it is far from clear that that Act, which confirmed and conferred legislative power on the Parliament of a State, was in conflict with the continuation of the *Constitution* of a State (48). The Commonwealth Parliament nevertheless may enact a law which is inconsistent with a State law that creates an offence amenable to prosecution in a State court in the exercise of its State jurisdiction (49).

P A Coghlan QC (with him *K E Judd*), for the respondent. The right arising out of s 42 is of not being tried in abuse of the process of the courts and it is to be enforced accordingly. Breach of a speciality provision is not necessarily an abuse of process (50). The public has an

(41) (1929) 42 CLR 481 at 495-496.
(42) (1976) 134 CLR 495.
(43) (1996) 189 CLR 51.
(44) *Western Australia v Wilsmore* (1981) 149 CLR 79 at 93-96; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 140-141. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 171-173; *Yougarla v Western Australia* (2001) 207 CLR 344 at 369, 377-380.
(45) *Antill Ranger and Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83.
(46) *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570-571 [67]-[70]; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 381.
(47) *Sue v Hill* (1999) 199 CLR 462 at 495.
(48) *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 381.
(49) eg, *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 at 160, 161, 163.
(50) *Levinge v Director of Custodial Services, Department of Corrective Services*

interest in courts exercising jurisdiction to try persons for criminal offences and it will be only in extreme cases that a court will use its power to stay proceedings (51). There is no reason to assume that s 42 limits the rights of a prosecutor in Victoria in relation to an offence against Victorian law. The authorities on which the appellant relies for the proposition that the power to indict may be limited, and that the point may be taken for the first time on appeal, do not apply in this case.

The language of s 42 of the *Extradition Act* is indistinguishable from that of the provisions considered in *Re Tracey; Ex parte Ryan* (52). If s 42 confers substantive rights on an accused above the doctrine of abuse of process, it is invalid for the reasons given in that case. It does not matter whether s 42 is jurisdictional or providing immunity. Difficulty arises with an immunity analogous to a plea in bar. If it is a proper plea, the result is final and no trial can follow. In the case of extradition and breach of speciality, s 42(a)(ii) leaves open the question of the consent of the surrendering State. If s 42 merely confers an immunity, the appellant could succeed on an appeal only where there is an abuse of process or other miscarriage of justice (53). Where abuse of process is said to arise from action of Australian prosecuting authorities, there must be deliberate or intentional action such as fraud, a deliberate attempt to circumvent the extradition process or a deliberate attempt to ignore a statutory requirement (54). There was no abuse of process here.

O P Holdenson QC, in reply. There can be an abuse of process where the prosecutor did not realise what he was doing and misunderstood the law and the restrictions placed on prosecuting certain offences (55).

D M J Bennett QC, in reply. The appellant's reliance on authorities concerned with visiting armed forces, or more generally, where the Crown receives a foreign sovereign (56), are not to the point. At issue is not the jurisdiction of Australian courts but the respective jurisdictions of the sovereign States. In extradition matters, once the person is standing trial the foreign State has conceded its jurisdiction

(cont)
(1987) 9 NSWLR 546; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; *Bou-Simon v Attorney-General (Cth)* (2000) 96 FCR 325; *R v Hartley* [1978] 2 NZLR 199.

(51) *Williams v Spautz* (1992) 174 CLR 509 at 519; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 74; *Bou-Simon v Attorney-General (Cth)* (2000) 96 FCR 325 at 335, 339.

(52) (1989) 166 CLR 518.

(53) *R v Gallager* [1998] 2 VR 671 at 679; *Conway v The Queen* (2002) 209 CLR 203.

(54) *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496; *R v Hartley* [1978] 2 NZLR 199.

(55) *R v GJB* (2002) 4 VR 355; *R v Sessions* [1998] 2 VR 304.

(56) *Chung Chi Cheung v The King* [1939] AC 160; *Chow Hung Ching v The King* (1948) 77 CLR 449.

with respect to the accused. The trial of the appellant was not in federal jurisdiction, no issue of federal plea in bar then being raised.

Cur adv vult

4 March 2004

The following written judgments were delivered: —

1 GLEESON CJ, MCHUGH AND HEYDON JJ. This appeal concerns the meaning and effect of s 42 of the *Extradition Act 1988* (Cth) (the Act), which deals with a topic commonly known as "speciality" (57), in its application to a person who was surrendered by a foreign country in respect of offences of conspiracy to kidnap and conspiracy to murder, and subsequently tried in Australia for the offences of kidnapping and murder.

2 The appellant claims that he was tried in contravention of s 42. He was convicted of kidnapping and murder. The point was not taken at the trial, which took place in the Supreme Court of Victoria before Vincent J and a jury. It was relied upon as the sole ground in an application to the Court of Appeal of Victoria for leave to appeal against both convictions. The application was dismissed (58). The appellant was granted special leave to appeal to this Court.

3 Because such a point would ordinarily be taken before a trial, perhaps in an attempt to stay further proceedings, the Court of Appeal was in the unusual position of considering the arguments of the appellant in the light of the case made against him, and accepted by the jury, at trial. It is convenient to explain the facts by reference to that case, bearing always in mind that greater significance may attach to the case against the appellant as presented in the proceedings for extradition, if there were a material difference.

The case at trial

4 The appellant, a Vietnamese national who resided in London, was alleged to be the head of a network of criminals engaged in trafficking in illegal drugs and operating in Hong Kong, Vietnam, Australia and elsewhere. He had a sister named Mrs Van, who lived in Melbourne. Through her, he came to know Mrs Ha, a wealthy importer of clothing and footwear, who also lived in Melbourne. Mrs Ha had a son, Le Anh Tuan. The appellant and his sister attempted to recruit Mrs Ha to join their illegal activities. In March 1996, the appellant met Mrs Ha in Melbourne. In addition to seeking her assistance, he also threatened that there would be serious consequences for her or her family if she did not co-operate. He then flew to Hong Kong, but continued to communicate with Mrs Ha by telephone. She rejected his requests. He demanded $400,000 protection money. She refused to pay.

5 In mid-April 1996, two Vietnamese criminals, resident in the United States, arrived in Sydney. They were allegedly acting at the direction of

(57) cf *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 503-504 [13].
(58) *R v Truong* (2002) 5 VR 1.

the appellant. They kidnapped Mrs Ha's son. A ransom was demanded but refused. The ransom note stated that the victim had "gone with the guys from [the appellant's] company" and that Mrs Ha had "72 hours to pay the money". After the kidnapping the appellant, by telephone, made further threats to Mrs Ha. Both before and after the kidnapping, the threats included reference to the need for her to have coffins ready. In early June 1996, the son's body was found in an aqueduct. The cause of death was a single gunshot wound to the head.

6 Ormiston JA, who wrote the leading judgment in the Court of Appeal, summarised the prosecution case as follows:

> "It was contended that the [appellant] (and his co-accused [Mrs Van]) procured the commission of both the kidnapping and the consequent murder. It was said that they planned and organised both the kidnapping and the subsequent murder and that the [appellant] was the mastermind and Mrs Van was the facilitator in that she passed on the demands to Mrs Ha. So it was said that both the [appellant] and Mrs Van were actively involved and thus directly responsible for the kidnapping and that, inasmuch as they were fully aware of the consequences if the ransom were not paid, they were also responsible for the young man's murder, even though the later execution was carried out by others."

7 If the prosecution established beyond reasonable doubt that the appellant procured the kidnapping and murder, as alleged, he was liable as a principal offender (59). Furthermore, even though the appellant may have been outside Victoria (whether in Hong Kong, London, or, for that matter, Sydney) for part or even the whole of the time when he procured the commission in Victoria of the crimes, he was guilty of offences against the law of Victoria (60) and was amenable to the jurisdiction of the Supreme Court of Victoria (61).

The original charges

8 After the discovery of the body of Le Anh Tuan there was a police investigation in Victoria which resulted in the bringing and filing of eight charges against the appellant. (Other people were charged as well.) Those charges were murder, kidnapping, conspiracy to murder, conspiracy to kidnap, blackmail, making a demand with a threat to kill, and two charges of illegal importation of heroin.

The extradition

9 In September 1997, pursuant to s 40 of the Act, a request was made by Australia, under the authority of the Commonwealth Attorney-General, to the Secretary of State for Home Affairs of the United Kingdom, for the surrender of the appellant. The request was not in evidence in the present proceedings, but Ormiston JA noted that "there

(59) *Crimes Act 1958* (Vic), s 323.
(60) *R v Robert Millar (Contractors) Ltd* [1970] 2 QB 54; *Liangsiriprasert v United States* [1991] 1 AC 225; *R v Fan* (1991) 24 NSWLR 60.
(61) *Lipohar v The Queen* (1999) 200 CLR 485.

seems little doubt that the subject offences were expressed in terms of State or Commonwealth (the drug offences) law". That must be so. Section 40 refers to a request by Australia for the surrender of a person from a country "in relation to an offence against a law of Australia of which the person is accused". This led the Secretary of State for Home Affairs of the United Kingdom to issue an authority to proceed directed to the Chief Metropolitan Stipendiary Magistrate sitting at Bow Street, which described the subject matter of the inquiry to be conducted as "conduct in the jurisdiction of the Government of Australia which appears to the Secretary of State to be conduct which, had it occurred in the United Kingdom, would have constituted offences of murder, false imprisonment, conspiracy to commit murder, conspiracy to commit blackmail, kidnap, conspiracy to kidnap, threats to kill, conspiracy to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin".

10 The relevant provisions of the United Kingdom legislation relating to extradition are set out in the joint reasons for judgment of Gummow and Callinan JJ (the joint reasons). We will not repeat them. Reference is also made in the joint reasons to the course of proceedings before the Bow Street Magistrate, who was initially informed by counsel for Australia that the appellant was wanted by the Government of Australia for murder, kidnapping, conspiracy to commit murder, conspiracy to kidnap, blackmail, extortion with threat to kill, conspiracy to import a prohibited drug, namely heroin, and knowing involvement in the importation of heroin. Once again, that is plainly a reference to offences against Australian law. The Government of Australia would not be wanting a person for offences against some other country's law.

11 It is convenient to refer at this point to a matter that is ordinarily of concern in extradition proceedings, but is not directly relevant in the present appeal. That is the matter of double criminality. In *Riley v The Commonwealth* (62), it was pointed out that this is a general principle of extradition law which is ordinarily reflected in statutes governing extradition, and applies according to the terms of the relevant statute. The general principle was identified by reference to a passage in *Oppenheim's International Law* (63):

> "And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition."

12 That principle is reflected in the United Kingdom legislation, and explains a potential ambiguity in the concept of "offences". As the joint reasons point out, that ambiguity appears to have given rise to confusion in some of the documents in the extradition proceedings.

(62) (1985) 159 CLR 1 at 11-12.
(63) 8th ed (1955), vol 1, p 701.

13 The material before the magistrate included a lengthy affidavit of Detective Senior Constable Tragardh of the Victoria Police Force. That affidavit set out the results of the investigation into the kidnapping and death of Le Anh Tuan, and explained the nature of the evidence against the appellant. In terms of s 10(2) of the Act, it is the document that sets out the acts or omissions by virtue of which the offences alleged against the appellant had been committed. There was no material difference between the evidence that was led against the appellant at his trial and the facts outlined in the Tragardh affidavit. Three important aspects of those facts should be noted. First, the case against the appellant was circumstantial. Secondly, so far as the alleged offences of conspiracy to murder and conspiracy to kidnap were concerned, the overt acts from which the existence of the conspiracies was to be inferred included the actual kidnapping and murder. There is nothing unusual about this. Criminal conspiracies are commonly proved by overt acts; and the overt acts often include the substantive crimes which are the object of the conspiracy. A legally informed reader of the Tragardh affidavit would clearly have understood that the overt acts of kidnapping and murder were important, perhaps critical, aspects of the cases of conspiracy which Australia, at that stage, intended to present against the appellant at his trial. They constituted the most significant parts of the evidence upon which those cases depended. Furthermore, the conspiracies in which the appellant participated were alleged to be continuing conspiracies which remained on foot up to and including the time of the kidnapping and the murder. There was no suggestion in the affidavit that the prosecution would, or could, seek to make out cases of conspiracy which involved an unperformed agreement to commit crimes. It is apparent from the material in the affidavit that the acts of performance of the agreement were relied on heavily, both in proof of the agreement, and in defining the extent of the agreement. Thirdly, the allegation was that the appellant was "the most senior member of a network of Vietnamese criminals" based in Hong Kong and that Mrs Van and the two men who entered Australia from the United States, and who allegedly committed the acts of kidnapping and murder, were assisting, and acting at the direction of, the appellant. In other words, the allegation was that, and the material outlined in the Tragardh affidavit supported the inference that, the appellant organised and directed the kidnapping and murder. Thus, the conduct of the appellant alleged to make the appellant liable as a principal for kidnapping and murder (procuring the two men from the United States to kidnap and, if necessary, kill the victim) was the same as the conduct alleged to make him a party to a conspiracy to kidnap and murder. He was not said to be guilty of kidnapping or murder because he himself kidnapped or killed the victim. His liability was based on the procuring. But that was also the act by virtue of which he was allegedly a party to the conspiracy to kidnap and murder.

14 The Tragardh affidavit concluded with a statement of the charges against the appellant that had been filed in Melbourne. They were, of course, expressed in terms of offences against Australian law. They were murder, kidnapping, conspiracy to murder, conspiracy to kidnap, demanding money with menaces (blackmail), demanding money with a threat to kill, conspiracy to import heroin, and being knowingly concerned in the importation of heroin.

15 For a reason that is unknown, counsel for Australia, when identifying the "draft charges upon which extradition is sought", included the conspiracy charges, but omitted the charges of murder and kidnapping. In the course of argument in this Court, there was some speculation as to why that might have occurred. In the light of the decision of the House of Lords in *Director of Public Prosecutions v Doot* (64) it can hardly have been because of some apprehension that the principles of territoriality which affect procuring the commission of a crime might be different from those which affect conspiracy. Whatever the reason, one thing is clear. Having regard to the contents of the Tragardh affidavit, neither the speciality provisions of the United Kingdom statute, nor the terms of the speciality agreement that was entered into by Australia, would have been inconsistent with a prosecution of the appellant in Australia for murder and kidnapping, even if he were only surrendered in respect of the offences of conspiracy to murder and conspiracy to kidnap. The reasons for that will be explained below. Counsel would have been aware of that. Accordingly, we do not accept that the narrowing of the charges in respect of which surrender was sought involved any express or implied undertaking not to try the appellant for the substantive offences. On the contrary, the terms of the speciality agreement entered into by Australia for the purpose of the extradition left that possibility open.

16 The Metropolitan magistrate, pursuant to s 9(9) of the *Extradition Act 1989* (UK), certified that the conduct alleged within the jurisdiction of the Government of Australia would amount to certain offences against the law of the United Kingdom, namely conspiracy to commit murder, conspiracy to kidnap, conspiracy to commit blackmail and conspiracy to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin. On receipt of that certificate, the Secretary of State signed a surrender warrant ordering the appellant to be returned to Australia in respect of the offences for which he was committed to custody by the magistrate. The warrant, erroneously, identified the offences of which the appellant was accused in terms of United Kingdom offences. This is evident because one of them, "conspiracy to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin", is an offence known to the law of the United

(64) [1973] AC 807.

Kingdom, but not to Australian law. The offences included conspiracy to murder and conspiracy to kidnap, but not murder or kidnapping.

17 Those were the circumstances in which the appellant was surrendered to Australia where, in due course, he was tried for the substantive offences of murder and kidnapping.

The speciality

18 Section 42 of the Act, upon which the present appeal turns, provides:

> "Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:
>
> (a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
>
> (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or
>
> (ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or
>
> (b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered."

