FEDERAL COURT OF AUSTRALIA

Traljesic v Bosnia and Herzegovina and Another

[2017] FCAFC 70

Griffiths, Perry and Bromwich JJ

2 November 2016, 28 April 2017

Extradition — Eligibility for surrender — Determination of — "Extradition objection" — Meaning of — Where a person had been harmed by other prisoners when previously in custody because of his political opinions — Where the State had knowledge of — Where the State failed to protect person from harm — Extradition Act 1988 (Cth), s 7(c).

Section 7(c) of the *Extradition Act 1988* (Cth) (the Act) relevantly provided that a person had an "extradition objection" if that person could demonstrate that on surrender to an extradition country, he or she could be punished by reason of his or her political opinions.

The appellant submitted that he had been beaten by other prisoners when previously in custody because of his political opinions, and that the prison authorities of the first respondent extradition country had not acted upon his complaints, despite having knowledge of the beatings, and the reason for the beatings.

The Court had to determine whether, and in what circumstances, harm inflicted upon a person in custody by other prisoners constituted an "extradition objection" within the meaning of s 7(c) of the Act.

Held, dismissing the appeal: The "extradition objection" in s 7(c) of the Act is not to be construed as extending to harm inflicted on a person in prison unless the requesting State is involved in, complicit in, or condoning of, both the harm and the reasons for the harm. [57]-[61], [70]

Republic of Croatia v Snedden (2010) 241 CLR 461, applied.

Cabal v United Mexican States (2001) 108 FCR 311, considered.

Appeal against decision of Mortimer J, (2016) 338 ALR 637, dismissed.

Cases Cited

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.

Cabal v United Mexican States (2001) 108 FCR 311.

Croatia, Republic of v Snedden (2010) 241 CLR 461.

Dutton v O'Shane (2003) 132 FCR 352.

Harris v Attorney-General (Cth) (1994) 52 FCR 386.

Immigration and Multicultural Affairs, Minister for v Khawar (2002) 210 CLR 1.

Kalinovas v Republic of Lithuania [2015] FCA 961.
New South Wales v Bujdoso (2005) 227 CLR 1.
O'Connor v Adamas (2013) 210 FCR 364.
Rivera v Minister for Justice and Customs (2007) 160 FCR 115.
Slimani v France (2004) 43 EHRR 49.
Traljesic v Bosnia and Herzegovina (2016) 338 ALR 637.
Vasiljkovic v Commonwealth (2006) 227 CLR 614.

Appeal

K De Ferrari and *J Lucas*, for the appellant.

Dr S Donaghue QC and *K O'Gorman*, for the respondents.

28 April 2017

The Court

1 The appellant, Mr Rasim Traljesic, who is an Australian citizen, appeals against the primary judge's orders in *Traljesic v Bosnia and Herzegovina* (2016) 338 ALR 637 (*Traljesic below*). Her Honour dismissed Mr Traljesic's application for review of a decision of the second respondent, a magistrate, and affirmed the magistrate's decision that Mr Traljesic was eligible for surrender to the first respondent, identified as the Federation of Bosnia and Herzegovina, in relation to several offences for which he had been convicted in Bosnia and Herzegovina in March 2005. The convictions, which were for attempted murder and causing general danger, related to a fracas at a restaurant in November 2004. There is no claim that the convictions were for political offences. Mr Traljesic was sentenced to a term of imprisonment of 3 years and 10 months and he commenced serving his sentence in January 2007 in the Bihac prison in Bosnia and Herzegovina. He failed to return to the prison in mid-2007 after being granted a weekend leave of absence. At that time he had served only 6 months of his sentence.

Background facts summarised

2 On 13 February 2014, Australia received a request from Bosnia and Herzegovina (an "extradition country" by virtue of the *Extradition (Bosnia and Herzegovina) Regulations 2009* (Cth)) seeking Mr Traljesic's extradition. On 28 August 2014, Mr Traljesic was arrested in Victoria and remanded in custody pursuant to s 15(2) of the *Extradition Act 1988* (Cth). On 20 August 2015, Magistrate Holzer made orders under s 19(9) of the *Extradition Act* determining that Mr Traljesic was eligible for surrender in relation to extradition offences. The extradition offences were identified as:

(a) attempted murder in violation of Art 166, paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina in conjunction with Art 28 of that Criminal Code; and

(b) causing general danger, contrary to Art 323, paragraph 3 of that Criminal Code.

3 Mr Traljesic contended that he was not eligible to be surrendered to Bosnia and Herzegovina because he had an "extradition objection" within the meaning of s 7(c) of the *Extradition Act*. This objection related to Mr Traljesic's evidence that he had been beaten by other prisoners while in Bihac prison because of inter alia his political opinions (being a supporter of a group called Fikret Abdic, which was against the idea of a purely Muslim state, and as a perceived

sympathiser of Serbia). He also gave evidence that the prison authorities did not act upon his complaints even though they knew of the beatings and the reasons why he was targeted. The magistrate held that the extradition objection created by s 7(c) of the *Extradition Act* was not to be construed so widely as to include "behaviours from other prisoners and behaviours from prison officials". Mr Traljesic's case, both before the primary judge and on appeal, is that there is an "extradition objection" such that he could not validly be extradited, which case turns on the proper construction of s 7(c) and its application to the particular facts and circumstances of his case. These matters are raised by ground 1 in the appeal.

