FEDERAL COURT OF AUSTRALIA

Snedden v Republic of Croatia [2009] FCAFC 111

EXTRADITION — extradition sought of Serbian to the Republic of Croatia **—** extradition opposed on basis of an extradition objection **—** prejudice claimed '*at trial*' **—** punished or detained **—** a mitigating factor in sentence unavailable to the person by reason of political opinions **—** reliance upon statistics as to numbers of persons charged and convicted and conviction rates

Held: Appeal allowed

WORDS AND PHRASES — an '*extradition objection*' — '*substantial grounds for believing*' — '*punished*' — *at trial* — '*by reason of*' — '*political opinions*'

Extradition Act 1988 (Cth) ss 3(a), 7, 19, 21
Extradition (Croatia) Regulations 2004 (Cth) reg 4
Extradition (Croatia) Regulations 2004 Statutory Rules 2004 No. 339 (Cth) Explanatory Statement

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, applied
In re Arton [1896] 1 QB 108, cited
Re Bolton; Ex parte Beane (1987) 162 CLR 514, cited
Brown v Lizars (1905) 2 CLR 837, cited
Cabal v United Mexican States (2001) 108 FCR 311, applied
Cabal v United Mexican States (No 2) (2000) 172 ALR 743, applied
Cabal v United Mexican States (No 3) (2000) 186 ALR 188, cited
De Bruyn v Republic of South Africa (1999) 96 FCR 290, cited
Director of Public Prosecutions (Cth) v Kainhofer (1995) 185 CLR 528, cited
DJL v The Central Authority (2000) 201 CLR 226, applied
Harris v Attorney-General of the Commonwealth (1994) 52 FCR 386, cited
Hempel v Attorney-General (Cth) (1987) 77 ALR 641, cited
O'Donoghue v Ireland [2009] FCA 618, cited
Prabowo v Republic of Indonesia (1995) 61 FCR 258, cited
Rahardja v Republic of Indonesia [2000] FCA 1297, considered
Schlieske v Federal Republic of Germany (1987) 14 FCR 424, cited
Snedden v Republic of Croatia [2009] FCA 30, reversed
Timar v Republic of Hungary [1999] FCA 1518, cited
Travica v The Government of Croatia [2004] EWHC 2747 (Admin), considered
Vasiljkovic v The Commonwealth of Australia (2006) 227 CLR 614, applied

Aughterson EP, *Extradition – Australian Law and Procedure* (The Law Book Company Limited, 1995)
Nicholls C, Montgomery C and Knowles JB, *The Law of Extradition and Mutual Assistance* (2nd ed, Oxford University Press, 2007)

DANIEL SNEDDEN v REPUBLIC OF CROATIA
NSD 126 of 2009

BENNETT, FLICK AND MCKERRACHER JJ
2 SEPTEMBER 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY
GENERAL DIVISION **NSD 126 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **DANIEL SNEDDEN**
Appellant

AND: **REPUBLIC OF CROATIA**
Respondent

JUDGES: **BENNETT, FLICK AND MCKERRACHER JJ**
DATE OF ORDER: **2 SEPTEMBER 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The appellant is to be released from custody.
3. Order 2 is stayed until 3 pm on Friday 4 September 2009.
4. The respondent is to pay the appellant's costs of the appeal.
5. Liberty is reserved to the parties to apply to vary orders 2 or 3 upon 24 hours' notice in writing.

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

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PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 On 17 February 2006 the Attorney-General's Department of the Commonwealth of Australia received a request from the Minister of Justice of the Republic of Croatia seeking the extradition of the appellant. That request was to be considered in accordance with the *Extradition Act 1988* (Cth) ('the Act').

2 The request stated that extradition was sought for the appellant's prosecution before a court in the Republic of Croatia in respect of two offences of war crimes against prisoners of war pursuant to Article 122 of the Basic Penal Code of the Republic of Croatia and for one offence of a war crime against the civilian population pursuant to Article 120, paragraphs 1 and 2, of the Basic Penal Code.

3 In summary form, the extradition request recounts that the appellant was the commander of a '*Special Purpose Unit*' of '*Serbian paramilitary troops*'. The request refers to a number of events when '*the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the "Republic of Krajina"*' engaged in armed conflict. The appellant is

said to be a citizen of the former state union of Serbia and Montenegro and of Australia. When a request for extradition is made, the Act attaches no legal significance to the fact that the person sought to be extradited is a citizen of Australia: *Vasiljkovic v The Commonwealth of Australia* (2006) 227 CLR 614 at 619 per Gleeson CJ; at 634 and 642 to 643 per Gummow and Hayne JJ. See also: *DJL v The Central Authority* (2000) 201 CLR 226 at 279 to 280 per Kirby J, with whom Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ agreed.

