FEDERAL COURT OF AUSTRALIA

Snedden v Republic of Croatia [2009] FCA 30

EXTRADITION – extradition proceedings before magistrate – review of magistrate's decision – extradition objection – substantial grounds for believing that there are extradition objections – *Extradition Act 1988* (Cth) s 21

EXTRADITION – extradition proceedings before magistrate – identification of material before the magistrate – *Extradition Act 1988* (Cth) s 21

EXTRADITION – abuse of process – whether proceeding should be stayed in the Federal Court of Australia because of delay in the prosecution of extradition offences in extradition country

CONSTITUTIONAL LAW – whether applicant entitled to be tried before a jury by reason of his being charged with offences 'in connection with' Commonwealth indictable offences – *Commonwealth of Australia Constitution Act 1901* (Cth) s 80

Commonwealth of Australia Constitution Act 1901 (Cth) s 80
Evidence Act 1995 (Cth)
Extradition Act 1988 (Cth) ss 5, 7(c), 12(1), 15, 16, 19, 21, 55
Extradition (Croatia) Regulations 2004 (Cth)
Geneva Conventions Act 1957 (Cth) ss 7, 10
Judiciary Act 1903 (Cth) s 39B

Ahmad et al v The Government of the United States of America [2006] EWHC 2927 (Admin) referred to
Cabal and Another v United Mexican States and Others (2001) 108 FCR 311 followed
Cabal and Another v United Mexican States and Others (No 2) (2000) 172 ALR 743 followed
Damir Travica v The Government of Croatia [2004] EWHC 2747 (Admin) referred to
Deputy Commissioner of Taxation v Edelsten (unreported, Burchett J, 10 March 1988) referred to
Dutton v O'Shane and Another (2003) 200 ALR 710 followed
Jago v The District Court of New South Wales and Others (1989) 168 CLR 23 referred to
Kingswell v The Queen (1985) 159 CLR 264 referred to
Pasini v United Mexican States and Others (2002) 209 CLR 246 referred to
Rahardja v Republic of Indonesia [2000] FCA 1297 followed
Re Colina and Another; Ex parte Torney (1999) 200 CLR 386 referred to
Rogers v The Queen (1994) 181 CLR 251 referred to
Sankey v Whitlam and Others (1978) 142 CLR 1 referred to

Spautz v Williams [1983] 2 NSWLR 506 referred to
Vasiljkovic v The Commonwealth of Australia and Others (2006) 227 CLR 614 referred to
Wiest v Director of Public Prosecutions and Another (1988) 23 FCR 472 referred to

DANIEL SNEDDEN v REPUBLIC OF CROATIA
NSD 705 OF 2007

COWDROY J
3 FEBRUARY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 705 OF 2007**

BETWEEN:	**DANIEL SNEDDEN** **Applicant**
AND:	**REPUBLIC OF CROATIA** **Respondent**

JUDGE:	**COWDROY J**
DATE OF ORDER:	**3 FEBRUARY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The Applicant pay the costs of the Respondent.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 705 OF 2007**

BETWEEN:	**DANIEL SNEDDEN** **Applicant**
AND:	**REPUBLIC OF CROATIA** **Respondent**

JUDGE:	**COWDROY J**
DATE:	**3 FEBRUARY 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The applicant, who is otherwise known as Dragan Vasiljkovic or Captain Dragan, applies under s 21 of the *Extradition Act 1988* (Cth) ('the Extradition Act') for a review of the decision of Deputy Chief Magistrate Cloran ('the Magistrate') made on 12 April 2007 which determined that the applicant is eligible for surrender to the Republic of Croatia pursuant to s 19(1) of the Extradition Act. The application is also made by way of an appeal under s 39B of the *Judiciary Act 1903* (Cth).

FACTS

2 On 28 November 2005 the Sibenik County Public Prosecutor's Office in the Republic of Croatia submitted a request to a magistrate of the County Court of Sibenik ('the Sibenik County Court') for investigation into criminal offences allegedly committed by the applicant contrary to Articles 120 and 122 of the Basic Criminal Code of the Republic of Croatia during the conflict between the armed forces of the Republic of Croatia and the armed Serbian paramilitary troops of the Republic of Krajina. The applicant was said to have been a commander of a special unit of Serbian forces.

3 On 12 December 2005 the Sibenik County Court accepted the prosecutor's claim that there was a *'well-founded suspicion'* that the applicant had committed the alleged offences.

4 On 10 January 2006 the Sibenik County Court ordered that a warrant for the

applicant's arrest be issued.

5 On 19 January 2006, in response to a request from the Republic of Croatia, the applicant was arrested in Sydney pursuant to a provisional arrest warrant issued under s 12(1) of the Extradition Act.

6 On 20 January 2006 the applicant was remanded in custody pursuant to s 15 of the Extradition Act. The applicant made three unsuccessful applications for bail on 27 January 2006, 3 March 2006 and 12 December 2007. The applicant remains in detention in a New South Wales correctional centre.

7 On 17 February 2006 Australia received an *'extradition request'* to extradite the applicant to the Republic of Croatia. An *'extradition request'* is defined in s 5 of the Extradition Act as *'a request in writing by an extradition country for the surrender of a person to the country'*.

8 The *Extradition (Croatia) Regulations 2004* (Cth) ('the Extradition Regulations') made pursuant to s 55 of the Extradition Act declares the Republic of Croatia to be an *'extradition country'*. An *'extradition country'* is defined in s 5 of the Extradition Act to include a country that is declared by the Extradition Regulations to be an extradition country.

9 On 18 March 2006 the extant Minister of Justice and Customs issued a notice of receipt of the extradition request pursuant to s 16 of the Extradition Act.