4 The primary judge confirmed the magistrate's orders that Mr Traljesic was eligible for surrender under the *Extradition Act*. As will be developed below, at the core of the primary judge's reasoning was her Honour's acceptance of the construction of s 7(c) advanced by Bosnia and Herzegovina and its application to the facts as found by her Honour. In particular, the primary judge held that the word "punished" in s 7(c) is capable of referring to the suffering that a person is likely to experience at the hands of fellow prisoners, or any other non-State officials, but it must also be demonstrated that the prison authorities were complicit in or condoned the mistreatment by the other prisoners, and also condoned or were complicit in the reasons for that treatment. Although her Honour found that, on the evidence before her, the authorities showed an "abject lack of concern for [Mr Traljesic's] welfare", it was critical to her Honour's rejection of Mr Traljesic's case that the evidence did not disclose whether there were substantial grounds for believing that the authorities were complicit in or condoning of the alleged mistreatment, because of lack of resources, personality, apathy, indifference, or a reflection of general community attitudes to prisoners in Bosnia and Herzegovina, or for some other reason (*Traljesic below* at [131]).

5 The primary judge also ruled that three letters which had been tendered by Bosnia and Herzegovina in the proceedings before the magistrate were admissible in the review proceeding under s 21 of the *Extradition Act*. Her Honour held, however, that it was not possible to give the correspondence any real weight in determining whether or not the conditions at the Bihac prison had changed from 2007 to 2015. This matter forms the basis of ground 2 in Mr Traljesic's appeal.

The appeal

6 Mr Traljesic appeals under s 21(3) of the *Extradition Act* from the orders made by the primary judge. The two grounds of appeal are (without alteration):

> 1. Her Honour erred in failing to find that that there are substantial grounds for believing there is an extradition objection within the terms of section 7(c) of the *Extradition Act 1988* (Cth), in that:
>
> a. the First Respondent:
>
> i. knew of violence being repeatedly inflicted upon the Appellant by non-state actors;
>
> ii. knew the reason why that violence was being inflicted upon the Appellant (political opinion); and
>
> iii. condoned and/or acquiesced in that conduct being engaged by non-state actors for the prescribed reason;
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> b. the non-state actors were within the First Respondent's control, being prisoners themselves;

c. on its proper construction, section 7(c) does not require the Court to be satisfied that the extradition country is complicit not only in the conduct (which her Honour accepted could be demonstrated by acquiescing in that conduct), but also the reasons for the conduct;
d. the task of construing section 7(c) is a matter of Australian law, and as such it is to be carried out having regard to international and common law principles;
e. on its proper construction, section 7(c) does not require proof of a legal duty on the part of the extradition country to prevent the conduct from occurring, before there can be a finding that it condoned and/or acquiesced in that conduct;
f. in the alternative, even if there needs to be shown that the extradition country condoned the prescribed reasons for the conduct, on the evidence this was established, given the matters at (a)(ii) and (b) above.

2. Her Honour erred in failing to find that sections 59 and 135 of the *Evidence Act 1995* (Cth) did apply to the proceeding, in that:
a. her Honour correctly rejected the First Respondent's submission that "*any document that is duly authenticated in the proceedings*" (section 19(6) of the Extradition Act) satisfies admissibility under the Evidence Act;
b. there is authority (relied by the Appellant below) in support of the proposition that the Court in conducting the section 21 review is not bound by the evidentiary rulings made by the section 19 magistrate, with the result that lesser materials than those which were before the section 19 magistrate may be considered in the section 21 review because, inter alia, of their exclusion under section 135 of the Evidence Act (*Kalinovas v Republic of Lithuania* [2015] FCA 961); and
c. Her Honour did not decline to follow that authority as plainly wrong; and
d. further and in any event, this Court has said that review proceedings under s 21 of the Extradition Act are subject to the operation of the Evidence Act (*Cabal v United Mexican States* (2001) 108 FCR 311).

7 It is convenient to refer to ground 1 in the appeal as the "extradition objection ground" and to ground 2 as "the *Evidence Act* objection".

The legislative scheme summarised

8 The legislative scheme of the *Extradition Act* and accompanying regulations were summarised by the High Court in *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 (*Vasiljkovic*) at [16]-[29] per Gleeson CJ; at [52]-[60] per Gummow and Hayne JJ and at [143]-[155] per Kirby J. The provisions of the *Extradition Act* most relevant to this appeal, as in force on 12 March 2014, are ss 7, 19 and 21. Section 19 relevantly provides for an application to be made to a magistrate on behalf of the extradition country concerned (s 19(1)(c)) and for the magistrate to conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence (or offences) for which surrender of the person is sought by the extradition country (s 19(1)(d)). Section 19(2) sets out the necessary conditions for eligibility for surrender:

> 19(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

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

(Emphasis added.)

9 The expression "extradition objection" is defined in s 7 of the *Extradition Act*, relevantly, as follows:

> 7 Meaning of extradition objection
>
> For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:
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> …
>
> (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, *or punished*, detained or restricted in his or her personal liberty, *by reason of* his or her race, sex, sexual orientation, religion, nationality or *political opinions*; or

(Emphasis added.)

10 Section 21(3) provides inter alia that a person the subject of an order by the Federal Court may appeal to the Full Court. Mr Traljesic has availed himself of this right.

11 It is desirable to view these statutory provisions within the broader context of the *Extradition Act*. The four separate stages involved in the process of extradition were summarised by the Full Court in *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 (*Harris*) at 389 (as approved by the plurality in *Republic of Croatia v Snedden* (2010) 241 CLR 461 (*Snedden*) at [37]):

> (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered.