19 That section must be understood in the light of s 10(2) of the Act which provides:

> "A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed."

20 The reference to *the acts or omissions by virtue of which* an offence is alleged to have been committed is of central importance in this appeal. It directs attention to the concrete, rather than the abstract. The offences of which s 42, interpreted in accordance with s 10(2), speaks are not theoretical offences, to be described by reference to the contents of a text book. They are specific offences, alleged to have been committed by a particular individual, by virtue of particular conduct. This is of special importance when dealing with such a protean offence as conspiracy.

21 Section 42 reflects a general principle of extradition law which has been formulated in varying ways, and which has found somewhat different forms of statutory expression. The reasons of Ormiston JA

contain a detailed examination of those variations and differences (65). Some caution is necessary in adopting general statements of the principle which may have been made in a context in which it was unnecessary to advert to questions of its detailed application. It is the language of the particular statutory provision reflecting the principle that matters, although the resolution of uncertainty about the meaning of that language may be assisted by an understanding of broader issues, and of the legislative history.

22 The *Extradition Act 1870* (UK) was the precursor of both the current Australian legislation and the current United Kingdom legislation, although there was intermediate legislation. Section 19 of the Act of 1870 provided that where, in pursuance of any arrangement with a foreign state, any person accused of a crime is surrendered by that foreign state, "such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence … other than such of the said crimes as may be proved by the facts on which the surrender is grounded".

23 The reference to "the facts on which the surrender is grounded" relates to a significant practical consideration in connection with extradition. By hypothesis, the person surrendered to the United Kingdom or Australia is wanted for trial for an offence or offences against the law of the country where the trial is to occur. But the criminal law of the foreign country surrendering the person will almost certainly be different in some respects, and will often be different in many respects, from that of the country of trial. The administrative or judicial officers dealing with extradition are not experts in foreign law. It happens, in the present case, that the law of the United Kingdom in relation to the appellant's alleged conduct is not very different from Australian law. That should not obscure the fact that extradition legislation is designed to operate as between countries whose laws may be quite different. Hence the operation of the speciality, in the Act of 1870, by reference to the facts on which the surrender by the foreign country was grounded rather than, for example, the offences against the law of the foreign country disclosed by those facts. There may have been no such offence known to the law of the United Kingdom, or Australia, as the case may be. Even if there were similar offences, they may not correspond precisely in their elements. There is a discussion of this problem in *Riley v The Commonwealth* (66).

24 The current United Kingdom legislation, pursuant to which the appellant was surrendered, in s 6(4) provides that a person shall not be returned from the United Kingdom unless provision is made by an arrangement with the country seeking return for securing that the person shall not, unless he has first had the opportunity to leave such country, be dealt with for any offence committed before his return to it

(65) *R v Truong* (2002) 5 VR 1 at 27-34.
(66) (1985) 159 CLR 1.

other than the offence in respect of which his return is ordered, an *offence* "*which is disclosed by the facts in respect of which his return was ordered*", or any other offence being an extradition crime in respect of which the Secretary of State may consent to his being dealt with. In accordance with that requirement, the Secretary of State certified that an arrangement had been made with the Government of Australia that the appellant, unless he had first had an opportunity to leave Australia, would not be dealt with in Australia for any offence committed before his return other than the offences in respect of which his return was ordered, or another offence "which is disclosed by the facts in respect of which his return was ordered" or any other offence being an extradition crime in respect of which the Secretary of State may consent to his being dealt with.

25 Having regard to the contents of the Tragardh affidavit it is clear that the substantive offences of kidnapping and murder were offences disclosed by the facts in respect of which the return of the appellant was ordered. It cannot be, and is not, claimed that Australia was in breach of the speciality agreement it made with the United Kingdom by reason of the appellant's trial for kidnapping and murder. However, the appellant contends that the constraint imposed by s 42 of the Act is more stringent than the speciality principle as reflected in the United Kingdom statute, and in the speciality agreement made in the present case. According to the argument, the Australian legislation imposes a tighter regime of speciality, and one with which the trial of the appellant did not comply.

26 The first point to be made about s 42(a) is that the offences to which it refers are offences against an Australian law. The provision is about trying people for offences in Australia. That can only be a reference to offences against Australian law. People are not tried in Australia for offences against foreign law. The word "offence" has the same meaning throughout s 42(a). Thus, "offence" in s 42(a)(i) means "offence against the law of Australia".

27 Having regard to the course of the extradition proceedings in London, we accept that the offences in respect of which the appellant was surrendered included conspiracy to kidnap and conspiracy to murder, and did not include kidnapping and murder.

28 The question then is whether kidnapping and murder, *in the circumstances of the present case*, were offences of which the appellant could be convicted on proof of the conduct constituting the offences in respect of which he was surrendered. (At the relevant time no problem existed by reason of the words in parenthesis in s 42(a)(i).) In that respect, in consequence of s 10(2), the reference to the conduct constituting the offences in respect of which he was surrendered is a reference to the acts or omissions by virtue of which those offences had, or were alleged to have, been committed. The acts or omissions by virtue of which the offences of conspiracy to kidnap and conspiracy to murder were, or were alleged to have been, committed are to be

identified by reference to the Tragardh affidavit, understood in the light of the criminal law of conspiracy as it applies in Australia.

29 The question, in our view, is not to be answered merely by a comparison of the elements of the (Australian) offences in respect of which the person has been surrendered and the (Australian) offences in respect of which he is to be, or was, tried, although an understanding of those elements is material. The acts or omissions, that is, the conduct, by virtue of which an offence has been, or is alleged to have been, committed, lie at a level of abstraction between a formal statement of the elements of the offence, on the one hand, and an account of the evidence relied on to prove the relevant conduct, on the other. Nor is the relevant comparison between the bare minimum that would be necessary to make out offences of the kind under consideration. The exercise required by the statute is concrete, not abstract, and is to proceed by reference to the actual conduct alleged against the person in question. In the present case, it is also important to bear in mind that the substantive offences for which the appellant was ultimately tried were offences in respect of which his liability as a principal was based upon a statutory provision to the effect that a person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender (67).

30 While the concept of aiding, abetting, counselling or procuring may extend beyond cases in which there is an agreement between the principal offender and the secondary participant (68), the term procure has a narrower meaning. In *Attorney-General's Reference (No 1 of 1975)* (69), Lord Widgery CJ said:

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening."

31 Not all procuring necessarily involves a conspiracy. However, in the present case, the nature of the procuring alleged against the appellant was straightforward. It did not vary between the Tragardh affidavit, and the prosecution case at trial. It was summarised in Vincent J's remarks on sentence:

> "Central to the prosecution case against you was the contention that you were … 'the controlling mind', 'the shadow force' and 'the shadow master' who directed all that took place in relation to the kidnapping. It was never argued that you may have been implicated in some less important way or that you may have performed some other role. The jury was instructed and must, accordingly, be taken to have found you guilty on that very clearly identified basis.

(67) *Crimes Act 1958* (Vic), s 323.
(68) *Giorgianni v The Queen* (1985) 156 CLR 473 at 493 per Mason J.
(69) [1975] QB 773 at 779.

> With respect to the count of murder, when and where Le Anh Tuan was executed by a bullet being fired into the back of his head is unknown and it is highly unlikely that we will ever learn who fired this single fatal shot. *What we do know is that he was kidnapped with the threat being made explicitly and implicitly that if the ransom was not paid as demanded his life would be forfeited … The jury has found beyond reasonable doubt that you directed that kidnapping* and that you well appreciated that a reasonable possible consequence of your actions was the death of the deceased."

(Emphasis added.)

32 In order to compare that case with the case of conspiracy in respect of which the appellant was surrendered, it is necessary to bear in mind certain aspects of the law of conspiracy.

Conspiracy

33 The nature of the conspiracy to kidnap and conspiracy to murder alleged in the Tragardh affidavit, and in respect of which the appellant was surrendered, is not described adequately simply by saying that he was a party to an agreement to kidnap and, if necessary, kill Le Anh Tuan. There was more to it than that. Agreement (here, agreement to commit a crime) is the essence of conspiracy, but the nature and scope of the alleged agreement is important when performing the exercise, required by the statute, of identifying the acts or omissions by virtue of which the particular offence of conspiracy in question has, or is alleged to have, been committed.

34 The alleged agreement was constituted initially by a direction rather than a request. According to the Tragardh affidavit, the appellant was the controller of a criminal syndicate, and engaged and directed the operatives from the United States who performed the kidnapping and killing. He was in charge of their activities, from beginning to end. There is no material difference between the conduct of the appellant which amounted to making and participating in the agreement for the purposes of conspiracy and the procuring for the purposes of the substantive offences.

35 Furthermore, the conspiracy was alleged to have continued in existence, and to have been completed by performance. Although a crime of conspiracy has been committed, and in that sense is complete, once an agreement to commit a crime has been made, conspiracy is a continuing offence. It is an error to think that the crime comes to an end once the agreement has come into existence. That is the error that was rejected by this Court in *Savvas v The Queen* (70). The point was explained by Lord Pearson in *Director of Public Prosecutions v Doot* (71):

> "A conspiracy involves an agreement expressed or implied. A conspiratorial agreement is not a contract, not legally binding,

(70) (1995) 183 CLR 1.
(71) [1973] AC 807 at 827.

> because it is unlawful. But as an agreement it has its three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place … But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

36 It is not to the point in the present case to say that the appellant could have been convicted of conspiracy even if the plan had been intercepted by the police before the victim was kidnapped or killed. We are not concerned with the theoretical question of what various crimes the appellant might have committed. We are concerned with the particular conspiracy into which he allegedly entered, and in which he participated.

37 The conduct by virtue of which this particular conspiracy, in this particular case, was alleged to have been committed included the continuing performance of the agreement up to and including the killing of the victim. *Savvas* is authority for the proposition that, if the appellant had been tried for, and convicted of, conspiracy rather than the substantive offences, the kidnapping and the killing would have been matters for the sentencing judge to take into account, being aspects of "the degree of criminality involved in the appellant's participation in the conspiracy" (72).

38 Reference was made in argument to *McAuliffe v The Queen* (73) in support of a suggestion that the murder charge against the appellant involved materially different conduct from that involved in the conspiracy to murder charge. Once again, the point is purely theoretical. It involves making the wrong comparison. It is unrelated to the circumstances of this particular case. That is made plain by the remarks on sentence of the trial judge quoted above, which, in turn, reflect the way the jury was directed. The allegation, in relation to procuring, at trial, was that the appellant was in command. He "directed all that took place in relation to the kidnapping", including the threat of killing and the ultimate execution of the victim. There was never any suggestion that the two thugs who were engaged by the appellant to carry out the kidnapping might have acted with excessive

(72) *Savvas v The Queen* (1995) 183 CLR 1 at 9.
(73) (1995) 183 CLR 108.

force, or behaved in some other way contrary to his instructions. If they had done so, their own life expectations may have been considerably shortened. The appellant's liability was based on procuring. He was not left exposed as some unfortunate secondary participant caught up in events that escalated beyond what was planned. He was the person in charge. That was the way the conspiracy cases were put against him. And that is the basis on which he was convicted of the substantive offences.

Conclusion

39 The case falls within the second limb of s 42(a)(i) understood in the light of s 10(2) of the Act. In the light of the nature of the cases of conspiracy to kidnap and conspiracy to murder that were put against the appellant, the acts or omissions by virtue of which he was alleged to have committed those offences were such that, on proof of those acts or omissions, he could be convicted of kidnapping and murder, as he was.

40 The appeal should be dismissed.

41 GUMMOW AND CALLINAN JJ. On 9 May 2000, at his trial in the Supreme Court of Victoria before Vincent J and a jury, the appellant was convicted on each of two counts in the presentment. One count was of kidnapping contrary to s 63A of the *Crimes Act 1958* (Vic) (74). The other count was of murder contrary to the common law. Vincent J sentenced the appellant to life imprisonment on the count of murder and to fifteen years imprisonment on the count of kidnapping, with a non-parole period of twenty-three years and eight months. The appellant had been extradited to Australia from the United Kingdom in circumstances which will be detailed later in these reasons.

42 It should be noted that, on his arraignment on 24 January 2000, the appellant had pleaded "not guilty" to both counts in the presentment. By that plea, the appellant was deemed by s 391 of the *Crimes Act* to have put himself upon the country for trial. Upon arraignment, the appellant had been "entitled to make plea of not guilty in addition to any demurrer or special plea" (s 390A). It is significant for what follows in these reasons that the appellant had not, rather than enter a plea of not guilty, demurred or entered a special plea that he could not be put on trial in the face of s 42 of the *Extradition Act 1988* (Cth) (the Act).

(74) Section 63A states: "Whosoever leads takes or entices away or detains any person with intent to demand from that person or any other person any payment by way of ransom for the return or release of that person or with intent to gain for himself or any other person any advantage (however arising) from the detention of that person shall, whether or not any demand or threat is in fact made, be guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum)."

The Court of Appeal

43 In his application to the Court of Appeal for leave to appeal against the conviction (75), the appellant contended that there had been a miscarriage of justice within the meaning of the first paragraph in s 568(1) of the *Crimes Act* because (i) the convictions were unlawful and (ii) the trial had constituted an abuse of process. The appellant further contended that the convictions and sentences were nullities. These complaints had not been made at the trial. To a significant degree, they turn upon provisions of the Act, including s 42. It may be accepted that, in the Court of Appeal, a matter arose under the Act, attracting the exercise of federal jurisdiction. However, as will appear, the conduct of the trial had not involved the exercise of federal jurisdiction. The Court of Appeal (Winneke P, Ormiston and Buchanan JJA) dismissed the application.

44 The grounds of appeal to the Court of Appeal, and now to this Court, reflect complaints respecting the circumstances in which the appellant was returned to Australia from the United Kingdom. The appellant was arrested in London on 22 August 1997. On 25 September 1997, a request was made on behalf of the Attorney-General of the Commonwealth to the United Kingdom that the appellant be returned to Australia to be dealt with according to law (the Request). The Request stated that the appellant was accused in the State of Victoria of the following offences:

> "(i) Murder contrary to the common law of Victoria (1 count);
>
> (ii) kidnapping contrary to section 63A of the [*Crimes Act*] (1 count);
>
> (iii) conspiracy to commit murder, and agreement to commit murder outside of Victoria, contrary to sections 321(1) and 321A of the [*Crimes Act*] (1 count);
>
> (iv) conspiracy to kidnap and agreement to kidnap outside of Victoria contrary to sections 321(1) and 321A of the [*Crimes Act*] (1 count);
>
> (v) blackmail contrary to section 87 of the [*Crimes Act*] (1 count);
>
> (vi) extortion with threat to kill contrary to section 27(1) of the [*Crimes Act*] (1 count);
>
> (vii) conspiracy to import a prohibited import, namely a commercial quantity of heroin contrary to section 233B of the *Customs Act 1901* (Commonwealth) [the *Customs Act*] (1 count); and
>
> (viii) knowingly involved in the importation of a prohibited import, namely a commercial quantity of heroin contrary to section 233B of the [*Customs Act*] (1 count)."

It will be observed that in the events that happened the appellant was

(75) *R v Truong* (2002) 5 VR 1.

convicted and sentenced in respect of offences (i) and (ii) and not on any of offences (iii)-(viii). Further, offences (vii) and (viii) were offences against a law of the Commonwealth; had they been charged on the presentment for trial in the Supreme Court, the Court would have been exercising federal jurisdiction, but there was no such eventuality.

45 Something more also should be said respecting offences (iii) and (iv), those concerned with conspiracy. With a presently immaterial qualification, s 321F of the *Crimes Act* abolishes the offence of conspiracy at common law. Then s 321(1) states:

> "Subject to this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence."