4 On 12 April 2007 a Magistrate of the Local Court determined that the appellant was eligible for surrender to the Republic of Croatia. A review of the Magistrate's decision by this Court is provided for by s 21(1) of the Act. Review of the Magistrate's decision was sought and on 3 February 2009 a Judge of this Court dismissed the application: *Snedden v Republic of Croatia* [2009] FCA 30.

5 The appellant opposes extradition. He maintained before the primary judge and on appeal that there was an '*extradition objection*' such that he could not be extradited. Pending the resolution of the appeal, the appellant remains in custody.

6 Section 21(3) of the Act provides for an appeal from the judgment of a single judge of this Court to the Full Court of the Federal Court. On 16 February 2009 a notice of appeal was filed which seeks to advance three grounds of appeal more fully set forth in that notice but which may for present purposes be summarised as being:

(i) a contention that the primary judge '*applied the wrong test in making findings on key areas of evidence as to whether or not the applicant was eligible for surrender to Croatia …*'. The particulars provided in respect to this ground of appeal make reference to the manner in which '*findings*' were expressed by the primary judge at [64], [73], [80] and [82] of his reasons for decision;

(ii) a contention that the primary judge '*erred in failing to consider whether evidence that service for the Croatian forces was treated as a mitigating factor*' in sentencing '*gave rise to substantial grounds for suspecting that the appellant may be prejudiced, and/or detained, and/or punished by reason of his political beliefs, nationality, or race, in relation to a portion of his sentence*'; and

(iii) a contention that the conclusion of the primary judge that no extradition objection was made out '*was against the weight of evidence …*'.

There emerged during the hearing of the appeal a considerable degree of overlap as between each of these grounds.

7 In the event that this Court disagreed with the primary judge, the Court was invited itself to review the evidence with a view to forming its own conclusion as to whether the appellant had made out an '*extradition objection*'. Such a course was complicated by considerable disagreement between the parties as to what the available evidence actually established; disagreement as to whether the onus upon the appellant had been discharged and the manner in which that onus operated; and disagreement as to the application of the statutory language to the facts.

8 It is nevertheless considered that the appeal should be allowed.

THE EXTRADITION PROCESS — AN EXTRADITION OBJECTION

9 The law of extradition has a long history: Aughterson EP, *Extradition – Australian Law and Procedure* (The Law Book Company Limited, 1995) at pp 2 to 7. On one account, that history dates back to a treaty providing for the mutual return of criminals between Ramses II, the Pharaoh of Egypt, and King Hattusli III of the Hittites in 1280 BC: Nicholls C, Montgomery C and Knowles JB, *The Law of Extradition and Mutual Assistance* (2nd ed, Oxford University Press, 2007) at [1.05].

10 Relevantly, part of that history is a recognition of the desirability of international co-operation in facilitating the surrender of fugitives to foreign nations so that they may be prosecuted. In *In re Arton* [1896] 1 QB 108 at 111 Lord Russell CJ observed:

> The law of extradition is, without doubt, founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

11 The law to be applied in Australia is that now set forth in the Act. A principal object of the Act is '*to codify the law relating to the extradition of persons from Australia to extradition countries … without determining the guilt or innocence of the person of an*

offence': s 3(a). For the purposes of the Act, the Republic of Croatia is declared to be an '*extradition country*' by reg 4 of the *Extradition (Croatia) Regulations 2004* (Cth).

12 It is also of relevance to note at the outset that the arrest and extradition of a person pursuant to the terms of the Act obviously involve a deprivation of the liberty of that person and, potentially, a serious disruption of his or her life. Indeed, it has been said that '*(t)he law of this country is very jealous of any infringement of personal liberty*': *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J, and that '*(t)he statute affects the liberty of the subject in a drastic fashion — the consequences are far more serious than being charged with a crime in Australia*': *De Bruyn v Republic of South Africa* (1999) 96 FCR 290 at 295 per Gyles J.