12 This appeal relates to the third stage of the extradition process.

13 Although not directly relevant at this stage of the extradition process, it is relevant to the task of construction to emphasise the fourth stage (which is directed to the operation of s 22). The Attorney-General has an ultimate discretion under s 22(3)(f) whether or not to surrender a person to an extradition country. Professor Shearer, a leading authority on extradition law, has described the Attorney-General's discretion under this provision as an "unlimited discretion" (see *Commentary on Halsbury's Law of England* (4th ed) at C203A). Although there is some overlap with the third stage, in the sense that one of the matters upon which the Attorney-General must be satisfied is that there is no extradition objection, the Attorney-General has a wider role than a court which is involved in the third stage. The breadth of the Attorney-General's executive power was emphasised by Gleeson CJ in *Vasiljkovic* at [27]:

> The ultimate discretion reposed in the Attorney-General by s 22 of the Act is consistent with the earlier Australian legislation. One aspect of its significance relates to a matter referred to in s 22, that is, political offences. Professor Shearer wrote:
>
> > The exercise of executive discretion in this matter can be supported by several arguments. In the first place, the executive may have confidential avenues of information closed to the courts which may significantly alter the appreciation of the nature or circumstances of an offence to the fugitive's advantage. Second, even where the executive has no further information of its own, it may be persuaded to act upon information supplied by the fugitive which could not be received as admissible evidence by the courts because of evidentiary rules or procedures. Third, where the executive is not persuaded by representations made to it by the fugitive to refuse extradition, it may nevertheless attach certain conditions to his surrender in order to satisfy any qualms it may have as to the consequences of his return.

(Footnotes omitted.)

The primary judgment summarised

The extradition objection ground

14 Mr Traljesic contended that the extradition objection under s 7(c) was made out by reference to the beatings and mistreatment he had suffered at the hands of other prisoners during his imprisonment at the Bihac prison; those beatings were by reason of inter alia his political opinions; and the prison authorities knew of the beatings and the reason for them but took no steps to prevent them. He also submitted that Bosnia and Herzegovina had failed to establish any material change since 2007 in the prison conditions in that country so as to displace what he submitted were substantial grounds for believing that, if he were extradited, he would be treated in the same way again.

15 The primary judge held that Mr Traljesic had not satisfied the Court that there were substantial grounds for believing there was an extradition objection within the terms of s 7(c).

16 As noted above, at the heart of the proceeding both below and on appeal, is the issue of the proper construction of s 7(c) and, in particular, the extent to which it applies in circumstances where the feared punishment involves conduct by State actors and non-State actors (in this case, being the prison authorities and other prisoners respectively). The primary judge approached this matter by describing the competing contentions of the parties as to the proper construction of s 7(c) before then applying her Honour's findings of fact in relation to the competing constructions.

17 Below, Mr Traljesic advanced two alternative constructions of s 7(c). The first was that the provision was satisfied where other prisoners had mistreated him in the past because of his political opinion and the prison authorities, while aware of this mistreatment and the reasons for it, did nothing to protect him. On this construction of s 7(c), Mr Traljesic submitted that there was no requirement for any further element of State sanction or acquiescence (see *Traljesic below* at [60]).

18 The alternative construction advanced by Mr Traljesic was that it was sufficient to demonstrate that there was a breach of a duty of care by the prison authorities (falling short of acquiescence or condonation) (at [128]).

19 By contrast, Bosnia and Herzegovina submitted that the proper construction of s 7(c) is that the word "punished" is not capable of referring to the harm that a person is likely to experience at the hands of fellow prisoners, or any other non-State official, unless that behaviour was "caused by or condoned by the state" (at [67]). This construction was ultimately adopted by the primary judge, as is reflected in [105] and [107] of her Honour's reasons for judgment, but she found that the evidence fell short of demonstrating the State's complicity or condonation. At [105] her Honour stated:

> In conclusion, I do not accept that the phrase "may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty" in s 7(c) is properly to be construed as extending to harm inflicted on a person in prison while serving a sentence of imprisonment, or being held in some other form of state detention, unless the requesting state can be said to be involved in, complicit in, or condoning of, both the harm, and the reasons for the harm.

20 It is desirable to summarise the primary judge's reasoning concerning the construction of s 7(c).

21 Her Honour accepted at [71] that imprisonment is "well within" the concept of punishment, referring to *Snedden* at [23] per French CJ.

22 Her Honour stated at [72] that the purpose of s 7(c) is tied to the requesting State's administration of its criminal justice system and its text focuses on "conduct by the state".

23 Her Honour at [76] rejected Mr Traljesic's suggested analogy with refugee law and its central focus on protection, citing *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (*Khawar*) at [19] per Gleeson CJ and at [60]-[61] per McHugh and Gummow JJ. Her Honour stated at [78] that "protection is not the focus of the extradition objections in s 7". Furthermore, although "there may be some commonality in the history and development of extradition objections and protection under the *United Nations Convention Relating to the Status of Refugees* (opened for signature 28 July 1951, 189 UNTS 137, entered into force 22 April 1954) (**Refugees Convention**), the exceptions as now set out in s 7 should not be construed as co-extensive with, or necessarily serving the same purpose as, protection under the Refugees Convention".

24 The primary judge observed at [81] that the context and purpose of s 7(c) are "intended to capture direct conduct by or on behalf of the requesting state and conduct in which the requesting state will either be complicit, or will condone". The focus of the exemptions is on the "manner" in which the requesting State administers its criminal justice system. For example, systematic targeting by prison guards may fall within s 7(c) if "by reason of its systematic nature that conduct can be attributed to the requesting state, or be found to have been condoned by it".

25 In support of his alternative construction, Mr Traljesic submitted that the State owed a duty of care to prisoners, recognised by both Australian domestic law and international law, and that this informed the proper construction of s 7(c). The primary judge described this submission as to going to the question of how the court or a magistrate might go about its fact finding on the issue whether the State condoned or was complicit in the harm feared by the person. Her Honour said that if State condonation of, or complicity in, the actions of

non-State actors, was to have a role in s 7(c), "there would need to be state condonation of, or complicity in, not only the conduct, but also the reasons for it" (at [102]).

