DE BRUYN

v.

MINISTER FOR JUSTICE & CUSTOMS

Federal Court of Australia

Spender, Kiefel and Emmett JJ

17 November, 22 December 2004

(2004) 143 FCR 162; (2004) 213 ALR 479; [2004] FCAFC 334

Spender J.

[1] I have had the benefit of reading in draft form the reasons for judgment of Kiefel J. I agree that the appeal should be allowed for the reason which her Honour gives. I agree with the orders proposed. I wish to add a few comments of my own.

[2] The application the subject of this appeal was an application to the Federal Court under s 39B of the Judiciary Act 1903 (Cth) filed on 26 February 2004, and was described in the application as 'against decision of respondent to extradite applicant to South Africa'.

[3] On 8 December 2003 an Assistant Secretary, International Crime Branch of the Attorney-General's Department forwarded a recommendation to Senator Christopher Ellison, the Minister for Justice and Customs, recommending that he:

(i)

determine under subsection 22(2) of the Act that Jacob Johannes de Bruyn should be surrendered to the Republic of South Africa for the extradition offence stated in the attached surrender warrant; and

(ii)

sign and date, under section 23 of the Act, the warrant at Attachment C for the surrender of Jacob Johannes de Bruyn to South Africa for the extradition offence stated in the warrant.

[4] The Minister for Justice and Customs struck out the words "Not Approved" leaving the word "Approved" on that document, and signed immediately under the word "Approved" and inserted date 29/1/2003 underneath his signature. In fact, the date was 29/1/2004. Senator Ellison also signed a surrender warrant under s 23 of the Extradition Act 1988 (Cth) in the following terms:

I, Christopher Martin Ellison, Minister for Justice and Customs of the Commonwealth of Australia, under section 23 of the Act:

(a)

require you, the person in whose custody Jacob Johannes de Bruyn is being held, to release him into the custody of a police officer; and

(b)

authorise that police officer to transport Jacob Johannes de Bruyn in custody, and if necessary or convenient, to detain him in custody, for the purpose of enabling him to be placed in the custody of the escort and transported out of Australia; and

(c)

authorise the escort to transport Jacob Johannes de Bruyn in custody out of Australia to a place in the Republic of South Africa for the purpose of surrendering him to a person appointed by that country to receive him.

That surrender warrant is dated 29 January 2004.

[5] The application of Mr de Bruyn to the Federal Court claimed that 'exceptions to extradition exist under the Extradition (South Africa) Regulations 2001', and specific reference was made to 'Art 3 1(b); 2(c), 2(g) and 2(h) as well as s 22(2) of the Extradition Act 1988 '.

[6] The submissions at first instance on behalf of the Minister indicated that the case was fought on grounds which included:

exceptions to extradition, in particular exceptions 1(b), 2(c) 2(g) 2(h), within the meaning of Article 3 of the Treaty on Extradition between Australia and the Republic of South Africa exist.

and

in the circumstances of the case, extradition would be unjust or oppressive, or incompatible with humanitarian considerations within article 3(2)(g) of the Treaty.

[7] It is disturbing that the briefing paper recommending that the Minister determine under s 22(2) of the Extradition Act 1988 (Cth) that Jacob Johannes de Bruyn be surrendered to the Republic of South Africa for the extradition offence stated in the surrender warrant, and that the Minister sign and date under s 23 of the Act a warrant for the surrender of Jacob Johannes de Bruyn to South Africa for the extradition offence stated in the warrant, addressed the requirements of the Extradition (South Africa) Regulations 2001. The decisions should have been made against the requirements of the earlier Extradition (Republic of South Africa) Regulations.

[8] Clause 5(4)(b) of the earlier Regulations provides that the Attorney-General may decline to issue a surrender warrant in relation to a person, if the Attorney-General, while taking into account the nature of the offence to which the extradition request relates, and the interests of the requesting country, is nevertheless of the opinion that in the circumstances of the case, it would be unjust, oppressive or incompatible with humanitarian considerations to surrender the person to that country.