10 The extradition request was made in respect of two alleged war crimes against prisoners of war, contrary to Article 122 of the Basic Criminal Code of the Republic of Croatia, and one alleged war crime against the civilian population, contrary to Article 120 of that same Code ('the extradition offences'). The request contained particulars of the extradition offences which allegedly took place in Knin in June and July 1991; in the village of Bruska near Benkovac in February 1993; and in Glina in July 1991. The request enclosed a copy of the Sibenik County Court decision and order.

11 An *'extradition offence'* is defined in s 5 of the Extradition Act to include, in relation to a country other than Australia, an offence against the law of the country for which the

maximum penalty is death or imprisonment or other deprivation of liberty for a period of not less than 12 months, or if the offence does not carry a penalty under the law of that country, conduct which, under an extradition treaty in relation to that country, is required to be treated as an offence for which the surrender of a person is permitted by the country and Australia.

12 In December 2006 the Magistrate conducted the inquiry pursuant to s 19(1) of the Extradition Act to determine whether the applicant was eligible for surrender to the Republic of Croatia in relation to the extradition offences for which his surrender was sought. Section 19(2) of the Extradition Act provides that the person whose extradition is sought is only eligible for surrender to the country seeking extradition if, inter alia,:

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

13 An '*extradition objection*' is defined in s 7 of the Extradition Act which relevantly provides:

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

14 The Magistrate was not satisfied that there were substantial grounds for believing that there was an extradition objection in relation to the extradition offences. The Magistrate determined that the applicant was a person who was eligible for surrender to the Republic of Croatia pursuant to s 19(9) of the Extradition Act.

15 Section 21(1) of the Extradition Act provides, inter alia, that where an order has been made by a magistrate of a State or Territory under s 19(9) of the Extradition Act in relation to a person whose surrender is sought by an extradition country, that person may apply to the

Federal Court for a review of such order. The applicant seeks a review of the Magistrate's decision in this Court pursuant to such subsection. The applicant submits that there are substantial grounds for believing that there is an *'extradition objection in relation to the offence'*, as provided by s 19(2)(d) of the Extradition Act, and accordingly claims that he is not eligible for surrender to the Republic of Croatia.

16 In determining whether *'substantial grounds'* exist for believing that there is an *'extradition objection in relation to the offence'*, French J (as he then was) in *Cabal and Another v United Mexican States and Others (No 2)* (2000) 172 ALR 743 ('*Cabal* (2000)') at 748-49 said:

> The requirement that the grounds for believing there to be an extradition objection should be substantial is evaluative in character. It must be applied having regard to the legislative purpose. In relation to the political objections in s 7(b) and (c) material which demonstrates a real or substantial risk that the circumstances described in those paragraphs exist or will exist may be sufficient to satisfy the condition in s 19(2)(d).

His Honour's observations were cited with approval by the Full Court in *Cabal and Another v United Mexican States and Others* (2001) 108 FCR 311 ('*Cabal* (2001)') at [137]-[138].

17 The proponent of the extradition objection bears the onus of establishing the existence of such objection: see *Cabal* (2001) at [126].

ADMISSIBLE EVIDENCE

18 Section 21(6) of the Extradition Act provides that a court conducting a review pursuant to an application under s 21(1) of such Act *'shall have regard only to the material that was before the magistrate'*: see s 21(6)(d) of the Extradition Act.

19 As a threshold question, the Court must determine the evidence which the Court may take into consideration. The Court observes that both the Magistrate and this Court are not entitled to receive evidence which contradicts an allegation that the applicant has engaged in conduct constituting an extradition offence: see s 19(5) of the Extradition Act.

20 The applicant submits that under s 21(6)(d) of the Extradition Act the Court is not limited to consider only the evidence which was accepted as exhibits before the Magistrate.

Rather, since the function of the hearing before the Magistrate under s 19(1) of the Extradition Act was administrative, not judicial, this Court is entitled to consider all material provided to the Magistrate. The applicant submits that such material comprises *'material that was before the magistrate'* regardless of whether or not such material was admitted into evidence.

21 It would follow from the applicant's submission that any document contained in the Magistrate's file should be taken into consideration by the Court including material which was rejected by the Magistrate in the course of his inquiry conducted under s 19(1) of the Extradition Act. The applicant also seeks to tender all material which was accepted into evidence by the Magistrate but in respect of which the respondent takes objection in this Court.

22 The extent of the phrase *'material that was before the magistrate'* was considered by French J in *Cabal* (2000) at 749 where his Honour said:

> Upon review by this court under s 21 the material proffered to the magistrate by the parties and received in evidence is plainly material that was before the magistrate for the purposes of s 21(6)(d). So too, in my opinion, is material that was proffered to the magistrate and was rejected by her.

23 At 751 French J said:

> In summary, I have come to the following conclusions in relation to the materials before the magistrate which may be considered by the court upon review under s 21. It is not suggested that these are exhaustive propositions, but they are reached in the light of the particular debate in this case:
>
> (1) The materials before the magistrate comprise the testimony, documents and things which were received by the magistrate in evidence and those which were tendered to the magistrate but not accepted in evidence.
>
> (2) The court upon review is not limited to consideration of material received by the magistrate in evidence but may have regard to other material tendered to the magistrate but not received in evidence.