13 '*Although the extradition of fugitive offenders is an executive act, it requires statutory authority*' which '*cannot be exercised "except in accordance with the laws which prescribe in detail the precautions to be taken to prevent unwarrantable interference with individual liberty"*': *Vasiljkovic* 227 CLR at 618 per Gleeson CJ, citing *Brown v Lizars* (1905) 2 CLR 837 at 852 per Griffith CJ. See also 227 CLR at 629 to 630. There is thus a need for what is said to be strict compliance with the formalities required by the Act: *Prabowo v Republic of Indonesia* (1995) 61 FCR 258 at 270 to 271 per Hill J; *Timar v Republic of Hungary* [1999] FCA 1518 at [62] per Weinberg J; *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188 at 240 per French J; *O'Donoghue v Ireland* [2009] FCA 618 at [68] per Barker J. There is no room for any presumption in favour of the executive where the liberty of a subject is concerned: *Schlieske v Federal Republic of Germany* (1987) 14 FCR 424 at 432 per Fox, Wilcox and Burchett JJ.

14 But this is not to conclude '*that every conceivable doubt or possible ambiguity of fact or law, no matter how inconsequential, must be resolved against the country seeking extradition*': *Timar* at [64] per Weinberg J. His Honour had there previously observed at [63] that '*documents emanating from countries with which Australia has extradition arrangements will often be drafted in language and style which is very different from our own, and perhaps less than perfect from our perspective*'.

15 The process of extradition now set forth in the Act involves four stages, summarised by the Full Court in *Harris v Attorney-General of the Commonwealth* (1994) 52 FCR 386 as follows:

> The Act contemplates four stages in extradition proceedings as follows: (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: (1994) 52 FCR at 389.

The approach to the legislation as contemplating '*four stages*' has been endorsed by Gleeson CJ in *Vasiljkovic* 227 CLR at 628; see also per Gummow and Hayne JJ at 635 to 636 and per Kirby J at 657, and by Gummow J in *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 547.

16 This is but an outline of the law as it is at present.

17 No matter how serious the allegations may be that are made by a country seeking extradition, every person whose extradition is sought is entitled to a careful application of the law to the facts.

18 For the purposes of the present proceeding, attention may be confined to that stage of the extradition process when a magistrate is called upon to determine whether a person is '*eligible for surrender*' pursuant to s 19(2) of the Act. Section 19(2) relevantly provides as follows:

> For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:
> (a) …;
> (b) …;
> (c) …; and
> (d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

Section 7 defines what is meant by an '*extradition objection*' as follows:

> **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:
> (a) the extradition offence is a political offence in relation to the extradition country;
> (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;
> (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;
> (d) …; or
> (e) …

Previously, the appellant relied on both s 7(b) and (c). Reliance is now placed solely upon s 7(c).

SECTION 19(2)(D) — SUBSTANTIAL GROUNDS FOR BELIEVING

19 The first ground of appeal focussed attention upon the manner in which the primary judge expressed his reasons for conclusion.

20 The appellant's position was that those reasons expose an incorrect application of the terms of s 19(2)(d) as it has been interpreted by decisions of this Court. The respondent advanced the contrary proposition but further contended, in the alternative, that if the primary judge had not properly applied s 19(2)(d), this Court itself should do so. In that regard, the respondent took issue with the factual conclusions sought to be advanced on behalf of the appellant.

21 Section 19(2)(d) makes it clear that the person maintaining that there is an '*extradition objection*' bears the burden of making out that objection. But that burden goes no further than requiring that there be '*substantial grounds for believing*' that there is an '*extradition objection*': *Cabal v United Mexican States* (2001) 108 FCR 311 ('*Cabal* (2001)') at 343. The Full Court there further set forth in some detail the origins of s 7(c) (and also s 7(b)). The predecessors of these provisions have also been examined extra-judicially: Aughterson, *Extradition – Australian Law and Procedure* at pp 111 to 115.

22 The meaning of the phrase '*substantial grounds for believing*' was addressed at first instance by French J in *Cabal v United Mexican States (No 2)* (2000) 172 ALR 743 ('*Cabal (No 2)*') as follows:

> 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 conditions in s 19(2)(d). The very nature of those objections 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: 172 ALR at 748.

On appeal, it was not suggested to the Full Court that this statement of principle disclosed any error: *Cabal* (2001) 108 FCR at 346. As also noted by the Full Court, these observations of French J were expressed in the same way that his Honour had approached the meaning of the term '*substantial grounds for believing*' in *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641. There in issue was the comparable phrase previously employed in s 14 of the *Extradition (Foreign States) Act 1966* (Cth). His Honour had there observed:

> **… What is meant by "substantial" in s 14?**
>
> … what constitute [*sic*] "substantial grounds" for the purposes of s 14 will depend upon the circumstances including the nature of the prejudice considered. It is ultimately a normative rather than a purely quantitative question.
>
> The minimum requirement of a substantial ground is that it be non-trivial. I think it goes too far to say that the term always requires the discernment of a greater than even chance of unfair discrimination: (1987) 77 ALR at 664 to 665.