[9] The briefing paper to the Minister included the following:

De Bruyn has provided several news articles which detail the conditions in some South African prisons.

This sentence seems to accept the correctness of the several news articles.

[10] The second of the articles refers to the UNAIDS Report of 2000, which one might expect would be regarded as a report of some authority. The newspaper article said that that report 'found that men in prison in South Africa are at "particularly high risk of contracting HIV" and further states that "a prison sentence is tantamount to a death sentence by HIV/AIDS".' That report spoke of men in prison being at a particularly high risk of contracting HIV. If that statement is accepted by the Minister as correct, I find it difficult to see how, in the circumstances of this case, it would not be unjust, oppressive or incompatible with humanitarian considerations to surrender de Bruyn to South Africa.

[11] It seems to me that the Minister concluded that surrender would not be oppressive or incompatible with humanitarian considerations because 'there is no certainty that de Bruyn will contract HIV/AIDS if made to serve a sentence in a South African prison.'

[12] This demonstrates jurisdictional error on the part of the Minister. In Lobo v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 132 FCR 93 ('Lobo'), the Full Court of the Federal Court was concerned with criteria prescribed for the grant of a particular subclass of visa, including a matter on which the Minister must be satisfied before he could grant such a visa. Their Honours said, at 106:

Where the Minister misconstrues one of the criteria prescribed in the Act or Regulations and, because of that misconstruction he considers that the criterion has not been satisfied, it is as though he did not consider the criterion at all. For, on the face of it, he has failed to ask the question which the Act and Regulations, upon a proper construction of the criterion, require him to ask. In such a case … the Minister's decision would be a nullity. The Minister has not done that which the Act requires him to have done. The decision would be a purported decision of no legal effect.

[13] The High Court refused special leave to appeal from the judgment of the Full Court in Lobo, Gummow J noting that the Full Court's conclusion that the Tribunal fell into jurisdictional error was 'not attended by doubt'.

[14] In concluding that surrender would not be oppressive or incompatible with humanitarian considerations because there was no certainty that de Bruyn would contract HIV/AIDS if made to serve a sentence in a South African prison, the Minister clearly misdirected himself in law as to that exception.

[15] Buck v Bavone (1975-1976) 135 CLR 110 was a case concerned with s 92 of the Constitution prior to the judgment of the High Court in Cole v Whitfield (1988) 165 CLR 360. Nonetheless, the observations of Gibbs J, as he then was, at 118–9 are apposite:

It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required

to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

Kiefel J.

[16] The appellant is a citizen of South Africa and the subject of a decision by the respondent that he be surrendered to the Republic of South Africa for an extradition offence. The offences with which the appellant is to be charged are defrauding the First National Bank of South Africa of $1.2m rand or stealing that sum. An application for orders under s 39B of the Judiciary Act 1903 (Cth) was dismissed by a judge of this Court ([2004] FCA 880).

[17] The matter has a lengthy history, which his Honour the primary judge set out. The extradition request was made on 24 June 1997. On 11 August 1997 the Minister issued a notice under s 16 of the Extradition Act 1988 (Cth) ('the Act') to a magistrate stating that the request had been received. The magistrate determined that the appellant was not 'eligible for surrender' under s 19 of the Act. That decision was set aside by a judge of this Court and an appeal from that decision did not succeed (see respectively Republic of South Africa v De Bruyn [1999] FCA 516 and De Bruyn v Republic of South Africa [1999] FCA 1344). Mr de Bruyn, who had been at large, then absconded. In February 2003 he was arrested and remanded in custody pending a determination pursuant to s 22 of the Act as to whether he should be surrendered. The Minister made that determination on 29 January 2004.