26 The primary judge then considered *Kalinovas v Republic of Lithuania* [2015] FCA 961 (*Kalinovas*). At [104] of *Traljesic below*, the primary judge expressed substantial agreement with the approach taken by Bennett J in *Kalinovas* at [96]:

> [Bennett J] accepted that how a person is treated while she or he is detained, or serving a sentence of imprisonment, is capable of coming within s 7(c), provided that the causal nexus required is met and — critically — provided that the treatment occurs at the hands of, on behalf of, or with the acquiescence of the requesting state.

27 The primary judge concluded that the extradition objection in s 7(c) is not to be construed as extending to harm inflicted on a person in prison *unless* the requesting State was involved in, complicit in, or condoning of, both the harm and the reasons for it (at [105]). (Ms De Ferrari (who appeared with Ms Lucas for Mr Traljesic) confirmed in oral address that the correctness of *Kalinovas* was not challenged on the appeal).

28 From [111]ff in *Traljesic below*, the primary judge made relevant findings of fact. She found that Mr Traljesic's account of his experiences within Bihac prison should be accepted (see [118]), which included his evidence that on several occasions he was seriously mistreated by other prisoners by reason of at least his political opinions. Her Honour further accepted (at [119]) that, when Mr Traljesic escaped custody in 2007, there were substantial grounds for believing that, if he was to be surrendered to Bosnia and Herzegovina at that time, he would have been seriously mistreated by other prisoners by reason of his political opinions, actual or perceived.

29 The primary judge then asked whether, in 2015, there were still substantial grounds for that belief. After referring inter alia to the three letters concerning the conditions of prisons in Bosnia and Herzegovina post-2007, including the Bihac prison, her Honour found that it was "not possible to give the evidence any real weight" with respect to the determination of the extradition objection. Her Honour was not satisfied, on the material before her, that there was sufficient probative and reliable material to be persuaded that "circumstances in prisons in Bosnia and Herzegovina have changed" to the extent that there was no real possibility Mr Traljesic would be subjected to the kind of harm that was found by the primary judge to have occurred in 2007 (at [124]).

30 From [126]ff, the primary judge applied the facts as found by her to each of the three constructions of s 7(c) as advanced by the parties. She observed at [127] that, when applying the relevant factual findings to Mr Traljesic's primary construction of s 7(c):

> If all that is required by the [appellant's] construction is for the harm to occur while a person is undergoing "punishment" by way of serving a sentence of imprisonment, and for that harm to occur for one of the reasons set out in s 7(c), then my factual findings would lead to a conclusion in favour of [Mr Traljesic].

31 If, however, Mr Traljesic's alternative construction was adopted, the primary judge stated at [128] that it required a "positive finding of some breach of a duty of care by the prison authorities (falling short of acquiescence or condonation)". Despite commenting at [129] that, if the common law applied, one might find a

breach of a duty of care, "the common law of Australia cannot be applied to the conduct of officials in Bosnia and Herzegovina". And, with respect to any international obligations, "the Court does not know (and the Magistrate did not know) whether Bosnia and Herzegovina has assumed any such obligations". Accordingly, her Honour at [130] could not see how, if Mr Traljesic's alternative construction was adopted, the extradition objection was available to him under s 7(c) "where there could be said to be evidence of omissions but no evidence of a correlative legal duty".

32 As noted above, however, the primary judge made clear that she preferred the first respondent's construction of s 7(c). Applying that construction to the facts as found by her Honour, the primary judge's ultimate conclusion is reflected in [131]:

> … the evidence does not rise to the point of the Court being able to say that there are substantial grounds for believing that the prison authorities of Bosnia and Herzegovina (assuming for the purpose of this argument that those authorities can be equated with the state of Bosnia and Herzegovina) were complicit in or condoned the mistreatment of the [appellant] by the other prisoners, and condoned or were complicit in the reasons for that treatment. It might be said that the evidence shows an abject lack of concern for the [appellant's] welfare. Whether that was for lack of resources, personality, apathy, indifference, or a reflection of general community attitudes to prisoners in Bosnia and Herzegovina, or for some other reason, is not apparent on the evidence.

The Evidence Act objection

33 In the review proceeding below, Mr Traljesic objected to some of the evidence which Bosnia and Herzegovina had sought to tender. His objection relied on the distinction between a s 19 proceeding (where the *Evidence Act 1995* (Cth) does not apply) and a s 21 review proceeding (where it has been held that the *Evidence Act* does apply). The documents in question were three letters, in both their original and translated English forms, being:

(a) a letter dated 3 February 2015 from Mirsad Demirovic, Director, Correctional Facility, Bihac;

(b) a letter dated 10 February 2015, also from Mirsad Demirovic; and

(c) a letter dated 26 February 2015 from Nikola Sladoje, Assistant Minister, Ministry of Justice of Bosnia and Herzegovina.

34 The letters addressed the then current conditions in prisons in Bosnia and Herzegovina, including the Bihac prison where it was proposed that Mr Traljesic be returned to serve the balance of his sentence. The first respondent submitted that these documents were admissible under s 19(6) of the *Extradition Act*, which provides that (subject to preserving the inadmissibility of evidence contradicting the extradition offence conduct in s 19(5)) "any document that is duly authenticated is admissible in the proceedings". The primary judge held that s 19(6) did not overcome the usual operation of the *Evidence Act* to exclude documents containing hearsay statements. Her Honour held that the term "admissible" in s 19(6) means that the document can form part of the record in a s 19 proceeding before the magistrate and can be relied upon and therefore admitted. Her Honour held that, on a s 21 review, such a document comes before the Court by operation of s 21(6)(d), which relevantly provides that "subject to section 21A, the court to which the application or appeal is made shall have regard only to the material that was before the magistrate or Judge".