23 The expression also received consideration in *Rahardja v Republic of Indonesia* [2000] FCA 1297. The Full Court there noted the submission as advanced on behalf of the appellant as follows (emphasis in original):

> [37] Counsel for Mr Rahardja emphasise the nature of the relevant test: there are "*substantial grounds* for believing" (para 19(2)(d)) that "the person *may* be prejudiced at his ... trial or punished ... by reason of his ... race" (para 7(c)). The inquiry is speculative, because it is concerned with future and hypothetical events, say counsel. In view of the relevant terminology, they submit, "it is inappropriate to apply an inflexible standard, such as the balance of probabilities, and a lesser degree of likelihood is sufficient to establish substantial grounds for the extradition objection". Counsel submit the minimum requirement is that the substantial ground of belief be "not trivial" or merely theoretical. Counsel emphasise it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance.

Their Honours expressed agreement with this formulation of the test for the establishment of '*substantial grounds*' in s 19(2)(d) of the Act as follows (emphasis added):

> [47] We accept the submissions of counsel for the appellant as to the test that must be applied in considering whether there is an extradition objection in this case. As counsel say, the inquiry concerns future and hypothetical events. Necessarily, therefore, the Court is required to engage in a deal of speculation. *And it is sufficient if the person raising the objection establishes a substantial or real chance of prejudice; it is not necessary to show a probability of prejudice or any particular degree of risk of prejudice.*

24 The primary judge expressly set forth in his reasons for decision the analysis by French J in *Cabal (No 2)* as to what constitutes '*substantial grounds*'. Thereafter, and at the outset of his analysis of the grounds of review then being advanced, his Honour said:

> [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.

His Honour then proceeded to consider each of the grounds being advanced. He expressed his conclusion as to whether or not there was an '*extradition objection*' as follows:

> [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.

The summary of the appellant's claim, it will be noted, is expressed in terms of '*a risk*'; and his Honour's conclusion employs the language of '*substantial grounds*'.

25 Notwithstanding this expression of the conclusion reached, the appellant contends that the primary judge impermissibly approached the application of the requirement that there be '*substantial grounds*' by applying '*a test of probability rather than possibility*'. The findings of the primary judge to which specific reference is made in the particulars to this first ground of appeal – and as expanded upon in the written outline of submissions – were expressed as follows:

> [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.
>
> …

> [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.
>
> …
>
> [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.
>
> …
>
> [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.

Particular emphasis is sought to be placed by the appellant upon the repeated manner in which the primary judge expressed his findings in terms of whether the appellant '*would*' or '*would not*' suffer the treatment being advanced. In contrast to these paragraphs stands the following finding made by his Honour in respect of a submission made that '*the evidence of witnesses may be corrupted during the investigative process*':

> [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.

Mr Bajic had given evidence of being offered incentives to give false evidence against the appellant. That evidence had been contradicted.

26 The appellant's submission was that the primary judge may have employed the statutory language of whether '*substantial grounds*' had been made out – but that, in making his findings, he was not directing attention to whether the material before him demonstrated '*a real or substantial risk that the circumstances described*' in s 7(c) could or may exist but impermissibly applied a test of '*probability*'.

27 A comparable argument was unsuccessfully advanced in *Rahardja*. The primary judge had there described '*the specific question for determination*' as being '*whether as a consequence of his ethnicity the applicant would experience prejudice at his trial or have his punishment increased for ethnic reasons*'. Counsel for the respondent did not dispute the

manner in which the test was to be formulated, but disputed the submission that the primary judge had misunderstood that test. The position for the respondent was that the appearance of the word '*would*' on two occasions in the judgment of the primary judge did not indicate any misunderstanding. Wilcox, Spender and Dowsett JJ agreed with the respondent as follows:

> [49] Notwithstanding the submission of counsel for Mr Rahardja, we do not think Tamberlin J was under a misapprehension as to the test he was required to apply. In para 40 of his reasons for judgment, quoted at para 25 above, his Honour stated the "specific question for determination": "are there substantial grounds for believing that the applicant ... *may* be prejudiced or punished or otherwise adversely differentially treated by reason of his Chinese Ethnicity" (our emphasis). In the last sentence of that paragraph he again used the words "*may* be prejudiced" (our emphasis). The words "would be treated" are used in the context of making the point that there was no evidence of a practice of treating persons of Chinese ethnicity differently, at trial, from other persons. We think his Honour's comment, in the passage set out in para 30 above, about Professor Lindsey's evidence should be read in the same way; it was a comment about the lack of specificity in that evidence upon the critical question of practices at trial.