24 On appeal to the Full Court in *Cabal* (2001) there was no issue between the parties that the material which could be considered by the reviewing court comprised material which had been rejected by the Magistrate. Accordingly, this question was not determined by the Full Court. However, their Honours expressed concern at some of the difficulties that may arise from French J's interpretation, stating at [73]:

> Both at first instance and on appeal the parties proceeded on the basis that the

> review required to be heard by the Court or the Supreme Court of a State or Territory was in the nature of a rehearing, but subject to the provisions of s 21(6)(d) of the Act which confine the Court hearing the review to the material which was before the magistrate. Likewise the parties agreed that when s 21(6)(d) referred to the material "that was before the magistrate" that included not only material which the magistrate had admitted into evidence, but also material tendered by either the extradition country or the person in respect of whom the extradition application was made, which, for whatever reasons, was rejected by the magistrate and accordingly not taken into account by her. At least the latter of these propositions is not self-evident, if only because it would permit the judge conducting the review to consider material not capable of being tested by cross-examination or which might, had it been admitted, have led to the calling of other evidence. Clearly s 21(6)(d) would not permit any cross-examination on that evidence to take place or further evidence to be considered. However, as the parties proceeded on that basis before us we are content to accept for the purposes of the appeal the correctness of this construction of s 21(6)(d).

25 In *Dutton v O'Shane and Another* (2003) 200 ALR 710 the Full Court considered whether the Magistrate's rulings as to the admissibility of documentary evidence were reviewable by the Court. Finn and Dowsett JJ at [162] said:

> As we understand it in light of the second respondent's additional submissions, the magistrate's rulings (which cover about 70 pages of transcript) were made in light of her consideration of the contents of the documents themselves and of the character of the material in question (that is, "relevance", "unqualified opinion", "unfairly prejudicial", etc). Though finding the "excluded" material not to have utility in the resolution of the question before her, the magistrate nonetheless engaged in "an active intellectual process" in relation to that material (cf *Tickner v Chapman* (1995) 57 FCR 451 at 462; *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265 at 277ff; 142 ALR 1 at 13) in and for the purposes of the s 19 determination. In light of her rulings, the magistrate may not have regarded the material as "admissible evidence" on the issue she had to determine. However, those rulings did not rob that material of the character of "material that was before the magistrate" for s 21(6)(d) purposes. They merely made it material that was disregarded.

26 In view of the above authorities, it is now established that the Court may take into account as constituting *'material that was before the magistrate'* any material that was admitted by the Magistrate as well as any material that was rejected by the Magistrate provided that in the course of rejecting the material the Magistrate had engaged in *'an active intellectual process'* in relation to that material.

The Evidence Act

27 In *Cabal* (2000) at 751 French J was not constrained by the provisions of the *Evidence Act 1995* (Cth) ('the Evidence Act') in determining what material was admissible in a review under s 21 of the Extradition Act. His Honour said:

> In considering whether there are substantial grounds for believing that an extradition objection is made out for the purposes of s 19, neither the court nor the magistrate is limited to evidence admissible, according to the rules of evidence, to demonstrate that the fact constituting the objection exists.

28 However, in *Cabal* (2001) the Full Court found that although the magistrate is not bound by the Evidence Act, the reviewing court is. At [189] the Full Court said:

> Proceedings for review brought in this Court under s 21 of the [Extradition Act] are subject to the operation of the provisions of the [Evidence Act] notwithstanding the fact that those provisions are not applicable to the initial proceedings brought before a magistrate under s 19 of the [Extradition Act].

The Court observes that the Full Court in *Dutton v O'Shane* at [147] confirmed that the reviewing court is bound to apply the Evidence Act.

29 A review under s 21 of the Extradition Act is in essence a rehearing subject to the limitation posed by s 21(6)(d) of the Extradition Act: see *Cabal* (2001) at [100]; *Dutton v O'Shane* at [148]. However, if a magistrate and the reviewing court are subject to different legislative regimes governing admissibility, and in particular if the reviewing court is subject to the regime of the Evidence Act, the ability of that court to consider material that was before a magistrate may be significantly restricted.

30 An extradition objection framed under s 7(c) of the Extradition Act requires an applicant to demonstrate, inter alia, that there are substantial grounds for believing that the extradition country's judiciary may be prejudiced against that applicant. Given the nature of such a task, it is possible that the evidence available to an applicant would be scarce. It seems incongruous that sections of that applicant's evidence should be excised in a court that is ostensibly conducting a rehearing based on the material that was before the magistrate.

31 The Court is mindful of the observations of French J in *Cabal* (2000) at 749 where his Honour said:

> The very nature of those objections [the objections are referred to in s 7(b) and (c) of the Extradition Act] is such that the evidence relied upon to make them out or to show substantial grounds for believing that they exist may be indirect or circumstantial in character.

French J's observations must be read in the context of his finding at [23], namely that this Court is not bound by the rules of evidence in conducting a s 21 review. As discussed above, the Full Court decisions in *Cabal* (2001) and *Dutton v O'Shane* have established that this Court is bound to apply the provisions of the Evidence Act when conducting the review.

EVIDENCE RELIED UPON

32 The Court admits into evidence without objection the transcript of the hearing before the Magistrate, the reasons and orders of the Magistrate, the statement of Associate Professor Peter Radan, the transcript of the evidence of Nikola Bajic, the report of the Human Rights Watch entitled 'Broken Promises: Impediments to Refugee Return to Croatia' ('the Human Rights Watch report'), the report of the Organisation for Security and Co-operation in Europe ('the OSCE') entitled 'Background Report: Domestic War Crime Trials 2005' dated 13 September 2006 ('the September 2006 OSCE report'), the OSCE report entitled 'Status Report No. 17 on Croatia's Progress in Meeting International Commitments since July 2005', the OSCE paper entitled 'News in Brief 22 February – 7 March 2006', and the respondent's further material including its amended submissions.

Reports

33 The respondent objects to the tender of a report published by Amnesty International ('the Amnesty Report') and a report of the Commission of the European Communities entitled 'Opinion on Croatia's Application for Membership of the European Union' ('the EC Report'). Such reports were contained in a bundle of material contained in a lever arch folder provided to the Magistrate. The folder was admitted by the Magistrate without objection as exhibit 17, the parties having requested that the folder which included the Amnesty Report and the EC Report be admitted without the necessity for the Magistrate to rule upon the admissibility of each document. The respondent submits that such material was not material that was *'before the magistrate'*.