35 Her Honour observed at [57] that there was "no occasion to consider the application of either ss 59 or 135 of the *Evidence Act*" because the three letters were part of the record before the magistrate pursuant to s 19(6) of the *Extradition Act*. Thus they could be considered on a review under s 21(6)(d), but "the weight the court might give it may differ from the weight given to it by the s 19 Magistrate". As noted above, the primary judge's consideration of the three letters is the subject of ground 2 in the appeal.

Mr Traljesic's submissions summarised

(a) Extradition objection ground

36 Mr Traljesic emphasised that there was no challenge to his evidence below (which was accepted by the primary judge). In particular, Mr Traljesic emphasised the primary judge's findings at [36] of *Traljesic below* that:

(a) the beatings were inflicted on him by reason of his political opinions;
(b) the prison authorities knew of the beatings and the reasons why he was being targeted and being harmed;
(c) there was disdain by the prison authorities as to what had happened to him and might continue to happen to him by the other prisoners; and
(d) when he complained to the authorities it attracted retribution from the other prisoners.

37 Mr Traljesic emphasised that the primary judge rejected the contentions of Bosnia and Herzegovina that:

(a) the prison authorities had taken steps to investigate his allegations of assaults by other inmates; and
(b) the prison authorities had punished some of the perpetrators of the beatings.

38 Mr Traljesic submitted that the primary judge found that there were, in 2007 and continuing, "substantial grounds for believing that if the applicant were to be surrendered to Bosnia and Herzegovina, and placed back into a prison in Bosnia and Herzegovina, he would be seriously mistreated by other prisoners by reason of his political opinions, actual or perceived" (at [119] of *Traljesic below*).

39 Mr Traljesic submitted that actions of other inmates or of guards, such as beatings of a prisoner, would be "punishment" if those actions were caused or condoned by the extradition requesting country.

40 In broad terms, it was submitted that her Honour erred in relation to the causal nexus implicit in the phrase *by reason of* within s 7(c), where she accepted that there had to be some separate "proof" of the first respondent's reason for condoning the actions of the other inmates, over and above the fact that it knew that the violence, which it was condoning, was being inflicted by those non-State actors because of Mr Traljesic's political opinions. He submitted that the extradition country is doing the punishing when it causes or condones what is being done by non-State actors *by reason of* one of the grounds "knowing that to be the motivation for the conduct". The causal nexus between punishment and political opinions is therefore satisfied, so Mr Traljesic contended.

41 It was submitted that her Honour's conclusion, by characterising the position of Bosnia and Herzegovina as "agnostic", could not stand in light of her Honour's factual findings. Specifically, the findings of fact that the other inmates were beating Mr Traljesic with knowledge that they were doing so *by*

reason of his political opinions, and the fact that Bosnia and Herzegovina did not care that the politically motivated violence continued, meant that the conduct of the first respondent amounted to "condoning".

42 Mr Traljesic submitted that this construction was supported by the following considerations:

(a) the ordinary English meaning of "condone", being to allow something that is wrong to continue;

(b) the dignity of persons must be guaranteed when deprived of liberty under the same conditions as for that of free persons (referring to the *International Covenant on Civil and Political Rights* (opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976) (ICCPR));

(c) the decision of the European Court of Human Rights in *Slimani v France* (2004) 43 EHRR 49 at [27], where it was held that, because detainees were entirely under the control of authorities and were vulnerable, the State authorities are under a duty to protect them;

(d) a State having an obligation to ensure safety of prisoners and in giving effect to its obligations, must not discriminate against prisoners (under the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*); and

(e) the State in running a prison owes a duty of care to prisoners and an affirmative obligation to take greater care if a particular prisoner is at greater risk, relying on *New South Wales v Bujdoso* (2005) 227 CLR 1.

43 In reply, Mr Traljesic contended that the intention of s 7(c) was to "enlarge the 'political offence' exception" and was "directed to *protecting* people from extradition to a country in which they might be punished on account of the listed attributes" (original emphasis) (citing *Snedden* at [21] per French CJ).

44 With regard to the nexus between the risk of harm (ie punishment) and the grounds in s 7(c), Mr Traljesic cited *Khawar* at [27]-[31] per Gleeson CJ and at [120] per Kirby J for the proposition that, in the context of harm caused by the conduct of non-State actors and where the State condones that conduct, the motivation for inflicting the harm could be either that of the non-State actors or that of the State.

(b) The Evidence Act ground

45 Mr Traljesic also challenged the primary judge's decision to admit the three letters notwithstanding his objection under ss 59 and 135 of the *Evidence Act*. He contended that the primary judge erred in not accepting that those provisions were relevant to the proceeding under the *Extradition Act*. Mr Traljesic contended that it did not follow that the Court in a s 21 review is mandated to have regard to *all* of the material that was before the magistrate (as emphasised by the first respondent). In looking at s 21(6)(d), the Court can have regard "*only* to that material that was before the magistrate or Judge" (original emphasis), subject however to s 21A.

46 Mr Traljesic further contended that the primary judge erred in not following decisions such as *Cabal v United Mexican States* (2001) 108 FCR 311 (*Cabal*) and *Dutton v O'Shane* (2003) 132 FCR 352, when her Honour stated in *Traljesic below* at [55] that the "intention of the scheme" might be impeded if the provisions of the *Evidence Act* applied to all the relevant material.

47 Mr Traljesic submitted that the "scheme" (apart from s 21A) was devised prior to the enactment of the *Evidence Act*, therefore making it highly doubtful that any relevant intention, post-1995, could be discerned.