STATUTORY REQUIREMENTS

[18] A warrant may be issued for the surrender of a person under s 23 of the Act if the Attorney-General has made a determination ' … under s 22(2) that a person is to be surrendered to an extradition country in relation to an extradition offence … '. South Africa is such a country. Section 22(3)(b) of the Act relevantly provides that a person may be surrendered if:

(b)

the Attorney-General is satisfied that, on surrender to the extradition country, the person will not be subjected to torture;

[19] Paragraph (e) of that subsection provides:

(e)

where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i)

surrender of the person in relation to the offence shall be refused; or

(ii)

surrender of the person in relation to the offence may be refused;

in certain circumstances — the Attorney-General is satisfied:

(iii)

where subparagraph (i) applies — that the circumstances do not exist; or

(iv)

where subparagraph (ii) applies — either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; …

[20] Section 11(1) of the Act provides:

(1)

The regulations may:

(a)

state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or

(b)

make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications, other than such limitations, conditions, exceptions or qualifications as are necessary to give effect to a multilateral extradition treaty in relation to the country.

[21] Regulation 5(4) of the Extradition (Republic of South Africa) Regulations ('the Regulations') then in force provided:

The Attorney-General may decline to issue a surrender warrant or temporary surrender warrant under Part II of the Act in relation to a person if:

(a)

the person is an Australian citizen; or

(b)

the Attorney-General, while taking into account the nature of the offence to which the extradition request relates and the interests of the requesting country is nevertheless of the

opinion that, in the circumstances of the case, it would be unjust, oppressive or incompatible with humanitarian considerations to surrender the person to that country.

[22] Regulation 4 of the later regulations (the Extradition (South Africa) Regulations 2001) provides that application of the Act to South Africa is to be subject to a Treaty on Extradition between Australia and the Republic of South Africa ('the Treaty') which is scheduled to the regulations. Article 3 para (2)(g) of the Treaty relevantly provides that extradition may be refused:

if the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment; …

[23] Regulation 6 of the 2001 regulations provides that the repealed regulations continue to apply to extradition requests made before 1 August 2001, which is here the case. His Honour the primary judge applied the repealed regulations and the respondent accepts that that approach was correct.

BACKGROUND TO THE MINISTER'S DECISION

[24] The Minister had provided to him a briefing paper and recommendations. Before his Honour, and on this appeal, it has been assumed that the Minister's reasons for the determination under s 22(2) are those contained in the briefing paper, which the Minister is to be taken to have approved and adopted as his own.

[25] The briefing paper gave some background facts and identified issues arising under the Act. It identified, erroneously, the Treaty as containing criteria relevant to the case. The effect of this error was dealt with by his Honour the primary judge and will be referred to later in these reasons.

[26] The Minister was advised, by the briefing paper, that he might be satisfied of the matters required by the Act for surrender and that:

(f)

none of the mandatory or discretionary grounds for refusal under the Treaty warrant refusing de Bruyn's extradition; and

(g)

there are no grounds warranting refusal of de Bruyn's extradition under your general discretion to refuse extradition.

[27] The briefing paper attached a number of documents, including representations made by the appellant and newspaper articles which had been submitted by him to the department. Also attached were South Africa's response to those representations and some material supplied by South Africa with its response. The appellant's reply was provided, together with representations made by his family.

[28] One of the matters raised by the appellant for the Minister's consideration, and which assumes particular importance on the appeal, was the circumstances prevailing in prisons in South Africa. His representations referred to recent television programs, as well as newspaper articles and publications, which reported appalling conditions in South African jails. Five such newspaper articles were attached to his submission and were provided in the briefing report to the Minister. The appellant submitted that it was shown by these materials that:

Inmates are gang raped. AIDS are of an epidemic proportions. Assault and murder are regular occurrences. Mafia control the inside of the prisons. Prison wardens are understaffed and prisons over full. Wardens prefer to look [the] other way whilst rape and assault flourishes.

He said that there were factors pertaining to him which made him a particular target.

[29] The first newspaper article referred to corruption in prisons and to the practice of selling young inmates to other inmates for sex. The focus of the second was on an 'UNAIDS' report relating to the AIDS epidemic in South Africa. It contained the following passage:

'According to the UNAIDS report men in prisons are at particularly high risk of contracting HIV. In South Africa, according to Gideon Morris of the Judicial Inspectorate's Office, a prison sentence is tantamount to a death sentence by HIV/AIDS. Morris estimated that between 70% and 80% of suspects held in South African jails are raped by fellow prisoners before they are even officially charged.'