Section 321A makes specific provision with respect to agreements to commit offences outside Victoria. Two provisions are made in that regard. First, s 321A(1) states:

> "The expression 'the commission of an offence' in section 321(1) extends to the commission of an offence against a law in force only in a place outside Victoria if, but only if –
>
> (a) the necessary elements of that offence include elements which, if present or occurring in Victoria, would constitute an offence against a law in Victoria; and
>
> (b) one or more of the persons referred to in section 321(1) is or are in Victoria when the agreement referred to in that sub-section is made."

Secondly, s 321A(2) provides:

> "Where all parties to an agreement are outside Victoria when it is made, section 321 shall apply in relation to it if, but only if, that agreement is to pursue a course of conduct which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence against a law in force in Victoria."

46 The materials before the Court of Appeal included a number of documents relative to the steps taken by the executive and judicial authorities of the United Kingdom in response to the Request. The appellant maintains that under the procedures set out in the relevant law of the United Kingdom, the *Extradition Act 1989* (UK) (the UK Act) (76), he was returned to Australia in respect only of some of the offences listed in the Request, and that he was not returned in respect of those offences (i) and (ii) for which he was tried and convicted. The

(76) References to the UK Act are to the statute as it stood in 1997, before the changes made pursuant to the Hong Kong (Extradition) Order 1997, SI 1997/1178.

result is said to be the vitiation of the appellant's trial on one or other of the grounds relied upon before the Court of Appeal and now in this Court.

The facts

47 It is convenient now to say something more of the facts. That task is assisted by the circumstance that the appellant has been tried, convicted and sentenced and that the record in this Court includes the evidence which the jury may be taken to have accepted and the remarks on sentence of the trial judge. But it should be emphasised that the complaints made by the appellant focus upon an earlier stage in the proceedings and the identification of the offences in respect of which he was surrendered by the United Kingdom and those offences of which, looking at the matter before trial, he could have been convicted on proof of the conduct constituting the offences in respect of which he was surrendered. That process of identification is not to be performed with the hindsight now available.

48 In his remarks on sentence, Vincent J said that the appellant had travelled across the world using false travel documents, was obviously involved in criminal activity, handled large sums representing the proceeds of crime and had the capacity to recruit assistance in Hong Kong, the United States and Australia. All the principal actors were persons of Vietnamese national origin. The appellant was a member of a Chinese ethnic minority in Vietnam. At the time of trial, he was approximately forty years of age. The sister of the appellant, Mrs Van, lived in Melbourne. The victim, Le Anh Tuan, was the twenty-one year-old son of Mrs Ha. She was an importer and exporter of clothing and footwear and a person of wealth. On 16 March 1996, the appellant, who had arrived from Hong Kong, met Mrs Ha in Melbourne. He endeavoured to enlist her assistance in the importation of heroin. At a later meeting, the appellant threatened Mrs Ha with unfortunate consequences for herself and her family should she not agree to take part. Mrs Van also put pressure on Mrs Ha. The appellant returned to Hong Kong and later went to London, but he continued in telephone conversations to put pressure on Mrs Ha, including demands for payment of $400,000 "protection money".

49 On 29 April 1996, Mrs Ha's son was kidnapped. His body was found on 7 June 1996. The cause of death was a single gunshot wound in the head. The prosecution alleged that the killing was carried out by two Vietnamese identified as the Biu brothers, at the instigation of the appellant. The trial judge, in accordance with authorities in this Court including *McAuliffe v The Queen* (77), directed the jury that, in order to convict the appellant of murder, the jury need only find beyond reasonable doubt that the appellant, having been a party to the kidnapping of the victim, knew or was aware that a realistic possible consequence of such was that the victim would be murdered.

(77) (1995) 183 CLR 108.

The law of the United Kingdom

50 Against that background, the first issue is the identification of those offences against the law in force in Victoria for which the appellant was surrendered by the United Kingdom. More specifically, did those offences include those for which the appellant was tried and convicted?

51 In attempting to answer that question, all parties, including the Attorney-General for the Commonwealth who intervened, looked to the UK Act and the steps taken by the authorities in that country in response to the Request. That puts the Court in the necessary but somewhat invidious position of considering the efficacy under British law of the steps taken in the United Kingdom. There was no evidence before the Court of Appeal upon any matters of foreign law and therefore none is before this Court. However, no other course is immediately apparent if the Court is to determine the consequential issues of Australian law upon which the appeal turns.

52 The UK Act applies in respect of the extradition of persons at large after conviction of an extradition crime in the requesting State, and also in respect of those such as the appellant who are accused in that State of an extradition crime. Section 1(2) provides for the arrest and return to certain Commonwealth countries, including Australia (78), in accordance with extradition procedures under Pt III of the statute, of certain persons in the United Kingdom. They are persons accused of an extradition crime in Australia or alleged to be unlawfully at large after conviction of such an offence in Australia. The expression "extradition crime" is so defined in s 2 to distinguish between "conduct in the territory of", relevantly, Australia (s 2(1)(a)), and "an extra-territorial offence against the law of [Australia]" (s 2(1)(b)) where the Australian jurisdiction is based on the nationality of the offender (s 2(3)(a)), or where the "equivalent conduct" would constitute an extra-territorial offence against United Kingdom law (s 2(2)). This requirement of "double criminality" is assessed at the time of commission of the alleged offence (79).

53 It should be noted that the extradition proceedings with which this case is concerned were conducted on the basis that, notwithstanding the identification in the Request of offences (iii) and (iv) by reference to the special provisions of s 321A of the *Crimes Act* (the text of which has been set out above), Australia did not rely upon extra-territorial offences within the meaning of s 2(1)(b).

54 Part II of the UK Act, which comprises s 6, is headed "RESTRICTIONS ON RETURN". Section 6(4) implements in the United Kingdom that rule of international practice known as "the speciality rule". The sub-section provides that a person shall not be returned, or committed or kept in custody for the purposes of such

(78) Extradition (Designated Commonwealth Countries) Order 1991, SI 1991/1700.

(79) *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147.

return, unless, among other things, provision is made by an arrangement with the relevant Commonwealth country for securing that the person:

> "will not, unless he has first had an opportunity to leave it, be dealt with there for or in respect of any offence committed before his return to it other than –
>
> (a) the offence in respect of which his return is ordered;
>
> (b) an offence, other than an offence excluded by subsection (5) below, which is disclosed by the facts in respect of which his return was ordered; or
>
> (c) subject to subsection (6) below, any other offence being an extradition crime in respect of which the Secretary of State may consent to his being dealt with."

Nothing turns for present purposes upon the exclusions by sub-ss (5) and (6). The arrangement referred to in s 6(4) may be an arrangement made for the particular case (s 6(7)). Further, for the purposes of s 6(4), a certificate issued by or under the authority of the Secretary of State confirming the existence of such an arrangement and stating its terms is conclusive evidence of the matters contained in the certificate (s 6(7)).

55 In the present case, on 2 October 1997, the Secretary of State certified to the effect that an arrangement as mentioned in s 6(4) of the UK Act had been made with Australia with respect to the appellant. The certificate used terms which followed the provisions of s 6(4), including paras (a), (b) and (c).

56 The procedures for surrender are set out in Pt III (ss 7-17) and are governed by s 7. That section stipulated that the appellant was not to be dealt with under Pt III except in pursuance of an order of the Secretary of State (referred to as an "authority to proceed") issued in pursuance of a request for his surrender (s 7(1)). Section 7(2) states:

> "There shall be furnished with any such request –
>
> (a) particulars of the person whose return is requested;
>
> (b) particulars of the offence of which he is accused or was convicted (including evidence or, in a case falling within subsection (2A) below (80), information sufficient to justify the issue of a warrant for his arrest under this Act);
>
> (c) in the case of a person accused of an offence, a warrant or a duly authenticated copy of a warrant for his arrest issued in the foreign state, Commonwealth country or colony; and
>
> (d) in the case of a person unlawfully at large after conviction of an offence, a certificate or a duly authenticated copy of a certificate of the conviction and sentence,
>
> and copies of them shall be served on the person whose return is requested before he is brought before the court of committal."

(80) Section 7(2A) is a special provision concerning extradition where certain Orders in Council are in force.

57 Section 7(2), like other provisions in the UK Act, is drawn so as to identify one offence in respect of which return is requested. The Request with which this appeal is concerned stipulated a plurality of offences and the UK Act was applied accordingly. The materials furnished with the Request in the present case included the affidavit of Detective Senior Constable Tragardh sworn on 26 September 1997. This was a document of seventy pages and gave a detailed summary of the then available evidence against the appellant. The affidavit concluded with the specification of the eight charges identified in the Request.

58 The phrase in s 7(1) "authority to proceed" is given content by s 7(5). This states:

> "An authority to proceed shall specify the offence or offences under the law of the United Kingdom which it appears to the Secretary of State would be constituted by equivalent conduct in the United Kingdom."

Although the term is not used in the legislation, s 7(5) was identified in argument as reflecting the "principle of double criminality" to which reference already has been made. In *Riley v The Commonwealth* (81), Deane J said of this "principle" that "although not binding as a mandatory rule under international law, [it] has long been recognised as an accepted principle which is customarily observed by states in making and applying arrangements for the extradition of alleged offenders". The arrangement reflected in the certificate of the Secretary of State under s 6 and dated 2 October 1997 was concerned with a different matter. This was identified in argument as the requirement of speciality found in s 6(4).

59 The authority to proceed was given by a certificate of the Secretary of State also dated 2 October 1997. It was addressed to the Chief Metropolitan Stipendiary Magistrate or other designated magistrate sitting at Bow Street, was expressed to be issued in pursuance of s 7 of the UK Act, and stated:

> "Now the Secretary of State hereby authorises you to proceed in conformity with the provisions of Part III of the [UK Act]."

The authority to proceed dealt with the specification of United Kingdom offences which would be constituted by equivalent conduct in the United Kingdom, as required by s 7(5). It did so by stating that the appellant was:

> "accused of conduct in the jurisdiction of the Government of Australia which appears to the Secretary of State to be conduct which, *had it occurred in the United Kingdom*, would have constituted offences of *murder*, false imprisonment, conspiracy to commit murder, conspiracy to commit blackmail, *kidnap*, conspiracy to kidnap, threats to kill, *conspiracy to be knowingly*

(81) (1985) 159 CLR 1 at 16.

concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin."

(Emphasis added.)

The emphasised portion confirms that the Secretary was concerned to identify offences under United Kingdom law for the purposes of considering double criminality. But it should be noted that the offences so identified included murder and kidnapping and were not limited to conspiracy counts.

The committal proceedings

60 The proceedings before the magistrate continued over at least two days, and there was a long adjournment, apparently at the request of the appellant. Representations were made to the magistrate by counsel for Australia and the appellant. The court was empowered by s 9(8) of the UK Act to commit the appellant to custody or on bail, to await the decision of the Secretary of State as to his return to Australia and, if the Secretary so decided, to await his return to Australia. The exercise of that power was conditioned by s 9(8) upon (i) the issue of an authority to proceed, a condition that had been met in the present case; and (ii) the satisfaction of the court that (a) the offences to which the authority to proceed related were extradition crimes within the meaning of s 2 of the UK Act, and (b) the evidence before the court "would be sufficient to make a case requiring an answer by [the appellant] if the proceedings were the summary trial of an information against him" (s 9(8)(a)).

61 The term "extradition crime", used in s 9(8), is concerned here with conduct in Australia; the authority to proceed had, in accordance with s 7(5), specified offences under the law of the United Kingdom which would be constituted by equivalent conduct in the United Kingdom.

62 The course of proceedings before the magistrate was determined by the submissions put by Australia's counsel. In a four page opening note, it was stated that the appellant was "wanted by the Government of Australia for murder; kidnapping; conspiracy to commit murder; conspiracy to kidnap; blackmail; extortion with threat to kill; conspiracy to import a prohibited drug, namely heroin; and knowing involvement in the importation of heroin". That statement tracked the identification of offences (i)-(viii) in the Request and was speaking of the law in force in Victoria, not putative offences against United Kingdom law.

63 However, the opening note went on to list five offences which were described as "the draft charges upon which extradition is sought". Four of these are conspiracy counts, none of them murder or kidnapping, and from the last of them it appears it is United Kingdom offences which are identified. The last charge repeats from the authority to proceed the words "to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin". Thus, it appears that the statement in the opening note should be understood as if it had stated that what was set out were the

draft charges under the law of the United Kingdom in respect of which the evidence would be sufficient to make a case requiring an answer by the appellant if the proceedings were the summary trial of an information against him (s 9(8)(a)).

64 The magistrate gave reasons dated 30 September 1998. The issues which may arise in committal proceedings include the authentication of the documents supporting the Request, the identity of the person whose extradition is sought, the limitations imposed by the authority to proceed, the identification of what answers the description of an "extradition crime", and the sufficiency of the evidence to make out a case to answer were the proceedings a summary trial of an information (82). In the present case, the magistrate stated that the only factual issue he had to decide was whether the man in the dock was the person identified in the evidence. The magistrate continued:

> "If he is so identified then he will have, subject to the representations advanced by the defence in relation to authentication and territorial jurisdiction, a case to answer, as there is the clearest evidence that 'PHUC' was a conspirator in each of the conspiracies."

The magistrate concluded on this issue:

> "Mr Truong claims he was in London, signing on at the local benefit office, when 'PHUC' was in Australia or Hong Kong on certain material dates. The purpose of the very long adjournment was to enable the defence to consider whether they wished to call any evidence in support of that alibi in these proceedings. In the event the defence has decided not to call any evidence before me. I am satisfied on the totality of all the evidence put before me that Mr Truong does have a case to answer *on each of the conspiracy allegations*."

(Emphasis added.)

The magistrate earlier in his reasons had noted the presence in the record of what he called "the speciality certificate". He also dismissed objections to the authenticity of the documents provided by Australia. The magistrate rejected a submission that Australia was seeking to establish extra-territorial offences within the meaning of para (b) of s 2(1) of the UK Act, rather than extradition crimes within the meaning of para (a) of s 2(1). The magistrate said:

> "All the overt acts in each of the conspiracies were committed in Australia."

65 The magistrate was satisfied that the conditions precedent to the exercise of the power of committal had been met. In particular, the offences to which the authority to proceed related were extradition crimes and, on the issue of double criminality, the evidence provided would be sufficient to make a case requiring an answer by the appellant if the proceedings were a summary trial of an information against him.

(82) *Halsbury's Laws of England*, 4th ed reissue, vol 17(2), paras 1115, 1190.

66 But what were the Australian offences to which the authority related and in respect of which the requirement of double criminality was assessed?

67 The magistrate made an order under s 9(8) committing the appellant "to await the decision of the Secretary of State as to his return to Australia". The magistrate also took the step indicated in s 9(9). That provides:

> "If the court commits a person under subsection (8) above, it shall issue a certificate of the offence against the law of the United Kingdom which would be constituted by his conduct."

That certificate, when read with the schedule, certifies that the conduct alleged within the jurisdiction of the Government of Australia would amount to four offences against the law of the United Kingdom. The first three are respectively conspiracy to murder, conspiracy to kidnap and conspiracy to blackmail. The fourth was conspiracy to be knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin, the United Kingdom offence to which earlier reference has been made. Murder and kidnapping were not mentioned.

68 The magistrate began his statement of reasons by saying:

> "The Government of Australia seeks the return of Mr Truong so that he can face trial in Australia in respect of linked allegations that he conspired with others to kidnap, blackmail, and murder. There is a further conspiracy allegation relating to the importation of substantial quantities of heroin. Originally there was a substantive charge of blackmail, but the Government on the second day of hearing abandoned this."

69 It is apparent from the tenor of the magistrate's reasons that he proceeded on the footing that Australia no longer pressed the Request in so far as it related to the offences of murder and kidnapping.