First respondent's submissions summarised

(a) Extradition objection ground

48 The first respondent submitted that her Honour made findings that:

(a) the evidence did not support that the prison authorities "were complicit in or condoned the mistreatment of the applicant by the other prisoners, and condoned or were complicit in the reasons for the treatment"; and

(b) it was not apparent on the evidence whether the prison authorities' "lack of concern for the applicant's welfare … was for lack of resources, personality, apathy, indifference or a reflection of general community attitudes to prisoners in Bosnia and Herzegovina, or for some other reason" (*Traljesic below* at [131]).

49 The first respondent submitted that these findings were correct and were not challenged. It submitted that Mr Traljesic's construction of the word "condone" is misconceived as he treats a word in a judgment as if it were part of the statutory text.

50 The first respondent submitted that the primary judge was correct to accept that the purpose of s 7(c) "is tied to the requesting state's administration of its criminal justice system; its context arises from mutual assistance in criminal matters between states rather than more general protection of individuals; and its text focuses, in my opinion, on conduct of the state" (referring to [72] and [81] of *Traljesic below*). It is not sufficient, therefore, to engage s 7(c) if there are substantial grounds merely to believe that, on surrender, a person may be subjected to serious mistreatment "by other prisoners" by "reason of his political opinions". Section 7(c) is only engaged with non-State actors if there is evidence that the requesting State "*supported, condoned, or was complicit in* the person's mistreatment by other prisoners" (original emphasis).

51 The first respondent further contended that proof of complicity, support or condonation requires proof of more than mere knowledge of a risk of harm for a specified reason because such a failure may be explicable for a range of reasons, including resource constraints, incompetence or indifference. The first respondent submitted that the ordinary meaning of the words in s 7(c) supports this construction.

52 The purpose of s 7(c), so submitted the first respondent, is to ensure the extradition process is not used to further the political or other discriminatory agenda of the requesting State. It is not to provide protection for persons from the general conditions within the requesting State.

53 Finally, the first respondent submitted that it was not saying that the risk that a person will be harmed by other prisoners on surrender to a requesting State is irrelevant if it does not give rise to an extradition objection under s 7(c). Rather, such a matter properly falls to be considered by the Attorney-General in the exercise of the wide discretion at the fourth stage under s 22 of the *Extradition Act* in deciding whether to surrender a person to the requesting State.

(b) The Evidence Act ground

54 In relation to ground 2, the first respondent submitted that the primary judge was correct to recognise that it would be inconsistent with the scheme of the

Extradition Act for the material that was before the Federal Court in conducting a review in a s 21 proceeding to be "entirely different to that considered by the s 19 Magistrate" (*Traljesic below* at [55]). The better view was that, once the scope of the material is determined by the magistrate under s 19, then by reason of s 21(6)(d), that material forms the material on a review under s 21, and, subject to s 21A, the Court on review may consider "only" that material and give it such weight as it thinks appropriate.

55 The first respondent submitted that this approach should be accepted because:

(a) applying the provisions of the *Evidence Act* in a s 21 proceeding would lead to an anomalous result that the scheme of the *Extradition Act* did not intend. In almost every case, had the *Evidence Act* provisions applied to the s 21 proceeding, much of the "duly authenticated" material (as stipulated by s 19(3) of the *Extradition Act*) that was before the magistrate and which the *Extradition Act* intended to be admitted in a duly authenticated, hearsay form in the s 19 proceeding, would be objectionable in the s 21 proceeding;

(b) the s 21 proceeding is in the nature of a rehearing in that the Court is required to determine whether the magistrate's s 19 decision "was right or wrong"; and

(c) when inquiring into whether the magistrate's decision "was right or wrong", the Court must have regard to "all" of the material that was before the magistrate, citing *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 262. If the rules of evidence applied to all the material at the s 19 stage, then the Court would be liable to exclude evidence that was not only properly admissible in the s 19 proceeding pursuant to s 19(6), but was perhaps of critical relevance to the magistrate's decision.

56 Alternatively, the first respondent submitted that, even if the primary judge did err, the primary judge placed no "real weight" on the relevant documents.

Disposition of the appeal

(a) Extradition objection ground

57 For the following reasons, we consider that Mr Traljesic has not demonstrated any relevant error in respect of the primary judge's construction of s 7(c) or her Honour's application of the facts as found to that construction.

58 First, on the issue of construction, it is well established that the phrase "by reason of" in s 7(c) requires a causal connection or nexus between, relevantly, the apprehended punishment and the person's political opinions (see, for example, *Snedden* at [21] per French CJ and at [69] per Gummow, Hayne, Crennan, Kiefel and Bell JJ and, for the provenance of the relevant statutory collocation, see *Snedden* at [13]-[21] and [66]-[72]).

59 Secondly, we respectfully agree with the primary judge's view that the focus of the extradition objection in s 7(c), along with the other extradition objections in s 7, is on the requesting State's administration of its criminal justice system. As her Honour pointed out at [106] in relation to stage three:

> Section 7(c) has, to be sure, a protective function insofar as the individual whose surrender is sought is concerned. However its context and purpose is different from the Refugees Convention. The scheme established by the Act is intended to facilitate the prosecution, trial and punishment of fugitive offenders, in accordance with the conditions and limitations agreed upon by the particular requesting state

> and Australia. In that sense, Australia's concern as evinced in the Act is with the conduct of the requesting state in the manner in which its system of criminal justice is administered, and applied to an individual. Section 7 is concerned with reasons, related to the conduct, practices or attitudes (and, in relation to provisions such as s 7(a), the politics) of the requesting state, as a polity. It does not have a more general protective function.