[30] Another reported Judge Fagan, the Inspecting Judge of Prisons, as saying that about 6000 of the 10 000 prisoners released monthly from South African jails are HIV-positive. The number of 'natural deaths' in prisons was increasing. Almost all of these were AIDS-related and conditions in overcrowded prisons were not conducive to the longevity of those who were HIV-positive, he is reported to have said. Overcrowding remained the root cause of the spread of contagious diseases, including HIV/AIDS.

[31] The fourth report said that the situation in South African jails 'has reached catastrophic proportions, with 45,000 prisoners dying of AIDS-related diseases every year.' The last report referred to prison gangs using HIV infection as punishment. It reported that gang members carrying the HIV virus were ordered to rape disobedient inmates in a ritual known as 'slow puncture', by which the victim would die over a period of time. This information was said to have an official source.

[32] In its response South Africa provided a copy of the annual report by the Inspecting Judge of Prisons, the aforementioned Judge Fagan, for the period 1 April 2002 to 31 March 2003. It pointed out, by reference to that report, that:

… it has not been established exactly how many prison deaths are as the result of HIV/AIDS. In the Annual Report for 2001/2002, it was stated that the number of HIV/AIDS related deaths in prison reflects the pandemic outside prison … It is therefore not possible at the present time to indicate the incidence of contracting HIV/AIDS whilst in prison in South Africa.

[33] In his reply the appellant reiterated his claims that there was conclusive proof that the prison system 'is inhumane and unjust' by reference to gang rapes and the contraction of the AIDS virus. He also identified overcrowding and unhygienic conditions as relevant to the contraction of the virus.

[34] The briefing report, under the heading 'Discretionary Grounds' advised that extradition might be refused in certain circumstances under the Treaty and identified those referred to in Art 3 para 2(g) above. It said however that neither it nor other discretionary grounds for refusal were made out. With respect to this particular basis for refusal it was said:

De Bruyn has made a number of representations claiming that his surrender to South Africa would be oppressive. A copy of these submissions is at Attachments D, E and J for your reference. However, there is no substantial evidence supporting a claim that the surrender of de Bruyn to South Africa would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

[35] Under 'Submission 2: De Bruyn believes that the conditions in South African prisons are unfavourable', the author of the briefing note referred to and summarised the newspaper articles referred to above and listed the appellant's contentions:

30.

De Bruyn has provided several news articles which detail the conditions in some South African prisons. These are attached for your reference at Attachment F. The first taken from The Guardian (dated 27/07/02) discusses the corruption and the abuse of inmates including the rape of younger inmates. The second article is undated and discusses the UNAIDS report of 2000 which found that men in prison in South Africa are at "particularly high risk of contracting HIV" and further states that "a prison sentence is tantamount to a death sentence by HIV/AIDS".

31.

The third article (of 21/05/02) states that 6,000 of the 10,000 prisoners released monthly from jail are HIV positive. Deaths from HIV/AIDS in prisons are increasing and include prisoners awaiting trial. It states that the prisons are overcrowded and there are long waiting periods for trials.

32.

The fourth article (dated 4/06/01) states that 45,000 prisoners die of AIDS-related diseases every year in South African prisons while the final article dated 21/11/02 from Reuter's states that the prison wardens have been known to use HIV infection as punishment on inmates who misbehave by ordering that infected prisoners rape these inmates. It also points to the "Jali Commission" which was set up in 2001 to investigate these allegations.

33.

De Bruyn contends that "assault and murder are regular occurrences" in South African prisons, the Mafia "control the insides of the prison" and prisons 'are understaffed and … over full.'

34.

De Bruyn also believes that he will be a "target" when in a South African prison because he is educated (he is a qualified chartered accountant with a doctorate in accountancy) and charged with a "white collar crime." He fears he will also be branded a 'sell-out' as he emigrated to Australia during the apartheid regime.

35.