Those conclusions are obviously confined to the circumstances of the case there being advanced but the approach of the Full Court is relevant to the present appeal.

28 It is the case that, in the reasons of the primary judge:

- there is not one or two – but repeated – use of the term '*would*' or the phrase '*would not*', and no use of the term '*may*', in the immediately surrounding context in which the impugned findings are expressed; and
- on each occasion upon which the term or the phrase is employed there is no other contextual comment which would provide any indication that the conclusion was but an assessment as to whether there was '*a substantial or real chance of prejudice*' or that it was '*not necessary to show a probability of prejudice or any particular degree of risk of prejudice*'.

29 Notwithstanding such factors, no error is discernible in the manner in which the primary judge construed and applied the terms of s 19(2)(d). His Honour correctly set forth the test as set forth by French J in *Cabal (No 2).* He thereafter started his analysis as to whether an extradition objection had been made out using the language of '*risk*' (at [55]) and concluded his analysis by reference to the terms of s 7(c) (at [89]). On a proper and informed reading of his Honour's reasons, no conclusion should be reached other than that his Honour informed himself by reference to the terms of the legislation itself and by reference to

authority as to how those terms were to be interpreted and proceeded to apply that test to the facts as he found them.

30 The first ground of appeal is rejected.

SECTION 7(c)

31 It was common ground that s 7(c) invites inquiry as to whether a person may be:

- '*prejudiced at his or her trial*'; or
- '*punished, detained or restricted in his or her personal liberty*'

and whether, in either case, that arises:

- '*by reason of his or her race, religion, nationality or political opinions*'.

So construed, the enquiry as to the prospect of '*prejudice*' is thus confined to what may happen '*at … trial*'. Whether a person may otherwise be '*punished*' is not so confined.

32 There was disagreement as to the correct construction of the terms:

- '*at … trial*'; and
- '*punished*'

33 The appellant contended that an '*extradition objection*' was made out because there was a risk which could not be described as trivial that he '*may be prejudiced at his … trial*' by reason of:

- his profile as a prominent Serbian political and military figure;
- the language in which the extradition request was expressed;
- the inability of the judicial system in the Republic of Croatia to provide him with a fair trial;
- the prospect that witnesses whom he may wish to call would not be willing to travel to the Republic of Croatia to give evidence;
- the prospect that evidence to be given may be corrupted during the investigative processes; and
- the disparity in the number of prosecutions and convictions as between Croatians and Serbians.

Those same factors were further relied upon in support of a contention that he would be '*punished*'.

34 An additional matter relied upon by the appellant, and a matter raised expressly by his second ground of appeal, was the failure of the primary judge to resolve an argument founded upon evidence that service for the Croatian forces is treated by the Croatian Courts as a mitigating factor on sentence ('the mitigating factor'). It was common ground that submissions based upon this evidence were advanced before the primary judge but not resolved. The appeal proceeded upon the basis that it was appropriate for this Court as presently constituted to consider this ground.

35 This was said to be relevant both to an asserted prejudice at trial and also to an asserted punishment, both by reason of the appellant's political opinions or nationality. The response of the respondent was to put in issue the factual conclusions to be drawn from the evidence. First, the respondent contended that some of the facts were irrelevant to any inquiry as to what prejudice may be suffered '*at … trial*'. Secondly, the respondent asserted that the mitigating factor did not operate such that the appellant would be '*punished*'. The respondent submitted that '*punished*' connoted a positive act and that the failure to apply a mitigating factor did not fall within the concept of punishment.

36 In putting in issue the factual conclusions to be drawn from the evidence, the respondent not only focussed attention upon whether the appellant had discharged the onus imposed upon him by s 19(2)(d), but also focussed attention upon whether those facts arose '*by reason of his or her race, religion, nationality or political opinions*'.

THE APPLICATION OF THE MITIGATING FACTOR

37 The starting point for the second ground of appeal was to be found in two reports of a body described as the '*Organization for Security and Co-operation in Europe*' ('OSCE'). The independence of the OSCE was accepted by both the appellant and the respondent and both parties sought to rely upon statements found in the two reports, albeit for different reasons.

38 The passage in the first OSCE report relied upon by the appellant, apparently published in March 2006, stated:

> The eight accused were sentenced to prison terms ranging from six to eight years. In setting the prison sentences, the court cited the role of the accused in defending Croatia against armed aggression as a mitigating factor. This type of mitigating factor is not applied by the ICTY [International Criminal Tribunal for the former Yugoslavia]. Not only does this politicize the verdict but it introduces a discrepancy into war crime sentencing largely correlated to national origin. Thus, the same crime committed by members of the Croatian armed forces is subject to lesser punishment than when committed by members of the former 'Krajina' or Yugoslav forces. The prosecution has indicated that it may appeal against the sentencing.