The warrant

70 The next step in the procedures of Pt III of the UK Act is indicated in s 11 thereof. Sub-sections (1) and (2) state:

> "(1) Where a person is committed under section 9 above, the court shall inform him in ordinary language of his right to make an application for habeas corpus, and shall forthwith give notice of the committal to the Secretary of State.
>
> (2) A person committed shall not be returned –
>
> (a) in any case, until the expiration of the period of 15 days beginning with the day on which the order for his committal is made;
>
> (b) if an application for habeas corpus is made in his case, so long as proceedings on that application are pending."

71 The materials do not indicate the making of any habeas corpus application under s 11. The final stage is detailed in s 12. In particular s 12(1) states:

> "Where a person is committed under section 9 above and is not

> discharged by order of the High Court or the High Court of Justiciary, the Secretary of State may by warrant order him to be returned unless his return is prohibited, or prohibited for the time being, by this Act, or the Secretary of State decides under this section to make no such order in his case."

72 On 16 November 1998, one of Her Majesty's Parliamentary Under Secretaries of State issued a warrant addressed to the Governor of the Brixton Prison and other officers. It concluded:

> "Now, therefore, it is hereby ordered that the fugitive be returned to Australia in respect of the offences for which he was committed by the Metropolitan Stipendiary Magistrate."

73 The operative words in the warrant are clear enough. This is so notwithstanding apparent errors in the first two of the three preceding recitals of the warrant. The first recital erroneously identifies the offences in the Request in terms of the United Kingdom offences indicated in the certificate under s 9(9) by the magistrate, dated 1 October 1998. The error is compounded in the second recital, the effect of which is to state that the magistrate was satisfied that the evidence given before him would be sufficient to warrant the appellant's trial for these offences (ie, the United Kingdom offences, not the Australian offences in the Request) "if they had been committed in the Inner London area".

74 The certificate by the magistrate had fixed upon "the conduct alleged within the jurisdiction of the Government of Australia" and had stated a conclusion as to the corresponding offences against the law of the United Kingdom. No consideration was given to double criminality in respect of the offences indicated in the Request of kidnapping and murder. That reflected the basis upon which the magistrate had proceeded, namely that Australia now sought the return of the appellant so that he could face trial in respect of linked allegations of conspiracy.

The speciality arrangement

75 The speciality arrangement under s 6(4) of the UK Act had limited the offences for which the appellant would be dealt with in Australia. So far as is relevant, the limitation was to the offences in respect of which his return under the UK Act was ordered and, significantly, to offences disclosed by the facts in respect of which the return was ordered. These "facts" had been detailed in the Tragardh affidavit to which reference has been made. It had been conceded by the appellant in the proceeding before the magistrate "that there is prima facie evidence that LE Anh Tuan was kidnapped and murdered", leaving as the only factual issue the identification of the appellant with the person called "PHUC" in the evidence.

76 The result is that the subsequent trial and conviction of the appellant on the counts of murder and kidnapping did not breach the speciality arrangement between Australia and the United Kingdom made pursuant to s 6(4) of the UK Act.

The jurisdiction of the Supreme Court

77 Section 85(1) of the *Constitution Act 1975* (Vic) states:

> "Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction."

78 The jurisdiction of the Supreme Court of Victoria in respect of the trial and conviction of the appellant was founded upon his presence at that time in the State (83). The following statement by McLelland A-JA in *Levinge v Director of Custodial Services* (84) is in point:

> "[S]ubject to any statutory provision to the contrary, a person physically within New South Wales is amenable to criminal process in this State regardless of the circumstances in which he came or was brought here."

To that statement, it should be added that the circumstance that an accused person was brought into a State by processes provided in federal law for extraditions to Australia does not render the subsequent State curial processes an exercise by the State court of federal jurisdiction. That no federal jurisdiction is exercised merely by reason of those antecedent federal processes follows from the reasoning in *Flaherty v Girgis* (85) and *Lipohar v The Queen* (86).

79 The appellant did not dispute these propositions, but fixed upon the reference by McLelland A-JA in *Levinge* to a contrary statutory provision. He submits that (i) such a provision was made by federal law, in particular by s 42 of the Act; (ii) its effect was to deny the exercise in respect of his trial and conviction on non-federal offences of what otherwise was the jurisdiction of the Supreme Court enjoyed under State law; and (iii) the consequence, in the events that happened upon his arraignment, not guilty plea, trial and conviction, is that his convictions and sentences are nullities and are vitiated by abuse of process. These submissions should be rejected. We turn to explain why this is so and why the appeal to this Court should be dismissed.

The Australian legislation

80 It is convenient to begin with federal law, in particular Pt IV of the Act (ss 40-44). The principal objects of the Act are specified in s 3. They are "to codify" the law relating to extradition from Australia (s 3(a)), "to facilitate" extradition requests by Australia (s 3(b)), and "to enable Australia to carry out its obligations under extradition treaties" (s 3(c)). Part IV furthers the objects in paras (b) and (c) of s 3 and is headed "EXTRADITION TO AUSTRALIA FROM OTHER

(83) *Lipohar v The Queen* (1999) 200 CLR 485 at 527 [106]; *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556, 562, 567; *R v Hartley* [1978] 2 NZLR 199 at 215.

(84) (1987) 9 NSWLR 546 at 567.

(85) (1987) 162 CLR 574 at 598, 603, 609.

(86) (1999) 200 CLR 485 at 514 [69], 551 [166].

COUNTRIES". Section 40 is "expressed in terms which assume the existence of a power in the Executive Government" (87) and the section restricts its exercise by stipulating that a request by Australia to a country such as the United Kingdom for the surrender of a person in relation to an offence of which the person is accused "shall only be made by or with the authority of the Attorney-General".

81 Section 40 also speaks to offences against a law of Australia of which the person has been convicted. In such cases the objective of the extradition processes will be return to Australia to be dealt with according to law, including detention or further detention as required by Australian law. Where the person returned is accused, but not yet convicted, the objective is return to be dealt with by trial according to law. These various outcomes are encompassed in s 41 of the Act.

82 Section 41 states:

> "Where a person is surrendered to Australia in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted (whether or not pursuant to a request under section 40), the person shall be brought into Australia and delivered to the appropriate authorities to be dealt with according to law."

This section applies to surrenders both pursuant to a request made under s 40 and otherwise. Further, as *AB v The Queen* (88) illustrates with reference to a treaty with the United States, an extradition treaty to which Australia is a party may make its own provisions for return to Australia with a particular speciality clause. In that regard, important provision is made by s 11(1). This states:

> "The regulations may:
>
> (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or
>
> (b) make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications …"

83 In the present case, it was Pt II of the UK Act which stipulated restrictions on the return of the appellant to a relevant Commonwealth country such as Australia. This then, in due course, engaged s 42 of the Australian legislation. The Court was referred to no regulations made under s 11 which would vary the operation of s 42.

84 Section 42 provides:

> "*Where an extraditable person in relation to Australia is surrendered to Australia by a country* (other than New Zealand), *the person shall not*, unless he or she has left, or has had the

(87) *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 507-508 [29].
(88) (1999) 198 CLR 111 at 116-117 [5], 144 [88].

opportunity of leaving, Australia or, *in a case where the person was surrendered to Australia for a limited period*, has been returned to the country:

(a) *be* detained or *tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than*:

(i) *any offence in respect of which the person was surrendered or any other offence* (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) *of which the person could be convicted on proof of the conduct constituting any such offence*; or

(ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or

(b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered."

(Emphasis added.)

85 The reference in s 42 to cases "where the person was surrendered to Australia for a limited period" directs attention to s 44. Surrender to Australia may be obtained upon an undertaking by the Attorney-General respecting trial in Australia for a particular offence or offences, return thereafter to the surrendering country and custody of the person while travelling to and from, and while in, Australia (s 44(1)). In such cases, the person "shall not be tried in Australia" for other offences, and shall not under federal, State or Territory law "be subject to any detention that would prevent the person being returned to the country pursuant to the undertaking" (s 44(1)).

86 Nothing in this case turns directly upon s 44, but the phrase "shall not be tried" appears there and in s 42. However, the text in s 42 differs, stating "shall not … be *detained or* tried" (emphasis added). The reason for the additional words in s 42 is found in the scope of the two sections. Section 44 is limited to surrenders for trial, whilst s 42 applies also to surrenders of those already convicted, for the purpose of their detention in Australia. The present case concerns a surrender for trial.

87 It is para (a)(i) of s 42 which is of central importance for the present case. That provision deals distinctly with the offence for which there was surrender and "any other offence … of which the person could be convicted on proof of the conduct constituting any such offence". It is not suggested that para (a)(ii) applied. The United Kingdom had not consented to the appellant being tried in respect of any offence not otherwise identified in para (a)(i) (89). The phrase in para (a)(i) "the

(89) cf *AB v The Queen* (1999) 198 CLR 111 at 136 [67].

conduct constituting any such offence" is to be read as referring to the acts or omissions, or both, by virtue of which the offence is alleged to have been committed (s 10).

88 The heading to s 42 is "Speciality". The heading is not part of the statute (*Acts Interpretation Act 1901* (Cth), s 13(3)) but, as s 15AB(2)(a) of that statute provides, it may be considered in ascertaining the meaning of s 42 (s 15AB(1)(b)). Paragraph (a)(i) of s 42 is inaptly drawn to protect the observance of the speciality arrangement with respect to the Request for the extradition of the appellant from the United Kingdom. The relevant clause in that arrangement speaks of offences "disclosed by the facts in respect of which [the appellant's] return was ordered". On the other hand, para (a)(i) fixes, more narrowly, upon the identification of murder and kidnapping as offences on which the appellant could be convicted on proof of the conduct constituting the conspiracy offences in the Request in respect of which the appellant was surrendered by the United Kingdom.

89 However, as was indicated in argument with respect to murder and conspiracy to murder, (a) it was easier to secure a conviction of murder on the *McAuliffe* basis because that involved contemplation of the possibility of intentional killing by the kidnappers, whilst the conspiracy would require proof of an agreement that the victim be killed, and, on the other hand, (b) the conspiracy charges did not require proving the death of the proposed victim. So, in one respect, the murder charge on which the appellant was convicted was less serious in terms of subjective criminality, but more serious in that it involved the death of the victim. Murder could not be an "other offence" within the second limb of s 42(a)(i) when put beside the offence of conspiracy to murder for which the appellant was returned. Similar reasoning applied to the charges of kidnapping and conspiracy to kidnap.

90 The second limb of s 42(a)(i) is to be read with the statutory requirement, of which it is part, that the appellant was only to be tried in Australia for certain offences alleged to have been committed before his surrender. It may be that, in the events that happened at trial, the jury must be taken to have convicted the appellant of conspiracies, where the agreements were fully performed. But the question posed by the second limb of s 42(a)(i) was addressed to the making by the accused of the plea upon arraignment, to which we will refer in a later section of these reasons. Hence the question was necessarily prospective and not to be answered in retrospect after the conduct of the trial. The question asked whether the appellant could be convicted of murder and kidnapping on proof of the conduct constituting the alleged conspiracies. In that setting, the reasoning in *Savvas v The Queen* (90) respecting the significance for sentencing of events relating

(90) (1995) 183 CLR 1.

to the implementation of a conspiracy is of no assistance. Nor are cases such as *R v Hoar* (91) disapproving the charging of conspiracy where it is alleged that the substantive offence has been committed.

91 For tactical or other reasons which do not appear, the issue under the UK Act respecting "double criminality", which is a distinct matter under that statute from limitations of speciality, was so restricted in the committal proceedings as to limit the offences stipulated in the Request in response to which the appellant was surrendered.

92 To conclude that the appellant was not to be tried in Australia for the offences of murder and kidnapping by reason of the terms of s 42(a)(i) of the Act does not give effect to the evident purpose of that provision. That is the protection of the speciality (92). Nevertheless, the language in which para (a)(i) is expressed is sufficiently intractable to gainsay the submissions for the respondent and the Attorney-General that (i) the offences of murder and kidnapping fell outside its terms and thus (ii) the prohibition imposed by s 42(a)(i) was not attracted in this case. As was emphasised in *Re Bolton; Ex parte Beane* (93), in such a case the function of the Court must be to give effect to the will of the legislature as expressed in the words of the statute.

Further issues

93 However, it remains to determine (i) those institutions of government or individuals to which that prohibition in s 42 of the Act is directed; (ii) those who have a justiciable complaint in respect of non-observance of the prohibition; and (iii) the effect of s 42 upon the general jurisdictional provision made for the Supreme Court by s 85(1) of the *Constitution Act*.

94 With respect to (iii), there may arise the questions (a) whether s 85(1) and its predecessors are included in the *Constitution* of the State of Victoria which is protected by s 106 of the *Constitution*; (b) whether, in any event, the power conferred by s 51(xxix) to make laws with respect to external affairs extends to support an operation of s 42 which withdraws from the Supreme Courts of the States the non-federal jurisdiction they otherwise enjoy; and (c) particularly in relation to (b), the significance of the reasoning and certain observations in *Re Tracey; Ex parte Ryan* (94).

Abuse of process

95 None of these further issues necessarily would arise for decision if the alternative ground of abuse of process were made out. That ground accepts the jurisdiction of the Supreme Court to try and convict the appellant. But the argument is that in the exercise of that jurisdiction

(91) (1981) 148 CLR 32 at 38.
(92) *AB v The Queen* (1999) 198 CLR 111 at 128-129 [41], 142 [82].
(93) (1987) 162 CLR 514 at 518, 520, 523, 532, 547. See also *Mann v Carnell* (1999) 201 CLR 1 at 45 [143]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 95 [132].
(94) (1989) 166 CLR 518.

the prosecution should have been stayed, albeit, apparently, in the absence of any such application. The result of that failure is said to have been a miscarriage of justice with which the Court of Appeal should have dealt. These submissions, as indicated, have curious aspects. But there is a short answer.

96 The power to stay prosecutions after extradition was recognised in this country in *Levinge* (95), in New Zealand in *R v Hartley* (96) and in the United Kingdom in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* (97). However, in the present case, it was for the appellant to make a case that there was a deliberate disregard by the Australian authorities and by the respondent prosecutor of the statutory requirements of s 42 or a knowing circumvention thereof (98). The appellant did not attempt when he first raised the subject of abuse of process in the Court of Appeal to present any such case of deliberate misuse of authority. This ground must fail.

97 It should be added that it was not suggested in *Levinge* that there had been any breach of the conditions necessary for a valid extradition from the United States. Rather, as McHugh JA emphasised, the United States courts had held that Levinge could lawfully be extradited to Australia (99). The unsuccessful complaint was that his forcible abduction from Mexico to the United States rendered the subsequent proceedings in New South Wales an abuse of process in the New South Wales courts. There was no evidence that the Australian police were involved in or connived at the expulsion of Levinge from Mexico (100).

98 In *R v Horseferry Road Magistrates' Court; Ex parte Bennett* (101), the House of Lords was dealing with a situation where there was no extradition treaty between the United Kingdom and South Africa and no arrangements made under the special provisions of s 15 of the UK Act. The defendant claimed he had been kidnapped in South Africa and returned to England as a result of collusion between the two police forces. The House rejected the holding of the Divisional Court that it had no power to inquire into the circumstances under which the defendant had been brought into the jurisdiction. The factual issues had not yet been tried and the case was remitted for further consideration.

99 We turn to consider the outstanding issues. These were the subject of additional written and oral submissions and attracted intervention by several Attorneys-General.

(95) (1987) 9 NSWLR 546.
(96) [1978] 2 NZLR 199.
(97) [1994] 1 AC 42.
(98) *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 564, 567.
(99) (1987) 9 NSWLR 546 at 561.
(100) (1987) 9 NSWLR 546 at 552, 565, 567.
(101) [1994] 1 AC 42.