Being 54 years of age, de Bruyn believes he is in no position to defend himself "against younger and fitter prisoners.'

[36] South Africa's comments were then referred to:

36.

In response to de Bruyn's claims of the high incidence of HIV/AIDS in their prisons, the South African authorities comment that "it has not been established how many prison deaths are as the result of HIV/AIDS" and that in the "Annual Report for 2001/2002, it was stated that the number of HIV/AIDS related deaths in prison reflects the pandemic outside prison. It is therefore not possible at the present time to indicate the incidence of contracting HIV/AIDS whilst in prison in South Africa.' A copy of the Annual Report for the period 1 April 2002 to 31 March 2003 by the Inspecting Judge of Prisons, Judge J J Fagan, was attached for our reference. This is at Attachment I.

37.

Responding to de Bruyn's claims that he will be a "target" if given a prison sentence in a South African prison, South African authorities have stated that these allegations are "with due respect, spurious and based solely on his personal opinion" and further that:

i.

educated prisoners are no more likely to be targeted than uneducated ones;

ii.

his perception that he will be branded as a "sell-out" is based on out-moded concepts that have no place in present South Africa;

iii.

the ethnic group from which a prisoner comes, has no impact on his/her treatment in present South African prisons; and

iv.

the need to physically defend himself from younger prisoners has no basis.

[37] And the following 'Departmental Comments' were provided to the Minister:

38.

The Annual Report to which the South African authority refers, states on page 20 that the natural death rate (ie those deaths caused by illness) among the prison population was 7.75 per 1000 and that "natural deaths appear to be mostly caused by HIV/AIDS." When compared with the incidence of HIV/AIDS in Australian prisons (which is around 0.2 per cent), this percentage appears quite high. Australia, however, does not suffer from a HIV/AIDS pandemic as does South Africa. It is conceivable that the HIV/AIDS related

deaths in prison reflect the situation in South Africa outside the prisons. There is no certainty that de Bruyn will contract HIV/AIDS if made to serve a sentence in a South African prison.

39.

Further, the Department has no substantial evidence that de Bruyn will be specifically 'targeted' if made to serve a prison sentence in South Africa.

[38] There was a further submission made to the Minister that the appellant felt that his extradition would be effectively sentencing him to capital punishment, which is an assertion no longer pursued by the appellant. However the departmental comments on this contention were in the same terms as those relating to prison conditions, namely that 'there is no certainty that de Bruyn will contract HIV/AIDS if made to serve a sentence in a South African prison.'

[39] Although it was not a matter then raised by the appellant, the briefing paper necessarily dealt with the requirement of s 22(3)(b) of the Act, that the Minister be satisfied that the appellant would not be subjected to torture following his surrender to South Africa. It said that he could be so satisfied. South Africa had acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1998. It then said:

There is no information available to the Department to support a conclusion that de Bruyn will be subjected to torture on surrender to South Africa.

THE PRIMARY JUDGE'S DECISION

[40] The appellant was represented by counsel before his Honour the primary judge. Nevertheless reliance was placed upon the substantial documentation the appellant had supplied which, his Honour noted, was largely irrelevant. His Honour considered that there were three primary grounds advanced in support of the application:

•

that the appellant was denied procedural fairness;

•

that the Minister erred in concluding that the appellant would not be subjected to torture in South Africa; and

•

that the Minister erred in not declining to surrender the appellant on the basis that it would be unjust, oppressive or incompatible with humanitarian considerations to do so.

[41] His Honour rejected the claim of want of procedural fairness. The appellant claimed that he should have had more time to put material before the Minister. That material would have dealt further with conditions in South African jails. His Honour observed however that the appellant had been able to supply a substantial amount of material but in any event had been given an adequate opportunity to do so. He had been allowed a period of weeks in which to put material before the Minister. The extradition proceedings had been in train since 1997.

[42] In relation to the question of torture, relevant to s 22(3)(b) of the Act, his Honour referred to the definition of the word 'torture' provided by the Shorter Oxford Dictionary, since the word was not defined in the Act. That definition is, relevantly:

… (the infliction of) severe physical or mental suffering; anguish, agony, torment … The infliction of severe bodily pain as a punishment or as a means of interrogation or persuasion; a form or instance of this.