A second OSCE report, dated 13 September 2006, relevantly contained the following statement as part of its '*Executive Summary*':

> 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. … Service in the Croatian army continued to be used as a factor to mitigate punishment.

The report continued:

> 2. The continuing use of "participation in the homeland war" as a mitigating circumstance to decrease punishment for members of the Croatian armed forces convicted of war crimes remains of concern. [See Section C.VII.1] The Supreme Court confirmed the Osijek County Court's conviction of one accused in the "Paulin Dvor" case, but increased the sentence from 12 to 15 years, indicating that the trial court's application of this mitigating circumstance had not been properly balanced against aggravating circumstances. It did not, however, deem the application of this mitigating factor as inappropriate *per se*. In 2006, trial courts continued to apply this mitigating factor. The ICTY does not apply this type of mitigating factor and in the Mission's view, military service is not an appropriate sentencing factor.

39 It should be noted that any lack of judicial impartiality in some County Courts may be answered in part by the undertaking given by the Attorney-General of the Republic of Croatia to ask the President of the Supreme Court of the Republic of Croatia to refer any trial of the appellant to one of the four specially designated County Courts to adjudicate alleged war crimes. Irrespective of that undertaking, however, the appellant relies on the fact that, in sentencing, the County Courts apply the mitigating factor to those who served in the Croatian army or, as it is called, the '*Homeland Army*'. The mitigating factor is not available to persons who served in the Serbian forces.

40 The Republic of Croatia submits that evidence that the Supreme Court has '*approved*' this practice is limited to one appeal where the Court indicated that the mitigating circumstances had not been properly balanced against other aggravating circumstances and

that the Court did not deem the mitigating factor to be inappropriate *per se*. The Republic of Croatia further submits that this does not necessarily suggest positive or general approval of the practice. However, it is also apparent, and has not been contradicted, that the County Courts of Croatia have taken the Supreme Court to have approved the practice and that, in any event, they continue to apply it as a factor to be taken into account in sentencing those who served in the Homeland Army.

41 It is worth emphasising that no evidence has been adduced by the Republic of Croatia to contradict the inference that such a factor continues to be selectively applied in sentencing. Emphasising that the onus is on the appellant to establish the extradition objection, the Republic of Croatia has not led evidence as to the present situation, nor to rebut or qualify the statements in the OSCE reports. It is not, of course, obliged to adduce evidence, but the Court is then in a position where the only available evidence is that adduced by the appellant.

42 The Republic of Croatia also submits that, if it is accepted that participation in the '*Homeland War*' (on the Croatian side) is not an appropriate sentencing factor in relation to offences committed in the course of that war, the fact that members of a certain group may inappropriately receive the benefit of that practice does not mean that members of another group are entitled to it. It submits that the relevant question for the purpose of considering whether there is an extradition objection is what will happen at the sentencing of the appellant and whether his sentence is increased for reason of nationality or political opinions.

43 There is no evidence that the appellant's sentence would be increased because he fought on the Serbian side.

44 The appellant accepts that, if the court applies a sentence and then declines to apply a mitigating factor that may be available to another person, that does not constitute punishment, detention or restriction of liberty within the meaning of s 7(c) of the Act. He submits, however, that the evidence is that the courts apply the various factors, including aggravating circumstances and mitigating circumstances, as part of the process of deciding the sentence. This determines the period of deprivation of liberty and the punishment to be applied. He says that the sentencing process itself involves a balancing of factors, so that the failure to apply the mitigating factor constitutes a positive act.

45 The available evidence supports the appellant's submission that the courts take a '*holistic*' approach to sentencing. From the two OSCE reports, it emerges that the Supreme Court of Croatia considered that the mitigating factor should be applied in the imposition of a sentence.

46 Moreover, if convicted, the appellant will be '*detained*' and deprived of his liberty for a period longer than a Croatian counterpart.

47 This treatment of the appellant thus falls within s 7(c) – subject only to whether it arises '*by reason of his or her race, religion, nationality or political opinions*'.

BY REASON OF

48 The case advanced by the appellant is that the difference in treatment upon which he focuses arises '*by reason of his … nationality or political opinions*'.

49 The phrase '*by reason of*' clearly requires that there be some causal connection between the matters relied upon and a person's '*race, religion, nationality or political opinions*'. So much was not in dispute. The phrase as used in s 7(c), it may be noted, is different to that employed in s 7(b) – namely, '*on account of*'. Whether any difference was intended by the legislature, or whether the different phraseology in s 7(b) is but a product of the different matters to which each provision is directed, was not addressed by the parties and need not be further pursued.