34 The applicant submits that since the Amnesty Report and the EC Report were

contained within exhibit 17 such reports comprised *'material that was before the magistrate'* even though the Magistrate was not directed to such reports nor was any submission made in respect thereof.

35 French J in *Cabal* (2000) held that material that was accepted by the magistrate constituted material that was before the magistrate. As the Magistrate did not reject the reports it is accordingly not necessary to consider whether he engaged in an *'active intellectual process'* in relation to such reports: see *Dutton v O'Shane* at [162]. In these circumstances, the Court accepts the submission of the applicant that such reports constituted material which was *'before the magistrate'*.

36 The respondent also objects to the tender of the Amnesty Report on the basis that such report contains remote hearsay. Such report is relied upon by the applicant as 'background' to the Serbian and Croatian dispute.

37 The Court finds that the Amnesty Report contains hearsay and anecdotal material and therefore does not comply with the requirements of the Evidence Act. Accordingly the Amnesty Report is not admitted.

38 The respondent also objects to the tender of the EC Report on the grounds of relevance. The EC Report contains statistics which refer to the decrease in the Serbian population in the Republic of Croatia. Although the applicant claims to only rely upon such statistics by way of factual background to the application, the respondent submits that such data is relied upon by the applicant to prove general prejudice in the Republic of Croatia against Serbians.

39 The Court considers that the applicant seeks to rely upon the statistics contained in the EC Report to prove prejudice against Serbians in the Republic of Croatia. The Court however considers that such data is irrelevant to whether the applicant would be prejudiced at his trial in the Republic of Croatia, and accordingly rejects the EC Report.

Text on plaque

40 The applicant seeks to tender the text of a plaque which was displayed at the Knin

Fortress, being the site of a military training camp conducted by the applicant in 1991. The translation of the text of such plaque reads:

> During 1991, at this place the Croatian defenders in Knin were imprisoned, tortured and murdered by the military unit of "Kapetan Dragan." In memory of and as a warning, this plaque is erected by the Croatian Society of Prisoners of Serbian concentration camps in Knin. 5 August 2006.

The respondent objects on the grounds of relevance to the admission of such translation.

41 It is not suggested that such plaque emanated from the Croatian government or that it was displayed by the Croatian government. The plaque was affixed by a society of Croatians who were apparently incarcerated in concentration camps. Even if the Croatian authorities acquiesced in the presence of the plaque, it is irrelevant to the question whether the applicant would be prejudiced at a trial in the Republic of Croatia. The Court considers that such evidence is too remote to be considered relevant to the issue of whether the applicant would suffer prejudice at his trial. The Court does not admit the text of the plaque.

Transcript of evidence – Aernout Van Lynden

42 The applicant seeks to rely upon a transcript of the evidence of Aernout Van Lynden taken on 2 June 2006 before the International Criminal Tribunal for the former Yugoslavia ('the ICTY') during the trial of Milovancevic, who was charged with war crimes. The particular passage relied upon relates to an incident wherein a Croatian policeman allegedly showed Mr Van Lynden a skull on a desk inside the police headquarters in Glina. Upon the skull was written the name *'Captain Dragan'* and a bounty. The respondent claims that such item is irrelevant to the question whether the applicant may be prejudiced at his trial and could not constitute any indication of bias by the Croatian judiciary. The Court accepts the submission of the respondent and accordingly does not admit such transcript.

Statements of witnesses

Statement of applicant

43 The applicant relies upon paragraphs 1, 3, 5, 18 and part of paragraph 4 of his statement as evidencing his political beliefs and background.

44 The respondent has objected to portions of the applicant's statement relating to the applicant's personal political beliefs; the applicant's belief concerning the purpose of the extradition; and the applicant's apprehension that he would not be afforded a fair trial if he were extradited to the Republic of Croatia.

45 Although the evidence essentially relates to the applicant's apprehension rather than to any facts, the Court is mindful of the observations of French J in *Cabal* (2000) at 749. The Court considers that such evidence should be admitted given the nature of the application before the Court. The Court admits those portions of paragraphs 1, 3, 4, 5 and 18 which were before the Magistrate subject to the deletion from paragraph 4 of the section commencing *'Gotovina has been indicted…'* and concluding *'…in the Milosevic trial'* which is not relied upon by the applicant.

Statement of Savo Strbac

46 Paragraphs 1 to 5 and 13 (except for the last sentence) of the statement of Savo Strbac are relied upon by the applicant. Mr Strbac is a former Magistrate in the Local Court in Benkovac and a former Judge of the District Court in Zadar. In 1993 Mr Strbac founded Veritas, a non-government organisation which monitors the treatment of Serbians by Croatian authorities in the territory of the Republic of Croatia and the former Republic of Serbian Krajina.

47 The respondent objects to the admission of the above paragraphs on the grounds of opinion and relevance.

48 The Court admits paragraphs 1 to 4 as they are relevant to the applicant's claims. As to paragraph 5, such paragraph will also be admitted subject to the deletion of the witness's personal opinion contained in the words commencing *'I do not believe…'* and concluding *'… the Croatian authorities'*. As to paragraph 13, the sentence commencing *'I fear…'* is not read. The balance of paragraph 13 is almost entirely hearsay and does not identify its sources. Such paragraph is of no probative value and is not admitted.

Statement of Richard Schneider

49 Paragraphs 1 to 3 and 11 to 18, except for the second sentence of paragraph 13, of the statement of Richard Schneider, a journalist, are relied upon by the applicant. Although the

respondent does not object to the admission of paragraphs 1, 2 and 15, the respondent objects to the remainder of the paragraphs on the ground of relevance. The last sentence of paragraph 16 is also objected to on the ground of remote hearsay, being Mr Schneider's assessment that *'*[f]*rom my association with Croatian solders* [sic] *I know that many Croatians have a deep hatred of Captain Dragan from him capturing the Krajina in June July 1991'*.