[43] In the Convention referred to in the briefing paper, and which is scheduled to the Crimes (Torture) Act 1988 (Cth), the word 'torture' is defined to mean:

… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[44] The appellant's argument before his Honour was that in the South African prison system, violence was often used by prisoners against fellow prisoners for coercive purposes and that the prison officials permitted, if not encouraged, this. His Honour considered that it was most unlikely that the Attorney-General had to be satisfied that no violence would occur in prison before making a decision as to extradition. Violence in prisons was not unknown nor was corruption of prison officials. In his Honour's view s 22(3)(b) of the Act is 'directed at institutionalised torture by government authorities, not at occasional and unpredictable violence occurring in prisons, even with the connivance of corrupt prison officers' (at [15]).

[45] In relation to the discretionary considerations for refusal of surrender, his Honour noted the error made by the relevant officer who had prepared the briefing paper, who had approached the matter on the basis that the Treaty and the new regulations applied. This might suggest that the Minister failed to consider the correct question. Because of the similarity between the relevant parts of the Treaty and the repealed regulations, his Honour then proceeded to examine the differences between the two sets of provisions and then the way in which the matter was dealt with by the Minister. The only relevant difference between the two was that the repealed regulations contained a reference to 'the circumstances of the case' as relevant and the Treaty referred to 'the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought … '. The additional words in the Treaty provision, in his Honour's view, did no more than make it clear that 'the circumstances of the case' include those personal considerations. One infers that his Honour considered that there would therefore be no significant difference between the provisions and the question for the Minister would have been the same. If anything was added by the reference to personal circumstances, the appellant's personal circumstances had in fact been taken into account. The error therefore could have only worked to his advantage, his Honour observed.

[46] His Honour then turned to consider the arguments concerning the relevance of prison conditions to the question of extradition. His Honour was of the view that it was unlikely that the Parliament intended that the Attorney-General should address the question of the general conditions in prisons in an extradition country in determining whether or not a person ought

to be surrendered. Such a consideration was likely to have been made anterior to identifying the country as an extradition country, in drafting the relevant treaty with the country or in making appropriate regulations for the purposes of s 11 of the Act. His Honour went on (at [22]):

This suggests that the words 'the circumstances of the case' should be construed as referring to the particular circumstances of the case in question. That would require a consideration of any special consequences of possible punishment for the relevant person, but not a general consideration of the conditions in the relevant country's gaols.

[47] So far as concerned the material put before the Minister concerning the risk of HIV/AIDS infection in prisons his Honour observed that the accuracy of some of the material might be doubted. However his Honour observed that the material was largely untested and there was no reason to doubt that the HIV/AIDS infection level in prisons is higher than in the general population in South Africa and higher than in other countries, including Australia. There was also no reason to doubt that on occasions prisoners have used HIV infection as a threat or punishment and that corrupt prison officials have been involved in such conduct. His Honour went on (at [32]-[33]):

[32]

The Minister was obliged to take into account the nature of the alleged offence and the interests of the requesting country, as well as the considerations raised by Mr de Bruyn. The enforcement of the criminal law is an important aspect of any civilized society. An accused person will readily find arguments for exemption from such enforcement. He or she will always find it unpleasant to contemplate the consequences of a guilty verdict, particularly if imprisonment is likely. Once Mr de Bruyn's case is shorn of its hyperbole, particularly the assertion that any sentence of imprisonment is a death sentence because of the likelihood of HIV/AIDS infection, there is little in it which offers a basis for refusing to surrender him. The conditions in South African gaols may be unsatisfactory, but South Africa's interest in enforcing its criminal law is substantial. There is no reason to believe that Mr de Bruyn will be raped or that he will otherwise fall foul of other prisoners or prison authorities.