"Shall not … be … tried"

100 The use of the passive voice (be tried) presents difficulty in identifying those to whom the command is directed and those for whose benefit the command is made. Various possibilities were suggested in argument. One was that the only "rights" involved are those of the country which has rendered up to Australia the individual concerned. Another was that the command is directed to the State courts respecting the exercise of their jurisdiction and that the appellant can assert that absence of jurisdiction and consequent nullity of his convictions. The third, which should be accepted, is that there is no attempted withdrawal of jurisdiction; rather, the federal law founds a special plea to the arraignment which in this case was not made by the appellant.

101 The expression appears in s 44 as well as in s 42, as has been remarked. It appears also in s 22(4). Section 22 (which is in Pt II, dealing with extradition from Australia) requires determination by the Attorney-General of whether a person who has been committed to prison by order of a magistrate is to be surrendered by Australia in relation to a qualifying extradition offence. There may be no such surrender unless a "speciality assurance" has been given by the extradition country, a phrase expounded in s 22(4). The assurance is deemed to be given if the person in question will not be tried for any other offence and this result is by virtue of a provision of the law of that country, a treaty provision or an undertaking given to Australia.

102 The various contexts in the Act in which the prohibition on trial appears may suggest that the Act reflects the general practice of international relations whereby the "rights" generated by a speciality undertaking vest in the state receiving that undertaking (102). That conclusion is supported by the provision in para (a)(ii) of s 42 for the giving of consent by the extraditing country to a relaxation of the prohibition in para (a)(i) of s 42.

103 However, the phrase "shall not be tried" suggests a command with effect in municipal law and upon the conduct of the trial for an offence other than those indicated in sub-paras (i) and (ii) of s 42(a). Does this lead to the conclusion that in such circumstances the court in question is deprived of what otherwise would be its authority to try the extradited person? The answer must be in the negative.

104 It has been emphasised in recent decisions of this Court (103) that it is to be expected that the Parliament will state clearly its will where there is a redefinition of the jurisdiction of a federal court by withdrawing rights and liabilities from what otherwise would be the engagement of Ch III of the *Constitution*. Reasoning of at least the same strength applies in the present case. The State courts are an

(102) *AB v The Queen* (1999) 198 CLR 111 at 116 [4], 144 [89].

(103) *Shergold v Tanner* (2002) 209 CLR 126 at 135 [27]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72].

essential branch of the government of the States (104). Here the jurisdiction is non-federal jurisdiction of the Supreme Court of Victoria and federal law is said to create rights and liabilities, the giving effect to which involves the withdrawal of subject matter from that Court.

105 In *Re Tracey; Ex parte Ryan* (105), Mason CJ, Wilson and Dawson JJ (106) explained that a federal law which denied the imposition of criminal liability, otherwise justiciable in the non-federal jurisdiction of the courts of a State, "upon defence members or defence civilians" might, depending upon its terms, be supported by s 51(vi) and (xxxix) of the *Constitution*. Such a law would prevail, by operation of s 109, over relevant State laws founding the jurisdiction of the State courts. In that way there would be effective "interference" with the exercise by the State courts of their general criminal jurisdiction. However, their Honours held that the federal law in question in *Tracey* was not supported by s 51 of the *Constitution* and so s 109 of the *Constitution* was not engaged.

106 In the present case, it is not necessary to determine whether any paragraph or paragraphs of s 51 would support a law which in terms ousted or displaced what otherwise was the general criminal jurisdiction of the Supreme Court of Victoria to try the appellant. It would need to be borne in mind that, without the extradition effected necessarily under federal law, the appellant would not have been present in the State and so liable to be put on trial there. However that may be, the elliptical method of drafting adopted by s 42 of the Act falls well short of a clear statement by the Parliament of such legislative will to oust or displace jurisdiction. The submissions respecting denial of jurisdiction should not be accepted.

107 However, that does not conclude all aspects of the matter adversely to the interests of the appellant. Counterpoised to the principles of construction just considered is another important general principle. It is exemplified in *Re Bolton; Ex parte Beane* (107) and is to the effect that a person constrained by the exercise of executive authority which is not supported by statutory mandate may challenge that constraint by access to the judicial power. When s 41 of the Act speaks of the bringing of the extradited person into Australia and delivery to the appropriate authorities "to be dealt with according to law", it accommodates that principle. The custody of the appellant after arrival in Australia was part of the lawful processes attending his readiness for trial in the Supreme Court.

108 Did the injunction in s 42 of the federal law that, upon the hypotheses accepted earlier in these reasons, he was not to be tried

(104) *Austin v The Commonwealth* (2003) 215 CLR 185.
(105) (1989) 166 CLR 518.
(106) (1989) 166 CLR 518 at 547; cf at 575 per Brennan and Toohey JJ, and see also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 491 per Deane J; at 494-495 per Gaudron J.
(107) (1987) 162 CLR 514.

give to him, quite apart from repercussions in the relations between the two nations, rights enforceable by curial procedures? The answer is that such rights did arise but they were in the nature of an immunity of a specific nature. At any time before trial on both counts, the United Kingdom might have given its consent to that course. If it had done so, then sub-para (ii) of s 42(a) would have operated to remove the prohibition imposed by that section upon his trial and the appellant would have retained no cause for curial complaint. The United Kingdom did not take that step.

109 That left the appellant in the position that, upon arraignment, he was entitled under the appropriate procedures of the Supreme Court of Victoria to plead that he was not required to put himself upon the country for trial. It may be accepted, consistently with the reasoning in *Felton v Mulligan* (108), that such a plea, based in a federal law, s 42 of the Act, if made would thereupon have attracted the exercise of federal jurisdiction by the Supreme Court. But this plea was not made.

110 It was with the arraignment that, in ordinary usage, the trial may be said to have commenced (109). Reference is made in the second paragraph of these reasons to ss 390A and 391 of the *Crimes Act*. It is not useful to use the term "waiver" in this context. The reasons why the point was not taken do not appear in the record. But there is no suggestion that the appellant was the victim of any malpractice in this regard. In the absence of such a plea and in the face of the pleading of the general issue by the plea of not guilty, the appellant's personal right derived from s 42 was spent.

Conclusion

111 The circumstances of the surrender of the appellant to Australia were such as to attract the operation of s 42 of the Act. However, the right given by s 42 to an extradited person is exercisable by demurrer or special plea under the applicable procedures of the trial court. It is not open to plead the general issue, then, after conviction, to seek to impeach that conviction in the fashion sought to be done in this case. There remains the general powers of the trial court with respect to abuses of its processes, but no such case could be sustained here.

Orders

112 The appeal should be dismissed.

113 KIRBY J. Where a completely new point is raised by a convicted prisoner, in objection to the lawfulness of a conviction following a lengthy trial, it is natural for a decision-maker to feel impatience and to resist the point (110). However, whilst the matter remains before the

(108) (1971) 124 CLR 367.

(109) *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 578 [17], 582 [32].

(110) *Gillard v The Queen* (2003) 219 CLR 1 at 17 [40]-[41]; cf *Gipp v The Queen* (1998) 194 CLR 106 at 153 [134].

judicature of the nation, the point may still be decided if the interests of justice so require (111). Sometimes the avoidance of a miscarriage of justice in the case (112) or the importance of the legal issue presented (113) will oblige a determination of the point. This will be so notwithstanding impatience over the merits of the proceeding and concern about its consequence for the discharge of a prisoner and the possibility of a costly retrial (114).

114 In this appeal Hong Phuc Truong (the appellant) raised a new point in the Court of Appeal of Victoria (115). It concerned alleged departures of his trial from the requirements of the law of speciality as expressed in s 42 of the *Extradition Act 1988* (Cth) (the Act). The Court of Appeal rejected the point. Now, by special leave, the appellant has maintained it before this Court.

The facts, legislation and the fundamental question

115 The facts of the case are set out in the reasons of other members of this Court (116). Also set out there is a description of the somewhat muddled course of the proceedings brought by Australia in the United Kingdom to have the appellant extradited to this country to face trial (putting it neutrally) in respect of offences arising out of, or concerned with, the death of Mr Le Anh Tuan (the deceased) (117). The deceased was killed in Victoria some time between April and June 1996.

116 The relevant law of the United Kingdom governing extradition of persons to Australia from that country is explained in other reasons (118). The extradition documents that were issued in the case are described there (119). Finally, those other reasons contain the applicable provisions of the Act (120) binding Australian courts and officials in the matter of extradition. I incorporate all of this material by reference. I will not repeat it.

117 The fundamental question in the case concerns the application, and effect, in the events that have occurred, of the command of the federal Parliament (121) that "an extraditable person … shall not … be …

(111) *Gipp v The Queen* (1998) 194 CLR 106.
(112) As in *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 153 [135], 164 [170]; cf at 125-126 [56].
(113) As in *Giannarelli v The Queen* (1983) 154 CLR 212 at 221, 222; *Gillard v The Queen* (2003) 219 CLR 1 at 17-18 [42]-[43].
(114) *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 290 [70]; 203 ALR 259 at 277.
(115) *R v Truong* (2002) 5 VR 1.
(116) Reasons of Gleeson CJ, McHugh and Heydon JJ at 134-139 [4]-[17]; reasons of Gummow and Callinan JJ at 148 [47]-[49].
(117) Reasons of Gleeson CJ, McHugh and Heydon JJ at 135-139 [9]-[17]; reasons of Gummow and Callinan JJ at 152-155 [60]-[74].
(118) Reasons of Gleeson CJ, McHugh and Heydon JJ at 136 [10], 140-141 [22]-[24]; reasons of Gummow and Callinan JJ at 149-155 [52]-[71].
(119) Reasons of Gleeson CJ, McHugh and Heydon JJ at 135-136 [9], 137-139 [13]-[16]; reasons of Gummow and Callinan JJ at 151-152 [58]-[59].
(120) Reasons of Gleeson CJ, McHugh and Heydon JJ at 139 [18]-[19]; reasons of Gummow and Callinan JJ at 156-158 [80]-[85].
(121) The Act, s 42.

tried in Australia for any offence that is alleged to have been committed … other than … in respect of [those offences for the trial of] which the person was surrendered". This provision, which reflects a long-standing rule of international law and international practice (122), had, and has long had, its counterpart in the law of the United Kingdom (123). However, the point in issue in this appeal concerns the requirements of the law in Australia. It is those requirements that this Court, as the final court in the Australian judicature, is constitutionally bound to obey.

The issues in the appeal

118 The fundamental issue so described was reduced to a number of subsidiary issues, argued in the appeal. Those still relevant are:

(1) *The speciality issue*: In the facts that occurred, and upon the true meaning of the Act, was the appellant tried in the Supreme Court of Victoria for offences he was alleged to have committed other than the offences in respect of which he was surrendered by the United Kingdom for extradition to Australia?

(2) *The abuse of process issue*: If so, did the appellant's trial constitute an abuse of process in respect of which he was entitled to judicial relief in his appeal?

(3) *The unlawful trial issue*: If relief for abuse of process is unavailable, was the ensuing process at the trial conducted according to law? Having regard to the failure of the appellant to challenge the lawfulness of his trial at its outset, is the appellant, on an appeal against his convictions, entitled to judicial relief against such convictions?

119 The foregoing issues, if the first and either the second or third issues are answered favourably to the appellant, give rise to still further issues, canvassed principally by the interveners:

(4) *The federal jurisdiction issue*: Having regard to the command in s 42 of the Act, was the Supreme Court of Victoria, in the purported conduct of the trial of the appellant, exercising federal or State jurisdiction when consideration is paid to the fact that no issue was expressly raised at the trial for adjudication, based upon the Act? Was the Supreme Court of Victoria, if exercising federal jurisdiction, bound by the *Constitution* and federal law to give primacy to federal law over an otherwise applicable State law and, if so, with what consequences for the breach of that obligation? Even if not exercising federal jurisdiction, was the Supreme Court so obliged?

(122) *Barton v The Commonwealth* (1974) 131 CLR 477 at 483 per Barwick CJ; *AB v The Queen* (1999) 198 CLR 111 at 128-129 [41], 141-143 [80]-[85].

(123) *Extradition Act 1870* (UK), s 19. See now *Extradition Act 1989* (UK), s 6(4).

(5) *The void convictions issue*: What is the result of non-compliance with s 42 of the Act? Does it present a justiciable question? Is it solely a subject for complaint by the government of the United Kingdom, not by the appellant personally? Alternatively, are his rights and interests affected in a way giving rise to an entitlement to obtain judicial relief? Is the trial, once concluded, a nullity? Are the convictions void or otherwise liable to be quashed?

(6) *The constitutional issue*: In the event that, otherwise, s 42 of the Act would suggest that the appellant's trial was a nullity and that his convictions were liable to be quashed in his appeal, is the Act, to the extent that it would so provide, contrary to the *federal Constitution*? Does it exceed the legislative powers of the federal Parliament in that respect? Does it involve an impermissible intrusion of federal legislation into the authority and exercise of its powers by the Supreme Court of a State, contrary to s 106 of the *Constitution*? Should s 42 of the Act be read down so as to avoid these particular constitutional difficulties?

The speciality requirement in the Act was breached

120 On the first two issues arising in the appeal, I am in broad agreement with the reasons of Gummow and Callinan JJ.

121 Thus, I agree in the construction of s 42(a)(i) of the Act which their Honours prefer. In the circumstances disclosed, it is the construction that accords with the language of the Act as it applies to this case. It also accords with the principle of the international law of extradition known as speciality, which is reflected in s 42 of the Act, as its heading (Speciality) indicates (124). Likewise, the construction reflects the imperative terms in which s 42 is expressed (shall not … be … tried). It is consonant with the long-standing common law principle that no person is to be sent out of the jurisdiction for trial elsewhere except with the express authority of law enacted by Parliament or incorporated in a treaty made within the powers of the Executive (125). And, if there be any doubt, it is the construction of s 42(a)(i) of the Act which, in the circumstances of this case, most closely ensures that the Australian federal law, applicable following the appellant's extradition from the United Kingdom to Australia, conforms to the rule of speciality in international law (126). It upholds the comity of nations.

122 Consistently with such comity, particular care and attention has usually been taken by the final courts of civilised nations to ensure that the rule of speciality is scrupulously observed according to statute and

(124) cf reasons of Gummow and Callinan JJ at 159 [88].

(125) *United States v Rauscher* (1886) 119 US 407 at 416-417.

(126) *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; Mason, "The tension between legislative supremacy and judicial review", *Australian Law Journal*, vol 77 (2003) 803, at pp 808-809.

treaty. Allowance must be made, as the Act permits, for occasional discordance between the expression of offences in the law of the receiving nation and the way the most proximate and relevant offence, suggested by the alleged conduct of the accused, is defined in the law of the surrendering nation. Thus, as between a country such as Poland and a country such as Australia, with a different language and legal tradition, precise equivalence between certain offences may sometimes be missing, making the interpretation of the provisions of the Act (offence in respect of which the person was surrendered) and the application of the rule of speciality there stated more difficult and contestable (127).

123 Such potential difficulties of correspondence between offences do not so often arise as between the criminal laws of the United Kingdom and Australia, given the common language and the shared legal history. Least of all do they arise in relation to the specification of common, generic and well-known offences such as "conspiracy", "murder" and "kidnapping". Such offences are all "offences" long established in the criminal law of both nations. There could be no reasonable doubt about them or about their essential legal incidents.