50 The Court admits the passages relied upon except paragraph 16, the first two sentences of which are irrelevant and the observations in the last sentence being predicated solely on hearsay.

Statement of Linda Karadjordjevic

51 The applicant also relies upon the statement of Linda Karadjordjevic, who is a princess of the former Serbian monarchy of the former Yugoslavia. The respondent has objected to the tender of portions of such statement on the grounds that they contain opinion evidence and contain evidence which is inadmissible under s 19(5) of the Extradition Act.

52 The Court admits such statement on the same basis as the applicant's statement, except paragraph 10 and the first sentence of paragraph 15 which are inadmissible under s 19(5) of the Extradition Act. The remainder of paragraph 15 is irrelevant and is accordingly not admitted.

APPLICANT'S GROUNDS OF REVIEW

53 The three substantive issues raised in the applicant's application require the Court to determine whether there are substantial grounds for believing that an extradition objection exists in relation to the extradition offences brought against the applicant; whether the extradition request of the applicant should be permanently stayed as constituting an abuse of the Court's process because of the delay in the institution of the proceedings; and whether the extradition of the applicant would deny him the right to a trial by jury, if such right exists.

Ground 1 – Extradition objection

54 The applicant makes several claims in support of his contention that, contrary to the Magistrate's finding, a valid extradition objection exists.

55 The applicant claims that there is a risk that he will be prejudiced at any trial of the charges brought against him if he were extradited to the Republic of Croatia and tried before a Croatian court. The claim is based upon the involvement of the applicant as a prominent Serbian political and military figure in the conflict with Croatian forces in the disputed territory of the Krajina and Croatian animosity towards the applicant.

56 The applicant also claims that the language of the extradition request prejudges the legality of the Serbian action; prejudges the constitutional status of the parties; prejudges the war status; and indicates bias against the actions of the Serbian forces.

57 The applicant submits that witness evidence may have been corrupted during the investigative process, and that certain witnesses who could provide exculpatory evidence would be unwilling or unable to travel to the Republic of Croatia to testify because of their apprehension that action would be taken against them by Croatian authorities.

58 The applicant also contends that, as a Serbian, the Croatian judiciary will be biased against him. In support of such submission, the applicant relies upon the disproportionate number of Serbians who have been charged and convicted of war crimes in the Republic of Croatia. Further, the applicant refers to the substantial number of Serbians whose convictions in the Republic of Croatia have been set aside in the appellate process.

59 The Court will consider each of the claims hereunder.

Applicant's involvement in Serbian/Croatian conflict

60 The portions of the applicant's statement which have been admitted establish that he was born Dragan Vasiljkovic in Belgrade in the former Yugoslavia and immigrated to Australia with his parents. He is a national of Serbia and, by naturalisation, an Australian citizen. He is a strong political supporter of an independent self-governing home for the Krajina Serbians, many of whom were expelled from the Krajina by Croatian military forces in Operation Storm in 1995. The applicant claims to have played a significant military role in preventing Croatian military domination of the Krajina. He claims that his extradition is sought in retaliation for such activity.

61 The applicant claims that *'Croatian hatred of me from the war has not abated and is on Croatian internet forums'*. He asserts that *'*[t]*here are hardly any Serbs left in the Krajina after 1995 and they have no influence or role in the Croatian justice system'*.

62 The admitted evidence of Mr Strbac establishes that the applicant was a military commander who was responsible for capturing the Croatian military command centre at the police station in Glena in June-July 1991. Mr Strbac's evidence also establishes that the applicant formed a charity in Serbia that provides financial relief for war victims.

63 The relevant portions of the statement of Ms Karadjordjevic state that she believes that the applicant will not receive a fair trial and that it would be of *'political benefit to the Croatian state generally and in particular to their claims concerning the Krajina'* if the applicant were convicted.

64 The Court has considered the above evidence. The Court finds that the applicant's alleged repute in Serbia resulting from his military and charitable activities does not lead to the conclusion that the judicial system in the Republic of Croatia would not provide him with a fair trial. Nor does the applicant's belief or the belief of the other witnesses that he is hated by Croatians and that his extradition is sought in retaliation for his military successes against the Croatians constitute sufficient grounds to establish that he would not receive a fair trial in that country.

Evidence of witnesses

65 The applicant asserts that witnesses who could provide exculpatory evidence would be unwilling to travel to the Republic of Croatia to provide evidence because of the possibility that the Croatian authorities could take retaliatory action against them. The applicant relies especially upon the evidence of Mr Strbac to support this assertion.

66 Mr Strbac gave evidence by telephone before the Magistrate that he was not prepared to give evidence in the Republic of Croatia in the absence of *'special permissions and guarantees'* for his entry into and return from the Republic of Croatia.

67 In answer to this assertion, the Court has evidence before it that recent amendments

have been made to the Croatian Criminal Procedure Act which permit evidence to be provided by means of audio/video conference. Accordingly, by use of such facilities Mr Strbac would be able to provide evidence in a Croatian court without physically entering the Republic of Croatia. The concern of Mr Strbac, and of other potential witnesses who share such concern, may be addressed by such means.

Corrupted evidence

68 The applicant also claims that the evidence of witnesses may be corrupted during the investigative process and that such implication may be drawn from the evidence provided by Mr Bajic. Mr Bajic gave evidence to the Magistrate in which he alleged that four police officers in the Republic of Croatia had questioned him on 8 August 2006 concerning his involvement with the training centre known as 'Alfa' in Bruska in 1993. He testified that the police officers offered him incentives to say that he saw the applicant mistreating prisoners in the Alfa training centre.