50 Some guidance as to the manner of interpreting s 7(c) may be gleaned from *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. There in issue was a claim to refugee status. A refugee was defined in part as being a person having '*a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'. Dawson J relevantly observed:

> The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group: 190 CLR at 240.

Similarly, McHugh J also observed:

> When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. Discrimination – even discrimination amounting to persecution – that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be: 190 CLR at 257.

51 The Explanatory Statement provided with the *Extradition (Croatia) Regulations 2004* (Cth) emphasises the need for this causal connection. That Statement provides in part as follows:

> Extradition under the Regulations is subject to the various safeguards set out in the Act. For example, extradition would not be permitted where the fugitive was sought for or in connection with her or his race, religion, nationality or political opinions or would be tried, sentenced or detained for a political or military offence. In addition, the Attorney-General would retain a broad discretion to refuse an extradition request by Croatia in any particular case.

52 The mitigating factor is not based on nationality, as it also seems to apply to Serbs who fought in the Homeland Army and does not apply to Croatians who fought with the Serb forces in support of an independent Republic of Krajina.

53 The mitigating factor, however, operates by reference to '*political beliefs*'. The appellant's political beliefs concern what he describes in his Statement as '*the self determination of Serbian people in the Balkans in those areas where they constitute a majority*', in particular in the Krajina. Serbs constituted a majority in the Krajina until they were removed by Croatian military forces in 1995. The appellant says 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*'. The appellant's political belief is '*that the Krajina Serbs have a right to return to their homeland and are entitled to an independent state*'. He played a significant role as a military commander in the military conflict in the former Yugoslavia that began at Knin in June 1991, particularly the battle for Glina. The extradition request refers in express terms to the armed conflict in Knin '*between the armed forces of the Republic of Croatia and the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the "Republic of Krajina"*' in which the appellant was a commander. It follows that the mitigating factor is applied by reason of a person's political beliefs.

54 It follows that the appellant has established a substantial or real chance of prejudice and has thereby satisfied the onus of demonstrating that there is an extradition objection in relation to the extradition offence (*Rahardja*).

55 The second ground of appeal is thus made out, that there are substantial grounds for believing that he may be '*punished*' or imprisoned and thereby '*detained*' or '*restricted in his personal liberty*' and that such treatment arises '*by reason of his … nationality or political opinions*'.

56 The appeal should thus be allowed.

EVIDENCE AND CONVICTION RATES

57 It was contended by the appellant that the risk of '*prejudice*' at trial, or the risk of the appellant being '*punished*' by reason of his race or political opinions, was also made out by reason of available statistics as to rates at which Serbians were being prosecuted and convicted as opposed to their Croatian counterparts.

58 The appellant's account of those statistics may be summarised by the following table:

	Total Number	*Croatians*	*Serbians*
Charged	1993	40	1953
Tried	586	Range: 3 – 9	Range: 577–583
Convicted	577	3	574
Tried but not convicted	9	0 – 9	0 – 9

Another way of expressing the same statistics is as follows:

	Croatians	*Serbians*
Numbers charged	40	1953
Numbers convicted	3	574
Conviction rate	7.5 %	29 %

59 Notwithstanding the care with which the submissions were advanced on behalf of the appellant, the conclusions to be drawn from these statistics remained elusive. To the extent that conclusions or inferences remained elusive, the respondent contended that the appellant had not discharged the onus of proof imposed by s 19(2)(d). The respondent also contended that such discrimination as may be evidenced by these statistics did not go that further step and establish that the differential treatment arose '*by reason of … nationality or political opinions*' for the purposes of s 7(c).

60 These submissions of the respondent have more weight if attention is focussed only upon a comparison of the numbers charged and convicted; they have less weight if attention is focussed upon the comparative conviction rates.

AT TRIAL

61 The use of the phrase '*at his or her trial*' in s 7(c) has the potential for ambiguity.

62 There is, perhaps, ambiguity as to whether that phrase is confined to such prejudice as a person facing extradition may face during the trial process itself. On such a confined construction of the phrase, prior steps that have been taken to secure the presence of a person in the country seeking extradition precede that trial process and would assume no relevance. And, upon such a construction, whatever questions which may otherwise arise by reference to the terms in which an extradition request is expressed would equally be of no relevance unless a link to the trial itself or to the judiciary were demonstrated. We note that the

extradition request was not prepared by the Croatian judiciary and does not indicate prejudgment. The same analysis would apply to the investigatory steps whereby evidence was gathered for the purposes of later being adduced during the trial process and the decision to prosecute. Questions which may emerge by reason of the potential use of evidence perhaps improperly obtained may fall within the phrase '*at his or her trial*'. The question also may arise as to whether the appellate or other review processes affecting a result secured at trial came within the expression '*at … trial*'.