60 That is not to say that the conduct of non-State actors is irrelevant. The likely conduct of other prisoners in Bihac prison towards Mr Traljesic was relevant at stage three, but only if the necessary causal connection is met by there being evidence which supported a finding that the State was complicit in, or condoned, that conduct. As the primary judge found in the particular circumstances here, this required evidence which established not only that the prison authorities (or State) knew of the beatings and the reasons for them, but also that the lack of protection provided by the authorities (or State) was *because of* Mr Traljesic's political opinions. It was insufficient that the authorities knew of the beatings and the reasons for them. Mr Traljesic, who carried the onus of making good the claimed extradition objection, needed to establish that the reaction of the authorities (or State) was because of his political opinions. There was no such evidence. As the primary judge correctly pointed out, the reaction of the authorities (or State) could have been attributed to a range of matters which would fall short of supplying the requisite causal connection, such as lack of resources, personality or a general community indifference to prisoners in captivity in Bosnia and Herzegovina.

61 The central significance of the requisite causal connection in s 7(c) and the evidence which is required to establish that nexus is well illustrated by *Snedden*. The respondent there claimed that there was an extradition objection under s 7(c) because he had political opinions which motivated him to join the Serbian paramilitary forces and to fight against Croatia in the Serbian-Croatian conflict. He further claimed that, in trying him in Croatia for war crimes against captured Croatian soldiers and civilians, he would not have the benefit of a mitigating factor which is normally taken into account by Croatian courts in sentencing for such crimes, namely service in the Croatian armed forces. Critically, the plurality rejected that claim for reasons which are stated in [74] and which are apposite here:

> Acceptance that the respondent had political opinions, and acceptance that such opinions motivated him to join the Serbian forces, and precluded his joining the Croatian forces, is not enough to sustain an objection under s 7(c). *It is necessary to show that the courts in Croatia apply the mitigating factor because of political opinions*. The evidence supported the contrary conclusion.

(Emphasis added.)

62 Thirdly, we respectfully consider that the primary judge was correct to reject Mr Traljesic's alternative constructions of s 7(c) for the reasons given by her Honour and as summarised above.

63 Fourthly, we also respectfully agree with the primary judge's rejection of Mr Traljesic's contentions that, in construing s 7(c) of the *Extradition Act*, a strong analogy exists with the central focus on protection under the Refugees Convention and that the analysis in *Khawar* concerning State and non-State actions should apply to the construction and application of s 7(c). In *Cabal* at [124], Hill, Weinberg and Dowsett JJ observed that s 7(c) appeared to derive from Art 33(1) of the Refugees Convention, as well as from Art 3(2) of the

European Convention on Extradition (opened for signature 13 December 1957, ETS No. 024, entered into force 18 April 1960). This does not mean, however, that caselaw relating to the non-refoulement obligation in a refugee context applies equally to the construction and application of s 7(c). As the primary judge explained, although there is some commonality in the history and development of extradition objections and protection under the Refugees Convention, the exceptions in s 7 of the *Extradition Act* should not be construed as being co-extensive with, or serving the same purpose as, protection under the Refugees Convention.

64 Although there is some overlap, there are significant differences between extradition and refugee laws in Australia. For one thing, Australia's extradition laws, as embodied in the *Extradition Act*, reflect an understandable concern on the part of Australia and other countries with whom Australia has extradition arrangements, to avoid fugitives escaping criminal justice, subject to recognised exceptions. The concept of comity between nations with whom Australia has entered into extradition arrangements provides a very different context to the adoption in relevant provisions of the *Migration Act 1958* (Cth) of some of Australia's obligations under the Refugees Convention. In particular, those obligations, as incorporated into Australia's domestic law, apply to any country in respect of which a refugee fears persecution, irrespective of whether that country has mutual obligations. The relevance of considerations of comity between nations in the context of extradition is reflected in the fourth stage of the extradition process and, in particular, in the breadth of the Attorney-General's discretion under s 22(3)(f) of the *Extradition Act*.

65 In the refugee context, the focus is upon protection of the person against the risk of persecution. However, under the *Extradition Act*, the focus is upon nations assisting each other in the administration of their respective criminal justice systems in which punishment is a State sanctioned form of harm and is an unexceptional and necessary aspect of the administration of that system. Accordingly, the fundamental underlying purpose and object of the *Extradition Act* is quite different from the Refugees Convention. The processes under the *Extradition Act* are only engaged where the executive has already made a judgment at a macro level as to the legal system of another country with which extradition arrangements have been entered into which necessarily precedes the declaration of a particular nation as an extradition country for the purposes of the *Extradition Act*.

66 Under the Refugees Convention, the concept of persecution does different work (unwilling or unable to protect). The question under the *Extradition Act* is whether there is punishment by reason of a particular characteristic. In the context of the criminal justice system, the circumstances in which actions of non-State actors will involve punishment *by the State* will be narrower than persecution for the purposes of the Refugees Convention, where a central question is whether the State is failing in its duties to protect the individual against persecution. In other words, in the refugee context, the central focus in not upon *who* (*Khawar* at [27]); it is sufficient if the persecution is by a non-State actor and the authorities are unable to address the fear of persecution by affording an adequate level of protection.

67 We respectfully agree with the primary judge that the word punishment in the context of s 7(c) bears the ordinary meaning of a sanction imposed by the State. This is supported by the text and context of s 7(c):

(a) the Parliament chose to use the word "punishment" with its peculiar association with State action, and not broader concepts such as "cruel, inhuman or degrading treatment or punishment" employed in, for example, Art 7 of the ICCPR, or "persecution" as employed in the Refugees Convention; and

(b) as the primary judge held at [80], s 7(c) picks up together with punishment, the different aspects of a requesting State's criminal justice system. Similarly, s 7(b) is concerned with the proscribed purposes for which a person might be prosecuted or punished by the requesting State.