69 However Mr Bajic's testimony is disputed by the statement of Mirko Lukic, one of the police officers who interviewed Mr Bajic. Such statement was prepared from an official note of the interview. The statement materially contradicts Mr Bajic's account of the interview. Mr Lukic also gave evidence to the Magistrate and refuted the claim that incentives were offered to Mr Bajic to give false testimony against the applicant.

70 The Court observes that the evidence of Professor Josipovic establishes that Article 9 of the Croatian Criminal Procedure Act does not permit illegally obtained evidence to be used in criminal proceedings. Such evidence also establishes that procedures exist by which a Croatian court may determine whether evidence was illegally obtained. If evidence is found to have been illegally obtained it is to be removed from the relevant file.

71 The Court is not satisfied that the evidence of Mr Bajic establishes that there is a real or substantial risk that the applicant may be prejudiced at any trial by reason of corrupted evidence.

The extradition request

72 The applicant also submits that the language of the extradition request suggests

prejudgment of the legality of Serbia's action in the war between Serbian and Croatian forces and of bias towards the actions of the Croatian forces over the actions of the Serbian forces.

73 The terms of the extradition request are generalised in relation to the Serbian forces. Further, the text of such request was not prepared by the Croatian judiciary. The Court cannot infer that the terminology used in the extradition request suggests that the applicant would not receive a fair trial.

Prosecution of Serbians

74 The applicant claims that the number of Serbians compared to Croatians who have been charged with war crimes in the Republic of Croatia is disproportionate as is the number of Serbians who have been convicted.

75 The cross examination of Mr Strbac refers to the disparity between the prosecutions and convictions of Serbians compared to that of Croatians in respect of war crimes. Mr Strbac claimed that of the total number of 1993 people *'in Croatian courts'* for war crimes, only 40 were Croatians, being members of the Croatian army. As to convictions, Mr Strbac testified that of the 586 people indicted or charged with war crimes in Croatian courts, 577 had been found guilty as at 1 September 2004. Mr Strbac claims that of that number only three were Croatian and the remainder were Serbians.

76 The Human Rights Watch report refers to arrests for war crimes in the Republic of Croatia. It contains the following extract:

> Cases against Croatian Serbs often do not reach the trial stage at all, because the prosecutors drop charges against the arrested person during the investigation. Of the total of forty-one arrests in 1999, 2000, and the first half of 2001, thirty-one persons were released. Of fifty-nine Serbs arrested in 2001, only twenty were in prison as of December 2002, according to the Serb refugee organization Veritas. That many of the charges against Serbs are eventually dropped, might reflect a measure of judicial integrity…
>
> The number of war crimes arrests of Croatian Serbs increased substantially in 2000-2001 and has been a major deterrent to return for Serb male refugees, most of whom at some stage of the war fought against government forces.

77 The September 2006 OSCE Report also states:

> While diminishing in impact, ethnic origin continues to be a factor in determining against whom and what crimes are prosecuted, with discrepancies seen in the type of conduct charged and the severity of sentencing. One source of this ethnic disparity may be the extent to which evidence is available, including the availability or willingness of witnesses to testify.

78 In *Rahardja v Republic of Indonesia* [2000] FCA 1297 the Full Court at [56] found that even if Indonesian authorities were more disposed to not prosecute a non-Chinese Indonesian rather than a Chinese Indonesian, such fact did not establish that *'there are substantial grounds for believing that Mr Rahardja may be prejudiced* at his trial *or* punished *by reason of his race'* (emphasis in original). The Full Court held at [56] that the question whether persons of a different ethnic background would have a better chance of avoiding trial is not a relevant consideration, as '[t]*he question is what will happen at trial or on sentence'*.

79 The Court also notes the decision of the High Court of Justice in *Damir Travica v The Government of Croatia* [2004] EWHC 2747 (Admin) in which Lord Justice Laws considered an issue under s 6(1)(d) of the *Extradition Act 1989* (UK), which is in substantially the same terms as s 7(c) of the Extradition Act. In such decision Laws LJ observed at [38] that the *Extradition Act 1989* (UK) could not be construed as conferring such a wide power of judgment over the practices of a foreign state as to warrant refusal of an extradition where an applicant will face a fair trial but complains that members of other groups would not have to face trial at all.

80 Accordingly, any discrepancy between the number of Croatians and Serbians prosecuted in the Republic of Croatia is irrelevant in this Court's consideration of whether the applicant would suffer prejudice at his trial by virtue of his race, nationality or political opinion. The applicant's contention does not lead to the conclusion that he would not be afforded a fair trial in the Republic of Croatia.

81 As to the alleged disparity in convictions between Serbians and Croatians, the Court observes that such alleged disparity may be a consequence of the disproportionate number of prosecutions against Serbians compared to Croatians. It is not possible to infer prejudice by the Croatian judiciary based upon the conviction data provided by Mr Strbac since the judiciary has not been involved in the prosecution process which has resulted in the disproportionate number of Serbian convictions. As considered above, discrepancy in the

number of prosecutions is irrelevant to the review before the Court. Similarly, any discrepancy in convictions which results from discrepancy in prosecutions is also irrelevant. The Court would need to have before it evidence that the disproportionate number of convictions arose independently of the number of prosecutions before it could be satisfied that there might be a basis for finding prejudice by the judiciary.

Reversal of convictions

82 As to the applicant's claim that over half of the convictions of Serbians have been found to be unsound by Croatian appellate courts, the September 2006 OSCE Report establishes that in 2005 the Supreme Court reversed war crimes verdicts in 65% of the appeals decided. The report states that the reasons for such reversals were procedural errors, such as failures to properly establish facts and failures to apply the law to the facts. The report does not suggest that the reversals were in any way predicated upon a finding of bias against the nationality of those who were convicted. Such reversals accordingly do not support the claim that the applicant would be prejudiced at his trial before the Croatian judiciary as a result of his nationality.