63 This, in turn, affects the ambit of the evidence relevant to each of these issues in the present appeal.

64 Some of these questions, it was submitted, had been resolved by the decision of the Full Court in *Rahardja*. *Rahardja* was said to support a confined interpretation of the phrase '*at … trial*'. One issue there addressed was whether a statement by the primary judge as to whether evidence of a particular witness established that a person '*would be treated*' in a particular manner evidenced a failure to properly apply s 19(2). The Full Court observed (emphasis in original):

> [49] … We think his Honour's comment … about Professor Lindsey's evidence should be read in the same way; it was a comment about the lack of specificity in that evidence upon the critical question of practices at trial …
>
> …
>
> [56] However, even if it is true that Indonesian authorities are more disposed to decide not to prosecute a non-Chinese Indonesian than a Chinese Indonesian, that fact does not establish there are substantial grounds for believing that Mr Rahardja may be prejudiced *at his trial* or *punished* by reason of his race. The question is what will happen at trial or on sentence, not whether persons of a different race would have a better chance of avoiding trial at all.

These passages, the respondent submitted, confined the ambit of the phrase '*at … trial*' to the hearing process itself and the sentencing stage of any such process.

65 If questions of interpretation had not been resolved by *Rahardja*, guidance was nevertheless said to be found in the decision of the Queens Bench Division of the High Court of Justice in *Travica v The Government of Croatia* [2004] EWHC 2747 (Admin).

66 In *Travica*, the statutory phrase in issue had similarities with s 7(c). That case involved an application for a writ of habeas corpus in respect to a person whose extradition to the Republic of Croatia was also sought. One of the issues there to be resolved was whether

a person who had '*already been convicted at first instance in his absence, and having had his appeal against that conviction dismissed … would face prejudice in the minds of the local population who would assume that his guilt had already been proved*'. In rejecting the submission it was held at [32] that (emphasis in original):

> Even if such prejudice were shown, that would not of itself begin to demonstrate … that the applicant would be prejudiced *at his trial* without at the very least some specific evidence, beyond what is available here, as to the distinct effect of such local feeling on the local judiciary.

Again, the confined ambit of the phrase '*at … trial*' was said by the respondent to be evident.

67 Notwithstanding the care with which these competing submissions were advanced, in view of our decision on the consequence of the way in which the mitigating factor is applied, it is presently unnecessary for any concluded view to be expressed.

CONCLUSIONS

68 The appeal should be allowed. An '*extradition objection*' has been made out.

69 In such circumstances, s 19(10) and s 21 of the Act assume relevance. Section 19(10) provides as follows:

> Where, in the proceedings, the magistrate determines that the person is not, in relation to any extradition offence, eligible for surrender to the extradition country seeking surrender, the magistrate shall:
> (a) order that the person be released; and
> (b) advise the Attorney-General in writing of the order and of the magistrate's reasons for determining that the person is not eligible for surrender.

On an application for review of a magistrate's order, s 21 thereafter sets forth the powers of this Court. The terms of those provisions appear to be self-evident. No submissions, however, were advanced during the hearing of the appeal as to whether or not an order should be made for the release of the appellant from custody if the appeal were allowed. Accordingly we propose to make an order for the appellant's release but also that this order be stayed for a limited period of time. This affords an opportunity to the appellant and the respondent to make such submissions as are considered appropriate. Given that it has been established that there is a valid '*extradition objection*', any further detention of the appellant would appear to be without lawful authority.

70 There is no reason why costs should not follow the event.

ORDERS

71 The orders of the Court are:

1. The appeal be allowed.

2. The appellant is to be released from custody.

3. Order 2 is stayed until 3 pm on Friday 4 September 2009.

4. The respondent is to pay the appellant's costs of the appeal.

5. Liberty is reserved to the parties to apply to vary orders 2 or 3 upon 24 hours' notice in writing.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bennett, Flick and McKerracher.

Associate:

Dated: 1 September 2009

Counsel for the Appellant	Mr C Jackson
Solicitor for the Appellant	Schreuder Partners
Counsel for the Respondent	Ms M Perry QC with Ms H Younan
Solicitor for the Respondent	Commonwealth Director of Public Prosecutions
Date of Hearing:	10 August 2009
Date of Judgment:	2 September 2009