68 We accept the first respondent's submission that the international obligations on which Mr Traljesic relies (in particular Art 7 of the ICCPR) do not assist in construing s 7(c). There is a lack of any alignment between the terms of s 7(c), on the one hand, and the relevant international obligations, on the other hand. Section s 7(c) is limited to "punishment" and unlike Art 7 of the ICCPR, does not refer also to "treatment". Moreover, the proscription against cruel and inhuman punishment is an absolute and non-derogable human right. Limiting the circumstances in which a non-derogable right applies is immediately to derogate from the right, inconsistently with that right.

69 In any event, as the first respondent pointed out, even if the international law authorities relied upon by Mr Traljesic established that there can be a contravention where one group of prisoners mistreats another, that provides no assistance in interpreting s 7(c). In particular, it does not mean that that issue has to be addressed at the third stage of the extradition process. It can be addressed at the fourth stage. In this regard, s 22(3)(b) implements Australia's non-refoulement obligation in Art 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987), in providing that the Attorney-General may surrender a person if, relevantly, she or he "does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture." We consider that this is a strong indicator against any implication that the Parliament intended that matter to be a bar to a determination that a person is eligible for surrender by a magistrate or a court on review at stage three of the extradition process. Whether other international obligations might be breached if a person were extradited is a matter which can also be considered under s 22(3)(f) (see, for example, *Rivera v Minister for Justice and Customs* (2007) 160 FCR 115 at [160]-[161] per Buchanan J and *O'Connor v Adamas* (2013) 210 FCR 364 at [468] and [473] per Barker J).

70 Ultimately, the question whether or not particular conduct involving non-State actors and the State falls within s 7(c) is necessarily a question of fact and degree. However, in our view, knowledge of the conduct and the reasons for it without more is not a sufficient nexus. Having regard to the evidence before the primary judge, the reason why the prison authorities in Bosnia and Herzegovina withheld protection is unknown. Accordingly, the necessary causal nexus was not established.

(b) The Evidence Act ground

71 Ground 2 can be disposed of shortly. At [119], the primary judge found that:

> … there were, at the time he escaped custody in 2007, substantial grounds for believing that if he were to be surrendered to Bosnia and Herzegovina, and placed

back into a prison in Bosnia and Herzegovina, he would be seriously mistreated by other prisoners by reason of his political opinions, actual or perceived.

72 The question was then whether, in 2015, there were still substantial grounds for that belief. On that issue, Bosnia and Herzegovina submitted in the Court below that less weight should be given to Mr Traljesic's evidence because it related to events in 2007 and that the situation in Bosnia and Herzegovina and, in particular, in its prisons had changed by 2014. Bosnia and Herzegovina relied in support of that submission upon several reports by the US State Department (dated 24 May 2012 and 27 February 2014) together with the three letters referred to earlier which had been admitted before the magistrate. Mr Traljesic objected to the admission of that evidence in the proceeding before the primary judge in conducting a review of the magistrate's decision. The primary judge's core reasoning in rejecting that objection is reflected in [123] and [124] of *Traljesic below*:

> 123 … I have ruled that the correspondence should properly be before the Court on the s 21 review. However, in my opinion, it is not possible to place any real weight on it, in the absence of an opportunity for the applicant to cross-examine the authors of the correspondence, or at least someone called on behalf of Bosnia and Herzegovina to depose to the truth of what is in that correspondence. This was the issue at the centre of the applicant's extradition objection, and this material remains wholly untested, by reason of a forensic choice made by Bosnia and Herzegovina. *In my opinion, it is not possible to give the evidence any real weight, in relation to the determination of the extradition objection*. The situation may be different if aspects of this correspondence are subsequently put to the Attorney-General under s 22, and in effect become an assurance relevant to the Attorney-General's residual discretion under s 22(3)(f).
>
> 124 I am not satisfied, on the material before the Court, that there is sufficient probative and reliable material for the Court to be persuaded that circumstances in prisons in Bosnia and Herzegovina have changed so much that there is no real possibility the applicant will be subjected to the kinds of harm I have accepted he was subjected to in 2007 at the hands of other prisoners, and for the reasons I identified: namely, his actual or imputed political opinions. The assurance given by Bosnia and Herzegovina was general, unsworn and untested and is insufficiently probative to change my view. The assurance was also, of course, self-serving in the sense of being advanced for the purpose of securing the applicant's surrender. That is one factor which made all the stronger the need for it, and the other material submitted by the requesting state, to be tested.

(Emphasis added.)

73 In short, her Honour did not give the three letters any real weight. Accordingly she was not satisfied that the situation in prisons in Bosnia and Herzegovina had changed so as to eliminate a real possibility that the appellant would still be subjected to the kinds of harm to which he had been subjected in 2007. In those circumstances, even if ground 2 were upheld and the Court were to find that the three letters were not admissible on the s 21 review in the Court below (and by implication also on this appeal), it would make no difference to the outcome and could not found the relief which Mr Traljesic seeks on the appeal. In effect, therefore, ground 2 seeks an advisory opinion from this Court and should be dismissed for that reason.

Conclusion

74 For these reasons, the appeal is to be dismissed. The first respondent seeks its costs of the appeal. No reason has been demonstrated why the costs should not follow the event as is the normal course. We consider that there is no need to make a separate determination for the purposes of s 21(6)(g) of the *Extradition Act* because such a determination was made by the Court on 20 April 2016.

75 The Court expresses its gratitude to Ms De Ferrari and Ms Lucas of counsel, as well as Mr Thomas, solicitor, all of whom acted for Mr Traljesic on a pro bono basis and provided helpful assistance to the Court.

Orders accordingly

Solicitor for the appellant: *G Thomas*.

Solicitors for the respondents: *Australian Government Solicitor*.

RAFFAELE PICCOLO