124 The rule of speciality is an important one (128). We obey it not only because the Act so provides and expressly deals with exceptions (129), but because so much is required by Australia's self-respect and national honour (130) in dealing with other nations with which it has extradition arrangements. Compliance with the rule of speciality is reinforced by Australia's expectation of reciprocity in the treatment of its own citizens and persons within its territory, surrendered to other nations. Such compliance is a contribution to the success of the international system of extradition of criminals in contemporary circumstances of easy access to international transport by fugitives, fleeing from criminal justice (131).

125 The price of the international extradition system that has been created in the past century and more includes strict observance of the rule of speciality, as provided by law. The construction of s 42(a)(i) of the Act urged by the respondent would debase that notion as upheld in Australian law. Effectively, it would read the notion out of the Act in what is otherwise a very clear case. In my view, the rule of speciality, expressed in s 42(a)(i), should be scrupulously observed. It should be

(127) cf *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 504-505 [17].

(128) Aughterson, *Extradition: Australian Law and Procedure* (1995), pp 83-84.

(129) Such as proof of certain conduct in the specified circumstances (the Act, s 42(a)(i), second element); where the surrendering country consents (s 42(a)(ii)); where the surrendering country is New Zealand for which separate provision is made (s 42); where the accused had left Australia or has had the opportunity to do so (s 42, opening words).

(130) *United States v Rauscher* (1886) 119 US 407 at 411-412.

(131) *Barton v The Commonwealth* (1974) 131 CLR 477 at 483; *Trimbole v The Commonwealth* (1984) 155 CLR 186 at 190; *AB v The Queen* (1999) 198 CLR 111 at 128-129 [41], 141-145 [80]-[90].

upheld by the courts. It must apply, and be applied, in a consistent way in many countries with legal systems distinct from those of the United Kingdom and Australia. There can be no different approach or rule. These are reasons for a measure of strictness in the interpretation of the requirements of the rule as stated in the Act. They apply to the present case.

126 Further, the principle of speciality protects inter alia the interests of the surrendering country, primarily from abuses of its processes. It was originally devised to ensure that an alleged offender was not extradited to face completely different allegations. A concern was that the person would be charged with a political offence not disclosed upon the extradition application. This is not a contention in the present case. Nevertheless, it was upon the United Kingdom's authority that that country granted the extradition request for the offences of conspiracy to kidnap and conspiracy to murder, despite Australia's requesting extradition for a range of other offences including the substantive offences of kidnapping and murder. Respecting this authority is paramount. Australia's extradition arrangements with the United Kingdom (and other nations) depend upon it. It is only a strict approach to the principle, and the language of the Act, that respects this authority.

127 Here the appellant was surrendered for trial in Australia for conspiracy to murder and conspiracy to kidnap. He was not surrendered to be tried for the substantive offences of murder and kidnapping. The offences concerned are not the same, either in law or fact. The legally tutored would not regard them as the same "offences" in the United Kingdom. None of the exceptions stated in the Act applies (132). The substantive offence of murder, in particular, which in Victoria carries a possible sentence of life imprisonment upon conviction (133), is the most grave offence provided for in the criminal law. A conviction of murder still carries special punishment and opprobrium. It is always treated as a crime of particular seriousness (134).

128 It may be accepted that detailed evidence was fully disclosed to the United Kingdom authorities, sufficient to establish the substantive offences of murder and kidnapping (135). However, the Act requires a comparison between the offence "*in respect of which the person was surrendered*" and the offence with which that person is charged. The appellant was surrendered for the offences of conspiracy to kidnap and conspiracy to murder. He was subsequently charged, tried and convicted of kidnapping and murder. Under the Act, it is the offence in respect of which the person was surrendered that is important, not what

(132) Reasons of Gummow and Callinan JJ at 158-159 [87].
(133) By s 3 of the *Crimes Act 1958* (Vic), the sentence may be life imprisonment or "imprisonment for such other term as is fixed by the court".
(134) cf *Charlie v The Queen* (1999) 199 CLR 387 at 400 [29].
(135) Reasons of Gleeson CJ, McHugh and Heydon JJ at 137-138 [13]-[15], 141 [25].

was disclosed in the form of evidence to the surrendering authorities. Were it otherwise, any country could call much evidence and then turn around and argue that the "other offence" was disclosed to the relevant authorities. The requesting country has the burden of establishing the relevant offences. It may attempt to establish as many offences as it can. However, it is the surrendering country that ultimately decides which offences the person shall be extradited for. The requesting country cannot simply ignore or dismiss this selection (136) and charge, or try, the person for another offence and argue that such offence was "disclosed" to the authorities. The offences for which the surrendering country grants extradition are the critical considerations, even where it is suggested that the surrendering country mistakenly omitted other offences (137).

129 Conformably with the international rule of speciality and its own law of extradition, if Australia wished, or intended, to put the appellant on trial for the substantive offence of murder, it was obliged to endeavour to secure the appellant's surrender by the United Kingdom for trial for that offence. Likewise with the offence of kidnapping. If this was not done initially, it was the obligation of Australia to endeavour to argue for an enlargement of the specified offences or to seek the consent of the United Kingdom to try the appellant for such offences (138). None of these things was done. With respect, there appears to have been a lack of attention to detail in the extradition procedures and documentation in the United Kingdom. The defects seem not to have been noticed by anyone until after the trial and conviction of the appellant (139).

130 In all other respects I agree with what Gummow and Callinan JJ have written on this issue. I agree that the language of s 42(a)(i) of the Act is sufficiently intractable to answer the contentions of the respondent and of the Attorney-General (140). That conclusion is not altered by the language of s 10(2) of the Act when ss 42 and 10(2) are read against the background of the important principles that I have mentioned.

131 The appellant therefore succeeds on the first issue. In conducting the trial, contrary to s 42(a)(i) of the Act, the command stated in that provision of the Act was breached. What follows?

Stay for abuse of process is not available

132 I agree with Gummow and Callinan JJ, substantially for the reasons they give, that the circumstances of the case did not enliven the Court of Appeal's power to grant the appellant a permanent stay of proceedings on his convictions on the basis that, for the prosecutor to

(136) I am not suggesting that the relevant Australian authorities did this in the present case or would do so.

(137) Reasons of Gummow and Callinan JJ at 154-155 [67]-[74].

(138) The Act, s 42(a)(ii); cf *AB v The Queen* (1999) 198 CLR 111 at 145 [90].

(139) cf reasons of Gleeson CJ, McHugh and Heydon JJ at 137-139 [13]-[16].

(140) Reasons of Gummow and Callinan JJ at 160 [92].

endeavour to enforce those convictions, in the light of the established breach of s 42(a)(i) of the Act, would constitute an abuse of process which the Court would prevent.

133 The authority of a court, under the common law, to stay proceedings as an abuse of process is an exceptional one (141). It is exercised with due regard for society's strong interest in having the jurisdiction of the courts invoked to put on trial persons lawfully accused of criminal offences (142). The precise conceptual foundation of the jurisdiction with respect to abuse of process is not yet certain. Thus, it is not entirely clear whether, in Australia, it arises from postulates of the *Constitution*, whether it represents an aspect of the courts' defending the integrity of their process (the "temples of justice" view) or whether it rests upon a notion akin to estoppel, so that those who have failed to comply with the law are not permitted to gain the benefit of their unlawful conduct (143).

134 Because I incline to the former explanations of the basis of the jurisdiction, rather than exclusively to the last (144), the foundation for the provision of a stay is not, in my view, confined solely to a case where the party against whom the stay for abuse of process is sought has acted deliberately in the misuse of that party's authority or power (145). This view is consistent with the authorities that suggest that a stay for abuse of process will be available in a proper case otherwise involving a waste of judicial resources, particularly in litigation unrelated to a determination of a genuine dispute (146).

135 Nevertheless, I accept that the prevention of deliberate misuse of a party's authority and power is the language in which the provision of a stay has been explained in many cases. Thus McHugh JA, in *Levinge v Director of Custodial Services* (147), wrote of whether the prosecutor had "knowingly circumvented" the law. This notwithstanding, the relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the

(141) *Williams v Spautz* (1992) 174 CLR 509 at 518-519; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 74.
(142) *Williams v Spautz* (1992) 174 CLR 509 at 519.
(143) *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556-557, 564-565; *Rochin v California* (1952) 342 US 165 at 169. See also *Herron v McGregor* (1986) 6 NSWLR 246; *R v Hartley* [1978] 2 NZLR 199.
(144) cf *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556; *Pearce v The Queen* (1998) 194 CLR 610 at 648-649 [117]; cf *Connelly v Director of Public Prosecutions* [1964] AC 1254; *R v Beedie* [1998] QB 356 at 360-361.
(145) Reasons of Gummow and Callinan JJ at 160-161 [95]-[98].
(146) *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279, cited with approval in *Djaigween v Douglas* (1994) 48 FCR 535 at 545.
(147) (1987) 9 NSWLR 546 at 564-565.

offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of.

136 Whatever the prerequisites to the exercise of the power to stay proceedings for abuse of process, it is clearly established by the cases that it is not available to cure some "venial irregularity" (148). Thus, where a "technical" breach of extradition law and procedure is later found to have occurred, in circumstances where the relevant officials were determined to have held the affirmative belief that they were acting appropriately, a stay has been refused, rightly in my view (149). At the very least, therefore, the departure complained of must be very serious, such that in the circumstances, for the court to continue with the proceedings would offend the very integrity and functions of the court, as such.

137 In the present case the element of deliberate misuse of authority is missing. Nor is the case otherwise one that attracts the stay power on the basis that enforcement of the conviction would reward recklessness on the part of the authorities or would offend the manifest integrity of the courts or of the judges and officers required to enforce the court's orders. The appellant may have remedies derived from the Act itself and from the powers of a court of criminal appeal. But his contention that there had been an abuse of process requiring, or warranting, exceptionally, a permanent stay of proceedings was not made out. No error is shown in the Court of Appeal's failure to afford such relief.

The breach of the speciality requirement renders the trial unlawful

138 The foregoing brings me to the point where I part company from Gummow and Callinan JJ. Their Honours conclude that, despite the language of s 42(a)(i) of the Act, and the events that have occurred, the Supreme Court of Victoria was not deprived of what would otherwise have been its authority under Victorian law to try the appellant once he was extradited to Victoria upon the offences alleged in the presentment (150). Their Honours decide that the appellant enjoyed rights to object to the conduct of the trial in breach of s 42(a)(i) of the Act; but that such rights existed only at the time before and up to the commencement of the appellant's trial (151). They accept that, had the appellant raised his objection to the trial then, it would have enlivened the power of the respondent to seek the consent of the United Kingdom to the trial of the appellant on offences different from those for which he was surrendered to Australia (152). According to their Honours, the time for objection, and the only time, was before or upon the

(148) *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 77 per Lord Lowry.
(149) See, eg, *R v Raby* [2003] VSC 213 at [37] per Byrne J.
(150) Reasons of Gummow and Callinan JJ at 162 [103].
(151) Reasons of Gummow and Callinan JJ at 163-164 [108]-[109].
(152) Reasons of Gummow and Callinan JJ at 163-164 [108].

appellant's plea to the arraignment (153). Having failed to object then, at least in circumstances, as here, where there was no suggested malpractice or deliberate wrongdoing on the part of the respondent, the appellant forever lost the right to complain about the point. That point was "spent" (154).

139 I accept, with their Honours (155), that s 42(a)(i) of the Act implies a personal right in the appellant to object to a trial for an "offence" other than those upon which he had been surrendered for trial in Australia. There are occasional judicial observations, prompted by the expression of provisions such as s 42(a)(i) in the passive voice, that suggest that such provisions are addressed solely to national polities and not to the rights of individuals (156). However, properly, in my view, the prosecutor did not argue that this was the true meaning of s 42(a)(i) of the Act. I agree that it is not.

140 The provisions of s 42 may appear as providing a duty of imperfect obligation, addressed principally at the executive government of the receiving nation concerned in the trial of the surrendered person. However, the language and purpose of the provision, and the serious consequences for accused persons of its breach, support the conclusion that such accused have a sufficiently relevant personal interest in the observance of s 42 as to warrant the conclusion that the Parliament meant them to be able to enlist the jurisdiction of the courts to secure obedience to its terms.

141 The point of disagreement, between myself and Gummow and Callinan JJ, concerns whether that entitlement is lost forever after the plea has been taken without raising the objection and once the trial has commenced. In my opinion it is not. I shall express the main reasons that persuade me to the conclusion opposite to that adopted by Gummow and Callinan JJ in this regard.

142 First, the language of s 42 is stated in extremely strong terms. It is expressed in the imperative mood (shall not … be … tried). The section appears in a federal statute of the Parliament of the Australian Commonwealth. If it is a valid law it is, by covering cl 5 of the *Constitution*, "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". This means that the command in s 42 was binding on the Supreme Court of Victoria, on the trial judge, on the prosecutor and on all who are required to carry out the orders of the courts. It is not a pious aspiration. Its content and expression, its purpose and history indicate clearly that s 42 expresses a rule that the Parliament intended to be obeyed by all persons with a relevant power and responsibility to do so.

(153) Under the *Crimes Act 1958* (Vic), ss 390A, 391.
(154) Reasons of Gummow and Callinan JJ at 164 [110].
(155) Reasons of Gummow and Callinan JJ at 163-164 [108].
(156) Such was the dissenting opinion of Waite CJ in *United States v Rauscher* (1886) 119 US 407 at 434.

143 Secondly, the language of s 42 may have been stated in the passive voice for a particular reason. The officials and other persons who are engaged in the complex process of detention and trial of persons surrendered by another country to Australia are many and varied. They are different in the various States and Territories, where the procedures and the role of these office holders engaged in extradition arrangements, custodial detention, and prosecutions also differ.

144 The extent of a "trial" can itself be a matter of controversy (157). Even if a trial did not include the appellate process (158), it would presumably include a retrial. A trial may nowadays be conducted in stages that differ as between the several States and Territories (159). Given the mandatory expression of s 42 and its protective purposes – both for the accused and for the entire extradition process – that section should be interpreted with these considerations in mind. The applicable meaning should be chosen to ensure, so far as the words permit, the fulfilment of the purpose of the Parliament (160). On the face of things, that purpose would not be fulfilled if the obedience to the command of the Parliament depended exclusively on decisions made by governmental authorities or on the vigilance and knowledge of those representing the appellant at his trial so that they advised him to raise at the arraignment an objection based on the Act's provisions concerning speciality.

145 Thirdly, there is nothing in the Act, including s 42, that suggests that any objection to non-compliance with the instruction of the Act concerning the conduct of a trial must be taken on a plea to the arraignment or forever lost. In accordance with the Act, most prisoners surrendered to Australia would be tried in State or Territory courts. The procedures governing such trials differ from State to State and also in federal courts and in the Territories. Given the language of s 42, there is a strong federal interest in ensuring compliance by authorities and courts (federal, State and Territory) with the speciality provisions there stated. It would therefore take very clear words to allow the effective importation into its terms of a procedure enacted in one State, to override, or thereafter to neutralise, the mandatory instruction of federal law.

146 Section 42 of the Act speaks to courts, prosecutors and other officials throughout Australia. The terms of s 42 contradict, and certainly do not provide for or support, a temporal limitation or operation which the federal Parliament has not seen fit to enact. By the terms of s 42, if a

(157) *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 577-579 [15]-[20]; cf *Bond v The Queen* (2000) 201 CLR 213.

(158) cf *Seaegg v The King* (1932) 48 CLR 251 at 256-257; *Adams v Cleeve* (1935) 53 CLR 185 at 191; *R v Gee* (2003) 212 CLR 230 at 242 [12], 253 [58], 271 [121], 284-285 [178].

(159) *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566; *R v Gee* (2003) 212 CLR 230.

(160) *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

"trial" contrary to the section has been had, that disobedience to the law remains a fact, for whatever legal consequences may follow. It does so notwithstanding the failure of the judge or prosecutor to notice the point or the omission of those representing the accused to rely upon it.