The Croatian judiciary

83 The Court has before it evidence which suggests that the Republic of Croatia has undertaken law reform in order to meet the preconditions for its admission to European Union Membership. The September 2006 OSCE Report states in respect of domestic war crimes trials in the Republic of Croatia:

> There are indications over the past year of an increasingly objective and impartial approach by prosecutors, judges, and police. This has entailed repudiating a past policy of politicized prosecution largely determined by the ethnic origin of victims and military affiliation of defendants in favour or even-handed prosecution.

84 The OSCE report entitled 'Background Report: ECHR (European Court of Human Rights) Cases Involving Croatia as of August 2005' records that the ECHR has stated that at least prospectively *'the Constitutional Court can now be regarded as an effective remedy for an increased number of categories of fair trial issues'*. The September 2006 OSCE Report also refers to co-operation in war crimes trials between the Republic of Croatia with regional States including Serbia, and with the ICTY. The report cites a matter in which the ICTY

referred a war crimes matter to the Republic of Croatia, it having been satisfied that *'there are appropriate measures now in place to ensure a fair trial'*.

85 Other reforms have been made in the Republic of Croatia. For example, as referred to in the September 2006 OSCE Report, the county courts of Osijek, Rijeka, Split and Zagreb have been granted extra-territorial jurisdiction to adjudicate upon war crimes, thereby removing proceedings from local courts in areas most directly affected by the conflict. The Chief State Attorney may initiate proceedings at these courts with the consent of the President of the Supreme Court of the Republic of Croatia.

86 The Court has before it evidence that the Attorney General of the Republic of Croatia has assured the Attorney General of Australia that he will make a request to the President of the Supreme Court of the Republic of Croatia that the trial of the applicant be held before one of the above four courts having extra-territorial jurisdiction. The assurances so given give rise to the presumption that the Republic of Croatia is acting in good faith: see *Ahmad et al v The Government of the United States of America* [2006] EWHC 2927 (Admin) per Laws LJ at [74], [76].

87 In *Travica* Laws LJ observed at [34] that the conflict between Serbia and the Republic of Croatia and its after-effects have been *'especially acute In the Krajina region'*. However, Laws LJ also observed at [35] that such circumstance did not by itself constitute a claim of prejudice *'not least when set against the signs of improvement in the conduct of prosecutions which I have surveyed, and which cannot have failed altogether to touch the Krajina region'*. At [30] Laws LJ also made comment of the *'signal progress made in Croatia towards a justice system which meets international standards'*. His Lordship's observations are consistent with the evidence contained in the reports referred to above.

Ground 1 - Conclusion

88 The Court has considered the applicant's evidence and finds that there is no specific evidence of pre-trial bias against the applicant, nor is there a nexus established between the applicant's apprehension and the question of whether he would be prejudiced at his trial. Further, the evidence before the Court establishes that the Croatian judiciary is capable of providing a fair trial to the applicant.

89 The Court is not satisfied that the evidence establishes that there are substantial grounds for believing that the applicant may be prejudiced at his trial or otherwise prejudiced as provided by s 7(c) of the Extradition Act.

Ground 2 – Abuse of process

90 The second ground of the applicant's application alleges that the delay in prosecuting the applicant for the extradition offences constitutes an abuse of this Court's process.

91 The applicant relies upon the facts that the alleged offences occurred in June and July 1991 and in February 1993 and that they were not made the subject of any investigation request until 28 November 2005. A warrant for his arrest was not issued until 10 January 2006 and the extradition request was not made until 20 January 2006. There was no evidence before the Magistrate that the applicant had been the subject of any investigation until 28 November 2005.

92 The applicant relies upon the judgment of Mason CJ in *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23. In those proceedings the question arose whether a permanent stay should be granted in view of a delay in the prosecution of six years after the defendant had been charged with certain offences. The High Court of Australia held that the Court's power to prevent abuse of process in criminal proceedings extends to a power to prevent unfairness to the accused. At 30-31 Mason CJ stated:

> The continuation of processes which will culminate in an unfair trial can be seen as a "misuse of the Court process" which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.

93 In *Rogers v The Queen* (1994) 181 CLR 251 McHugh J at 286 observed that abuses of process *'usually'* fall into three categories, namely where the Court's procedures are invoked for an illegitimate purpose; where the use of the Court's procedures is unjustifiably oppressive to one of the parties; and where the use of the Court's procedures would bring the administration of justice into disrepute.

94 The inherent jurisdiction of a superior court to stay its proceedings on the grounds of abuse of process was traditionally exercised to prevent its jurisdiction being used *'for a purpose*

other than that for which the proceedings are properly designed and exist': see *Spautz v Williams* [1983] 2 NSWLR 506 at 539 per Hunt J. In *Wiest v Director of Public Prosecutions and Another* (1988) 23 FCR 472, Burchett J at 486-487 quoted his decision in *Deputy Commissioner of Taxation v Edelsten* (unreported, Burchett J, 10 March 1988) where his Honour, having reviewed the authorities said:

> These authorities unite in seeing as crucial the purpose for which the process is used. It is the illegitimacy of the purpose that makes the abuse.

95 It should be observed that no complaint is made by the applicant of any delay in the extradition proceedings. For him to do so would constitute a complaint in respect of a process which he has initiated in this Court. The applicant's claim of delay could only be predicated upon delay by the Sibenik County Public Prosecutor's Office in submitting a request for investigation. Accordingly, any abuse occasioned by such delay was of the process of the Sibenik County Court in the Republic of Croatia, not of this Court.