147 Fourthly, the larger purposes of the rule of speciality expressed in s 42 of the Act reinforce this conclusion. Those purposes (161) include the compliance of Australia with reciprocal treaty obligations, the principles of international law and the comity of nations and the achievement of successful arrangements of extradition of criminal fugitives between countries of many kinds with many different legal systems. These considerations remain applicable in the State of Victoria once the time for a plea to the arraignment has passed in the accused's trial. They exist, at the very least, during the whole time that the case is before the judicature of the nation that has secured the surrender of the accused for trial upon offences of a limited and defined kind. This was the approach taken in *AB v The Queen* (162), where the point relying on the rule of speciality was not even taken (as here) in the intermediate court but was raised for the first time in this Court (163). This fact notwithstanding, the majority of the Court gave legal effect to the rule.

148 To interpret s 42 in this respect by reference only to the interests and duties of the accused involves serious error. Whilst those interests are obviously involved, they are not the only ones at stake. In many ways, the national concerns (164) represent a more important interest that the courts must vindicate. If Australian courts fail to do so, in respect of persons surrendered to Australia, Australians can scarcely be surprised if the courts of foreign nations fail to observe the rule of speciality in respect of persons, including Australian citizens, that Australia has surrendered to them. If this indifference to speciality in offences were to become common, the international system of extradition would be fractured. This Court should adopt a construction of the Act that avoids such consequences. This suggests that the allegedly rigid procedural precondition favoured by Gummow and Callinan JJ, although not expressed in the Act or extradition law, should be rejected.

149 Fifthly, the fact that the Act imposes the duty of compliance with the rule of speciality in s 42 upon governmental authorities, in the context of the accusatorial criminal trial conducted in this country, means that the primary duty of ensuring that the requirements of s 42 are obeyed rests upon those authorities. It does not primarily rest upon the accused. In the nature of things the accused will normally be detained awaiting trial. Virtually without exception, he or she will be dependent upon legal representatives to recognise, and take, legal points on his or

(161) See above at 167-169 [121]-[126].
(162) (1999) 198 CLR 111.
(163) (1999) 198 CLR 111 at 128-129 [40]-[42], 145 [92], 153-154 [110]-[111].
(164) *United States v Rauscher* (1886) 119 US 407 at 411-412, 419-420.

her behalf. It is normally for the prosecution authorities to make sure that proper documentation is prepared, in terms sufficiently broad to include all "offences" for which the trial of the accused may properly be conducted. This is not the duty of the accused or the accused's representatives.

150 If, subsequently, as the case against the accused is prepared for trial, a disparity is discovered between the offence(s) in respect of which the accused was surrendered and the offence(s) for which it is wished to try the accused, the prosecuting authorities are not without remedy. They may seek the consent of the surrendering country to the course they propose (165). To suggest that the onus lies on the accused to detect and take the point at the plea to the arraignment or forever lose it, is to reverse the ordinary obligations that rest on the prosecution for criminal process in this country. If, with their legal obligations and significant resources, public officials cannot ensure that the extradition and its consequences comply with the Act, it is an unreasonable construction of s 42 to hold the rights and liberty of the accused hostage to having legal points recognised and taken, on the accused's behalf, before or on the arraignment (166).

151 Sixthly, Australian courts have in recent times taken a more realistic view concerning the operation of procedural rules and the need for a measure of flexibility defensive of substantive justice. This approach reflects a recognition of the imperfections of legal process, the variability of professional skills and the need to defend the substantive merits of cases rather than adherence to rules for their own sake (167). This is especially so in the case of criminal trials, where what is, or may be, at stake is the liberty of the accused. In the present case, this Court needs to remind itself that the appellant, on the conviction in the trial that he challenges, was sentenced to life imprisonment: the highest punishment known to our law.

152 I would not readily come to a conclusion that this consequence was lawful, although the trial of the appellant was contrary to s 42 of the Act and breached a command of the federal Parliament, solely because his counsel failed to advise him to take the present point on his plea. It was not suggested that the appellant's failure in this respect was a deliberate, strategic decision. I would not infer that it was. It was always in the interests of the appellant to confine the offences on which he was tried to those for which he was surrendered to Australia. The notion that, on the arraignment, it would have been open to the respondent, in answer to a plea, to obtain promptly, or at all, the consent of the United Kingdom to the trial of the appellant for different and more serious offences is not established, either as a matter of fact or as a matter of law. Given the precise character of extradition

(165) The Act, s 42(a)(ii); *AB v The Queen* (1999) 198 CLR 111 at 145 [90].
(166) *Conway v The Queen* (2002) 209 CLR 203 at 241 [102].
(167) See, eg, *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 [66].

arrangements and the cumbersome nature of its procedure, this suggestion seems intuitively unlikely.

153 Seventhly, whilst a case is still being considered by the judicature in Australia, and in criminal appeals in particular, courts have often permitted late amendments to raise new points that need to be considered to avoid a substantial miscarriage of justice (168). In part, this approach, which has been upheld by this Court despite the limited nature of the appeals it hears under the *Constitution*, reflects the contemporary attitude of the law: generally preferring substance over form. In part, it also follows the language of criminal appeal statutes with their typical emphasis on the avoidance of injustice, which includes legal injustice.

154 In the present case it is difficult to believe that, if the appellant could make good his objection to the lawfulness of his trial, he would lose the opportunity to be heard on that issue simply because of a delay in raising it. Much less substantial grounds of objection to less serious convictions carrying much shorter sentences have been permitted by this Court, notwithstanding a failure of the prisoner to raise the objection at trial. Here, the appellant submitted that the conduct of *any trial at all*, on the offences in the presentment, was contrary to the express command of federal law. If this was so, it is arguable that the "proviso" (169) is inapplicable, being designed to defend a lawful trial which was flawed in its conduct, not one which explicit federal legislation said should not be conducted at all (170).

155 Eighthly, to the argument that the Supreme Court of Victoria had jurisdiction over the appellant because he was physically present at his trial, and in that sense within the power of that Court, the appellant raised no contest. However, it is commonplace that in the law, the word "jurisdiction" has many meanings (171). The appellant's point, correct in my view, is that it remained to be determined what that Court was obliged to do in the *discharge* of that jurisdiction. By the terms of s 42 of the Act, it was instructed not to try the appellant for any offence other than those upon which he had been surrendered to Australia.

156 The terms of s 42 are not conditional upon an objection being raised by the accused or anyone else. This fact tends to confirm that, in the case of a prisoner who has been surrendered by another country for trial in Australia, it is the duty of the prosecutor to ensure that s 42 has been complied with. If it has not been, and that fact is discovered whilst the case is still before the judicature of Australia, in my view it

(168) *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476; *Mickelberg v The Queen* (1989) 167 CLR 259 at 272-273; *Gipp v The Queen* (1998) 194 CLR 106 at 153-155 [134]-[138]; *Smith v The Queen* (2001) 206 CLR 650 at 658 [22]; *Gillard v The Queen* (2003) 219 CLR 1 at 31 [89].

(169) *Crimes Act 1958* (Vic), s 568(1) (proviso). See *Ousley v The Queen* (1997) 192 CLR 69 at 95; cf at 158.

(170) *Conway v The Queen* (2002) 209 CLR 203 at 241 [102].

(171) *Harris v Caladine* (1991) 172 CLR 84 at 136; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78]-[79].

remains open to the appellate court to allow the accused to rely upon the unlawfulness of the trial and hence of its outcome. Any other interpretation of the Act renders the accused hostage to the conduct of public officials and to the knowledge and vigilance of the accused's legal advisers in a way that is either arbitrary, capricious or both.

157 Ninthly, the reasons of Gummow and Callinan JJ accept, as I do, that it is difficult to treat the omission of the appellant to raise the point under the Act, at the stage of his plea to the arraignment, as constituting a legal "waiver" that would prevent him from advancing a challenge to the lawfulness of the trial later, as he has now done (172).

158 There are at least two reasons why waiver does not apply (173). There is no evidence that the appellant's failure to raise an objection based on s 42 of the Act at that stage constituted an informed or deliberate decision by the appellant. All indications are to the contrary. In any case, it is arguable that it was not competent for the appellant to waive the requirements in s 42 of the Act. Those requirements are addressed to many people apart from an accused. On the face of things, the accused cannot waive the obligations of those other people (174). He cannot waive the interests of others in due compliance with the section. Those others include (1) the people of the Commonwealth, who have an interest in the conformity of courts and officials with the law stated by the federal Parliament; (2) the Commonwealth itself, which has an interest in the compliance of trials before Australian courts following extradition of the accused with the rule of speciality upon which the international regime of extradition depends; and (3) the governments of surrendering countries (in this case the United Kingdom), which, by international law, have expectations under treaties and other instruments that Australia will adhere to its obligations, acknowledged in s 42 of the Act, not to try a person surrendered to it for an "offence" other than the "offence" for which the person was surrendered (175).

159 I do not have to resolve this last-mentioned argument finally. It is sufficient to say that I agree with Gummow and Callinan JJ that waiver is not relevant in this case.

160 Tenthly, a decision in this appeal favourable to the appellant would certainly be a forensic misfortune in his case. Considerable costs of the appellant's first trial would be thrown away. The decision would doubtless present new and different legal problems if attempts were made to retry the appellant, possibly upon the conspiracy offences for which he was originally extradited; possibly upon the offences of murder and kidnapping after fresh extradition proceedings; or possibly

(172) Reasons of Gummow and Callinan JJ at 164 [110].
(173) cf *AB v The Queen* (1999) 198 CLR 111 at 116 [3], 144-145 [89]-[92].
(174) cf *Jago v District Court (NSW)* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378; *Rogers v The Queen* (1994) 181 CLR 251.
(175) The Act, s 42(a)(i).

following attempts to secure the consent of the United Kingdom to the enlargement of the triable "offences", if that is legally permissible.

161 However, the appellant would meantime be subject to an order for his lawful custody. He could not ultimately escape a retrial for any offences for which he could be lawfully tried. He is entitled to invoke the law of this country, as he has. In a real sense, what is at stake in the appeal is an interest much larger than that of the appellant. It concerns obedience of an Australian court to the imperative language of the federal Parliament in s 42 of the Act and faithful compliance by Australia and its institutions with the reciprocal rule of speciality expressed in international law, in extradition treaties and in Australia's own statute.

162 It follows that, subject to the succeeding remarks, I would uphold the appellant's right to rely in the appeal upon the objection that he raises to the lawfulness of his trial. Because that trial upon the offences in the presentment was conducted contrary to the command of the federal Parliament, the convictions and sentences that ensued must be quashed in accordance with the powers of the Court of Appeal in criminal appeals. They are the formal consequences of a "trial" that could not lawfully take place in the way that it did.

The jurisdiction within which the trial was conducted

163 *The parties' submissions*: In the event that this Court reached such a conclusion, the respondent, and governmental interveners, urged various propositions to dissuade the Court from giving effect to it. They argued that the trial had taken place in the Supreme Court exercising *State* jurisdiction and that the Supreme Court was not bound, in the way the trial had been conducted, to determine any issue arising under the Act. The outcome of the trial thus stood as valid. No basis was shown to disturb the appellant's conviction on appeal. The appellant submitted, to the contrary, that his trial had involved the exercise by the Supreme Court of *federal* jurisdiction and that, in exercising such jurisdiction, that Court was bound to comply with the Act, whether or not any party relied on it.

164 *The exercise of federal jurisdiction*: Federal jurisdiction is "the authority to adjudicate derived from the *Commonwealth Constitution* and laws" (176). Subject to the *Constitution*, federal law may confer the power to adjudicate particular matters upon courts, federal, State and Territory. Within the ambit of its legislative powers, and subject to other provisions or implications of the *Constitution* (177), the federal

(176) *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142. As observed in *Baxter*, *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78] and many other cases, the term "jurisdiction" has many meanings.

(177) Such as provisions or implications concerning the scope of the judicial power, for example in the determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs: *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 706; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258; cf *Kable v Director of*

Parliament may, expressly or by necessary implication, forbid the exercise of the authority to adjudicate specific matters if valid preconditions are complied with. Or it may regulate, in particular respects, the ways in which that exercise is to be performed.

165 It is open to argument that, in conducting the appellant's trial, the Supreme Court was exercising federal jurisdiction, although unaware of that fact. According to this argument, the opposite of the *authority* to conduct a trial is a valid *withdrawal of authority*. By s 42 of the Act, assuming it to be valid (as I will hold), the federal Parliament withdrew the authority to conduct the trial of the appellant otherwise enjoyed by the Supreme Court of Victoria pursuant to s 85 of the *Constitution Act 1975* (Vic). In proceeding to conduct the trial, notwithstanding such federal withdrawal of State authority, the Supreme Court was not merely failing to exercise State jurisdiction in accordance with relevant federal regulation. It was effectively, and in law, asserting State statutory authority to ignore an applicable command of federal law. By doing so, even if unconsciously, the Supreme Court was resolving a clash between applicable federal and State legal authority. It was doing so by upholding the latter and thereby resolving a constitutional question. In doing this it was, however unconsciously, exercising federal jurisdiction. It could not resolve the question, as it did, exercising purely State jurisdiction.

166 It is not at all uncommon for Australian courts to proceed without noticing a governing federal law and resolve an issue that such federal law presents for the outcome of a case (178). Upon the appellant's argument, to do so the court needs (and exercises) federal jurisdiction.

167 *The exercise of State jurisdiction*: Although this is a possible view of the jurisdiction question, it is not the only one. The alternative view is that the appellant's trial was a matter within State jurisdiction and that this was so notwithstanding the appellant's surrender to Australia by another country pursuant to federal action and despite the command of s 42 of the Act, a federal law, which regulated one aspect of the trial in the exercise of State jurisdiction.

168 In the appellant's case, the primary authority of the Supreme Court to adjudicate upon his trial was clearly derived from s 85 of the *Constitution Act*. According to the second view, the federal Act *regulated* his trial. However, it did not grant the *authority* for the trial. The State jurisdiction of a court is not changed to federal jurisdiction as a consequence of the court's giving, or not giving, effect to rights arising under federal legislation. Jurisdiction is determined by authority.

(cont)

Public Prosecutions (NSW) (1996) 189 CLR 51; *Nicholas v The Queen* (1998) 193 CLR 173 at 232-233 [145]-[146]; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15].

(178) As illustrated in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

169 *Federal jurisdiction on appeal*: In the view that I take, it is not necessary to resolve the foregoing controversy concerning the jurisdiction that the Supreme Court of Victoria exercised in the trial of the appellant. This is because, whatever label is placed upon the jurisdiction at trial, the Supreme Court was bound to obey applicable federal law. When the Court of Appeal was called upon to adjudicate the speciality issue, it was clearly exercising federal jurisdiction. This was because it was determining an issue that arose directly under the Act, a federal law (179). To determine it, the Court of Appeal exercised federal jurisdiction. Only federal jurisdiction would confer the *authority* on the State court to do so.

170 Subject to the issue of the suggested invalidity of the federal law under the *Constitution*, no provision of State law could override, qualify or negate the obligations stated in s 42 of the Act. Thus the provisions of the State *Crimes Act 1958* (Vic), expressing in general terms the procedures ordinarily to be followed in a plea to the arraignment in a trial conducted in the Supreme Court, could not override the explicit instruction contained in s 42 of the Act. Indeed, the *State* Act does not purport to do so. Any attempt to do so would fail for constitutional reasons. The *federal* law would prevail in accordance with s 109 of the *Constitution* – so long as it was valid.

171 *Conclusion: federal law prevails*: The Act obliged the Supreme Court, its judges and other relevant public officials not to conduct a trial of the appellant whilst the "offences" named in the presentment did not conform to the "offences" in respect of which the appellant had been surrendered to Australia by the United Kingdom. The Act's requirements were clear. It addressed successively the prosecutor, the Supreme Court of Victoria, the trial judge and the Court of Appeal. There was no relevant exception. Its terms were not obeyed. Specifically, they were not obeyed in the appeal when the Court of Appeal was undoubtedly exercising federal jurisdiction and had the power, after trial, to ensure that the federal law was given effect to prevent any miscarriage of justice that was demonstrated. A miscarriage of justice may be of a legal, as well as of a factual (or merits) kind. There could be no greater legal miscarriage of justice than the conduct of a trial upon counts of a presentment that, in terms, contradicted the express command of federal law. It constitutes a fundamental error in the proceeding (180). The Court of Appeal failed to correct this miscarriage of justice. This Court, also exercising federal jurisdiction, must ensure that applicable federal law is obeyed. It is not too late. The matter is still within the judicature.

(179) Reasons of Gummow and Callinan JJ at 146 [43].

(180) *Wilde v The Queen* (1988) 164 CLR 365 at 373; cf Penhallurick, "The Proviso in Criminal Appeals", *Melbourne University Law Review*, vol 27 (2003) 800, at pp 806-811.

The convictions and sentences must be quashed

172 I have already indicated that the failure of the prosecution to present the appellant for trial only on the "offence[s] in respect of which the person was surrendered" (181) is not a matter solely concerning the relations between the United Kingdom and Australia. The appellant's personal rights and interests were directly affected.

173 If the appellant's purported "trial" was conducted contrary to the Act, it was arguably not a "trial" at all. Certainly, it was seriously flawed. Its outcomes were not lawful verdicts, convictions or sentences. Subject to the *Constitution*, no provision of State law could make them so, contrary to the Act. Subject to the constitutional issues, therefore, the convictions and sentences must be quashed.

The constitutional objections are meritless

174 It is difficult to take seriously the constitutional issues propounded in final resistance to this outcome. The notion that the federal Parliament did not have the power to enact s 42 of the Act in the terms there appearing, either because of a lack of the relevant legislative power in s 51 of the *Constitution*, or because of supposed limitations expressed or implied elsewhere in the *Constitution*, borders on the fanciful.

175 The enactment of a law with respect to extradition of alleged offenders and, relevantly, the surrender of offenders by other countries to Australia for trial in this country, clearly falls within s 51(xxix) of the *Constitution* (external affairs). Amongst other things, it is a subject designed to give effect to extradition treaties. Such treaties were an established feature of the external affairs of nations long before the creation of the Commonwealth (182). Other heads of federal legislative power specified in the *Constitution* are also relevant, including s 51(xxviii) (the influx of criminals) and s 51(xxxix) (the execution of any power). Together these are sufficient to sustain the general validity of the Act.

176 The particular provision in s 42 of the Act, with regard to the international rule of speciality in extradition as there defined, is a valid law. It is a law upon an attribute of all national laws on the subject of extradition of which I am aware. Such a provision was included in the *Extradition Act 1870* (UK). That Act was in force when the *Australian Constitution* was written and adopted. Similar provisions have been a feature of extradition laws and treaties ever since.

177 The argument that the attempt by s 42 of the Act to impose restrictions on State criminal trials is contrary to s 106 of the *Constitution*, as amounting to an invalid endeavour to control the conduct of such trials in a State Supreme Court, is equally meritless. It was based on a misunderstanding of the decision of this Court in *Re*

(181) The Act, s 42(a)(i).

(182) Such as the successive treaties between Great Britain and the United States of America described in *United States v Rauscher* (1886) 119 US 407 at 410-412. See also the *Extradition Act 1870* (UK), s 19.

Tracey; Ex parte Ryan (183). Whatever that decision exactly stands for, it cannot cast doubt on the enactment by the federal Parliament of a specific requirement of federal law designed to safeguard and enforce a clear federal, indeed national and international, interest. Specifically, this is the interest of Australia in securing the reciprocal surrender of fugitive offenders and others found overseas who are accused of offences against the laws of Australia. To defend that interest and to obtain the trial of such persons it is clearly within the power of the federal Parliament to enact a law controlling the circumstances of the trial and commanding when such trials take place and when they shall not take place, conformably with the applicable treaties and other arrangements with foreign nations.

178 Here the federal Parliament did not purport to interfere in the conduct of a trial by a State court. It simply regulated when such a trial could, and could not, occur. It did so in accordance with a well-established and international principle inherent in the comity of nations (184). There was not, therefore, any disturbance of the arrangements of the *Constitution* concerning the government or a court of a State contrary to s 106 of the *Constitution*. It was no more than the enactment of a valid federal law in a matter of unquestionable federal concern regulating a trial in order to give effect to a principle of legitimate federal concern.

179 But for the Act and the system of international agreements to which it gives effect – including on the basis of the stated rule of speciality – there could normally be no trial of persons, such as the appellant, who are accused of offences in one country, but who are present in another. Unless such persons could be snatched or otherwise secured by trickery or force they would remain beyond the jurisdiction of Australian courts and prosecutors – federal, State and Territory alike. It is the Act that makes it possible for those courts and prosecutors – including in the Supreme Court of Victoria – to secure and exercise jurisdiction over the surrendered prisoner. But such jurisdiction is afforded upon conditions regulated by federal law. Important amongst these is the series of conditions, defensive of the rule of speciality, set out in s 42 of the Act. They are valid. They must be obeyed by all those to whom they are addressed – relevantly the prosecutor and the judges of the Supreme Court of Victoria at trial and on appeal.

Conclusion and orders

180 The appellant has therefore made good his complaint that the rule of speciality, stated in s 42 of the Act, was breached by his trial. In the circumstances, he is not entitled to relief by way of a stay for abuse of process. He is, however, entitled to rely on his personal rights to which s 42 of the Act gives rise. Those rights are not "spent" merely because

(183) (1989) 166 CLR 518.

(184) *Barton v The Commonwealth* (1974) 131 CLR 477 at 483; *AB v The Queen* (1999) 198 CLR 111 at 128-129 [41], 141-143 [81]-[84].

they were not raised in his plea at his trial. That would be an unacceptably artificial view of the applicable federal law, its language and its purpose.

181 The Supreme Court of Victoria, in conducting the trial of the appellant, was obliged to conform to the applicable federal law. This included s 42 of the Act. Its failure to do so in this case renders the resulting orders of that Court invalid and of no legal effect. Those orders must be quashed. The objections to the constitutional validity of s 42 of the Act are without merit. They should be rejected.

182 The appeal should be allowed. The orders of the Supreme Court of Victoria (Court of Appeal) should be set aside. In place of those orders, it should be ordered that leave to appeal be granted and the appeal to that Court be allowed and the appellant's convictions and sentences quashed. Any new trial must conform with the Act.

183 HAYNE J. As the reasons of other members of the Court show, there are two questions in this appeal. First, were the offences of kidnapping and murder, for which the appellant was tried and convicted in the Supreme Court of Victoria, offences of which the appellant "could be convicted on proof of the conduct constituting" (185) an offence in respect of which he was surrendered to Australia? Secondly, if the offences of kidnapping and murder were not offences meeting that description, what consequence does that have for his conviction? I would answer the first question, "Yes", and the second question, "In the circumstances of this case, it would have had no consequence for his conviction".

184 The facts and circumstances which give rise to the appeal are set out in other reasons. The relevant provisions of the *Extradition Act 1988* (Cth) (the Act) are also set out in those other reasons. I need not repeat any of that material except to the extent necessary to explain my reasons.

The first question – speciality

185 The first question concerns what the Act calls "speciality". It may or may not be possible to discern some principles about speciality which find general acceptance internationally or find acceptance in a number of other jurisdictions (186). The first question argued in this Court does not require the identification of principles of that kind. Nor does it require the construction or application of the law of the surrendering country. It requires the construction and application of the relevant provisions of Australian law – the Act.

186 As the reasons of Gummow and Callinan JJ demonstrate, it is possible to determine whether the appellant's trial for kidnapping and murder contravened the particular arrangements made with the United Kingdom for his surrender to Australia. For the reasons given by

(185) *Extradition Act 1988* (Cth), s 42(a)(i).
(186) *R v Truong* (2002) 5 VR 1 at 27-34 [69]-[79] per Ormiston JA.

Gummow and Callinan JJ, the appellant's trial for those offences did not contravene those arrangements. But the question which the appellant agitated in the Court of Appeal, and in this Court, does not depend upon any internationally accepted principles about speciality. It does not depend upon the particular arrangements which were made between the governments of Australia and the United Kingdom. The question which the appellant agitated is a question about the construction and application of the Act and, in particular, s 42.

187 The specific question which arises concerns the application of that part of s 42(a)(i) which provides that, unless certain conditions are met, a person who is surrendered to Australia, by a country other than New Zealand, shall not be tried in Australia for any offence that is alleged to have been committed before the surrender other than, first, any offence in respect of which the person was surrendered, or, second, any other offence (for which the penalty is the same or a shorter maximum period of imprisonment) "of which the person could be convicted *on proof of the conduct constituting any such offence*" (emphasis added).

188 The reference to any "such" offence is a reference back to "any offence in respect of which the person was surrendered". The offences for which the appellant was surrendered included conspiracy to kidnap and conspiracy to murder. They did not include the offences of kidnapping or murder. Could the appellant be convicted of kidnapping and murder on proof of the conduct constituting the offences in respect of which he was surrendered, namely, conspiracy to kidnap and conspiracy to murder?

189 In deciding that question it is necessary to take account of the provisions of s 10(2) of the Act that:

> "A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed."

Thus the question becomes: would proof of the acts or omissions by virtue of which it was alleged that the appellant had committed the offences of conspiracy to kidnap and conspiracy to murder have proved that he committed kidnapping and murder? That requires consideration of what was alleged against the appellant in support of the application in the United Kingdom for his extradition to Australia, not what was proved at his trial. But it also requires recognition of two further matters: first, the fact that particular conduct may reveal alternative legal bases upon which it may be found that a person committed a particular crime and, secondly, that the conduct may reveal the commission of more than one offence.

190 Where two offenders agree to commit an offence, and that offence is later committed, it is possible to describe the criminality of their conduct both as the offence of conspiracy and the substantive offence committed. And where two offenders act in concert in pursuit of a common criminal design each may be found guilty of the offence that has been committed even if it is shown that each participated in its

commission in some different way (187). And again, persons may be guilty of an offence as an accessory before the fact or as a principal in the second degree who, being present at the scene of a crime, aids or abets its commission.

191 The establishment of each of these different forms of criminal responsibility will require proof of the particular elements which go to establish that responsibility. The elements of a charge of conspiracy differ from the elements to be established in proving joint criminal enterprise. The elements of each of those offences differ from what must be established to make out a case that an accused person was an accessory before the fact or a principal in the second degree.

192 In the case of conspiracy, because the offence is complete upon the conspirators reaching an agreement to commit the crime, the charge may be proved without showing that the intended crime was committed. By contrast, doctrines of complicity or common purpose only apply where the substantive offence has been committed. In such a case a person will be held responsible for a crime, the commission of which was contemplated by the parties sharing a common purpose (188), even if there is no specific agreement that that crime be committed. Doctrines of complicity or common purpose apply only where the crime is committed, but apply even if there is no positive agreement to commit that crime.

193 In considering the application of s 42 of the Act, must attention be confined to those facts which *sufficed* to establish the offence for which the appellant was extradited (the two charges of conspiracy)? That is, must attention be confined to those facts which, if proved, would have demonstrated the making of an agreement to kidnap and an agreement to kill, or may account be taken of the fact that at the time of extradition it was alleged that those agreements had been carried into effect?

194 In proving a case of conspiracy to commit an offence, it is open to the prosecution to prove, as one step in demonstrating the existence of the agreement, that the offence was in fact committed. That is why there are many cases in which it would be open to charge both conspiracy to commit an offence and the substantive offence itself. The courts have said that prosecutors should charge the substantive offence, where it is alleged that the offence was committed, rather than the offence of conspiracy (189) in order to avoid, among other things, the engagement of those evidentiary rules that attend the trial of a charge of conspiracy (190) and what is sometimes said to be the consequent advantages to the prosecution (191). But the point of present relevance

(187) *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1.
(188) *Gillard v The Queen* (2003) 219 CLR 1 at 36 [111]-[112].
(189) *R v Hoar* (1981) 148 CLR 32 at 38 per Gibbs CJ, Mason, Aickin and Brennan JJ.
(190) *Tripodi v The Queen* (1961) 104 CLR 1; *Ahern v The Queen* (1988) 165 CLR 87.
(191) *Howard's Criminal Law*, 5th ed (1990), pp 375-381.

is that there are many cases where the criminality of a person's conduct may properly be reflected in a number of different charges.

195 Is s 42 to be understood as directing attention only to that evidence which would suffice to establish the elements of the offence for which an accused was surrendered? Reading the section in that way would, of course, still give it useful work to do. It would permit prosecution for an offence wholly included in the offence for which a person was surrendered. But so to read the section does not appear to me to give full weight to the requirement of s 10(2) to consider the acts or omissions (of the particular accused in question) by virtue of which it is alleged that that person (the accused) committed the offence for which he or she was surrendered.

196 When the extradition of the appellant was sought, the material advanced in support of the request for extradition not only alleged that the appellant conspired with others that the victim should be kidnapped and murdered, but also alleged that the conspiracy had been carried into effect. In those circumstances, the acts and omissions of the appellant, by virtue of which the offences of conspiracy to kidnap and conspiracy to murder were alleged to have been committed, included the acts of murder and kidnapping which it was alleged that the appellant had instigated. That he could be shown to be party to a joint criminal enterprise to commit those crimes, by demonstrating that he not only contemplated the possibility that the other party to the joint criminal enterprise would carry out the agreement (192), but actively sought that end, required the proof of no other act or omission than, in the circumstances of this case, it was alleged that, if proved, would demonstrate his guilt of conspiracy to kidnap and conspiracy to murder.

197 I agree with Gleeson CJ, McHugh and Heydon JJ that the trial of the appellant on charges of kidnapping and murder did not contravene s 42(a)(i).

198 Although that conclusion is sufficient to require the dismissal of the appeal, it is desirable to deal with the second question because, if the appellant's submissions about that second question were correct, further, constitutional questions would arise. For the reasons given by Gummow and Callinan JJ, the appellant's contention that his trial constituted an abuse of process of the court, if the offences of murder and kidnapping were not offences of which he could be convicted on proof of the conduct constituting an offence in respect of which he was surrendered, is a contention that should be rejected. The appellant entering a plea of not guilty, the Supreme Court had jurisdiction to try the issues which thus were joined, even if, contrary to my view, s 42 of the Act applied in the way now alleged by the appellant. And once the appellant, on being arraigned, pleaded not guilty he could not later, having been convicted, say that he should not have been tried. On

(192) *McAuliffe* (1995) 183 CLR 108; *Gillard* (2003) 219 CLR 1.

arraignment he could have entered, as a special plea (193), the plea that his trial would contravene s 42 of the Act. Not having done so, even if the premise for this second contention had been made out, there would have been no miscarriage of justice warranting the intervention of the Court of Appeal (194). Otherwise, in respect of this second question, I agree in the reasons of Gummow and Callinan JJ.

199 The appeal should be dismissed.

Appeal dismissed

Solicitors for the appellant, *Clarebrough Pica*.

Solicitor for the respondent, *Solicitor for Public Prosecutions (Vic)*.

Solicitors for the interveners, *Australian Government Solicitor*; *J H Y Syme*, Victorian Government Solicitor; *Timothy Sharp*, State Solicitor for Western Australia.

LGDEF

(193) *Crimes Act 1958* (Vic), s 390A.
(194) *Crimes Act*, s 568(1).