96 No claim of an abuse of process can be sustained under Chapter III of the *Commonwealth of Australia Constitution Act 1901* (Cth) ('the Constitution') since at no earlier stage prior to the institution of these proceedings has the judicial power of the Commonwealth been invoked: see *Pasini v United Mexican States and Others* (2002) 209 CLR 246 at 253 per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

97 The Court observes that even if a stay of proceedings could have been warranted of the present proceedings before this Court on the ground of delay, it would not affect the determination of the Magistrate that the applicant was eligible for surrender pursuant to s 19(1) of the Extradition Act, nor would it affect the order under s 19(9) that the applicant be committed to prison to await surrender: see *Pasini* at 279 per Kirby J.

98 Finally, it should be observed that the applicant's reliance upon *Jago* is misplaced as the current proceedings do not relate to a criminal trial: see *Vasiljkovic v The Commonwealth of Australia and Others* (2006) 227 CLR 614 at 629. *Jago* was concerned with the power of the High Court to prevent abuses of process in criminal proceedings. This Court is only concerned to determine whether the order of the Magistrate that the applicant is eligible for surrender to the Republic of Croatia in relation to the extradition offences should be upheld.

99 In light of the above the Court rejects the second ground of the application.

Ground 3 – Right to a jury trial

100 The applicant claims that he is entitled to have a jury determine the offences with which he is charged. Such claim is made on the basis of s 80 of the Constitution, which provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

101 The applicant submits that s 10 of the *Geneva Conventions Act 1957* (Cth) (now repealed) ('the Geneva Conventions Act') provided, at the relevant time, that offences of the type in respect of which the applicant's extradition is sought are to be tried on indictment; that s 80 of the Constitution requires that Commonwealth indictable offences are to be tried on indictment; that the applicant is sought to be extradited *'in connection with'* Commonwealth indictable offences; and that there is no evidence that the Republic of Croatia has facilities to provide a jury trial.

102 At the time of the alleged offences, s 7 of the Geneva Conventions Act provided that a person (in Australia or elsewhere) who committed, or aided, abetted or procured the commission of a *'grave breach'* of the 1949 Geneva Conventions was guilty of an indictable offence. Such breaches included wilful killing; torture or inhuman treatment of prisoners of war; and wilful causing of great suffering or serious injury to the body or health of prisoners of war and civilians. Section 10 of the Geneva Conventions Act invested federal jurisdiction in the relevant State and Territory Supreme Courts in respect of offences committed against s 7 of the Extradition Act.

103 The flaw in the applicant's submission is readily apparent. Had the Australian authorities sought to prosecute the applicant for offences arising from his alleged conduct in the Republic of Croatia in 1991 and 1993, the above statutory procedure would have been available to them by virtue of s 7 of the Geneva Conventions Act. However, the Australian authorities have not done so and the applicant has not been prosecuted under the laws of this country. Rather, he has been charged with offences under Articles 120 and 122 of the Basic

Criminal Code of the Republic of Croatia.

104 In *Kingswell v The Queen* (1985) 159 CLR 264 at 292 Brennan J said in relation to s 80 of the Constitution:

> An "offence against any law of the Commonwealth" is, of course, an indictable criminal offence created by or under a law made by the Parliament.

See also *Re Colina and Another; Ex parte Torney* (1999) 200 CLR 386 at 397 per Gleeson CJ and Gummow J.

105 The extradition offences with which the applicant is charged cannot be characterised as offences against a Commonwealth law since the offences do not arise under a law made by the Commonwealth Parliament. In *Sankey v Whitlam and Others* (1978) 142 CLR 1, the High Court confirmed the need for an exercise of power by the Commonwealth Parliament in enacting legislation before a law can be said to be a Commonwealth law: see Gibbs ACJ at 30-1, Stephen J at 73, Aickin J at 104.

106 Any similarity between the offences with which the applicant is charged in the Republic of Croatia and the possibility of the existence of an equivalent criminal offence in Australia is irrelevant. Section 80 of the Constitution does not apply because the applicant has not been charged with a Commonwealth criminal offence.

107 It follows from the above finding, namely that s 80 of the Constitution does not apply, that there is no requirement under Australian law that the applicant be tried by jury. Accordingly the submission that the applicant has the right to be tried by jury, and that such right will be lost to him if he is tried in the Republic of Croatia, is rejected. It follows that the submission of the applicant that there is no evidence that the Republic of Croatia has the facilities to accommodate a jury trial is irrelevant.

108 As a second basis for the applicant's claim that the extradition offences should be tried by jury, the applicant alleges that the Geneva Conventions Act had extra-territorial application in accordance with Australia's Geneva Convention Treaty obligations. The submission proceeds on the basis that an Australian court is competent to try, and should try, the applicant for the alleged offences. However, the Republic of Croatia is the State which is

seeking to try the applicant, not Australia. In view of the above finding such submission is rejected.

109 The applicant's application also claims that the Extradition Regulations are invalid. Insofar as their effect is to remove the applicant's right to a trial by jury, no submissions were made in favour of this ground. The Court observes that such Regulations merely declare the Republic of Croatia to be an extradition country. The right to a jury trial by a person for indictment of any offence against a Commonwealth law is not affected by the Extradition Regulations.

CONCLUSION

110 It follows from the above findings that the applicant's application must be dismissed. The orders of the Magistrate are confirmed.

I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cowdroy.

Associate:

Dated: 3 February 2009

Counsel for the Applicant:	Mr Jackson
Solicitor for the Applicant:	Schreuder Partners Lawyers
Counsel for the Respondent:	Dr Perry QC with Ms Younan
Solicitor for the Respondent:	Commonwealth Director of Public Prosecutions
Date of Hearing:	27 & 28 August 2008, 10 September 2008, 1 October 2008
Date of Judgment:	3 February 2009