[33]

Under both the repealed regulations and the new regulations and the Treaty, the Minister was required to determine whether the circumstances of this case should lead to a refusal of surrender. The Minister considered all of the material put before him and decided to permit surrender. There is no rational basis for suggesting that the decision was in any way affected by the erroneous application of the new regulations and Treaty … Mr de Bruyn had not demonstrated any operative error in the Minister's approach to this aspect of the case.

THE APPEAL

[48] The appellant's notice of appeal contains the following grounds:

(a)

There has been a miscarriage of justice in that there was not a fair trial.

(b)

The judgement is unreasonable or cannot be supported having regard to the whole of the evidence and international laws (unsafe and unsatisfactorily judgement).

(c)

Submissions filed by applicant per instructions from Judge on 15/4/04 not considered. [Name of barrister] never met with applicant, discussed his case and failed to plead submissions. Filed annexures (f) and (g) incorrectly. Failed to prepare for the hearing. Made secret deals with Minister not to plead some material. Failed to file vital material. Legal aid claimed conflict of interest.

[49] It is a matter of some regret that, through his own actions, the appellant appeared on the appeal without legal representation. It was apparent that he did not properly comprehend the issues arising for the Court. They are of relatively narrow compass. Much of the voluminous written submissions and lengthy oral submissions did not address the true issues arising from the Minister's decision, the briefing paper upon which it was based, and his Honour's consideration of it. His complaints were wide-ranging and sought to involve the Court in considering the facts pertaining to prison conditions in South Africa from a range of sources. The appellant sought to put further material before the Court as material the Minister could have obtained about the subject. And, it will be observed, he raised the question whether he had had a fair hearing before his Honour. Nevertheless I will attempt to deal with the more pertinent of the matters raised by the appellant in the course of identifying what appears to be the real question on the appeal.

[50] One of the appellant's contentions was that the grounds originally raised by him, numbering about eight, had been reduced to only three by his Honour. The others were not considered. A reference to the appellant's document containing these arguments however shows that it pre-dated his legal representation. The only additional ground which can be discerned from it is an allegation of bias on the part of the Minister, an allegation which the appellant did not pursue before his Honour the primary judge and which he disavowed on the appeal.

[51] The appellant's submissions contained reference to him not receiving a fair trial, not because of anything done or not done by the primary judge, save for a refusal to admit certain material, but because of the lack of competence of his counsel and a perceived conflict of interest because a person working for Legal Aid (Queensland), which provided his legal representation, was related to senior counsel for the Minister. That contention may be rejected. There is no substance in the allegation that there was an unfair hearing. The contention appears to be based upon the appellant's counsel's failure to have material received by his Honour, but that was the subject of argument. The ruling by his Honour was that material not before the Minister was not relevant. This is hardly surprising. There is nothing in the transcript of evidence to otherwise suggest counsel did not properly represent the appellant. His Honour's reasons disclose that the essential relevant points were agitated. The appellant's principal complaint really appears to be that he was not appointed the barrister whom he had nominated. The appellant's claim to want of procedural fairness leading up to the hearing before his Honour must also be rejected. The appellant had sufficient opportunity to prepare the matter, including the assistance of lawyers. And his Honour granted an adjournment of almost one month at the appellant's request.

[52] The appellant's principal arguments concerning the Minister's decision, inferentially not appreciated by his Honour the primary judge, were that his material and representations were

not considered by the Minister and as a result the Minister failed to appreciate the degree of risk to which he would be put of HIV/AIDS infection if he were returned to South Africa and incarcerated. He contended that the Minister had a duty to enquire into the numbers of persons who had become infected and sought to put before the Courts supplementary material which might have been available to the Minister had he sought it. The material has not been accepted by the Court but I observe that it does not appear to add much to the earlier material.

[53] The appellant contended that the Minister was wrong, and his Honour also wrong, in determining that he would not be subjected to torture. This contention rested upon the fact that prison gangs raped prisoners and put them deliberately at risk of HIV/AIDS infection. This was apparent from the newspaper articles but the Minister did not address this issue. The appellant's point is that the Minister failed to characterise the conduct of the gangs as torture.

[54] The appellant also submitted that it was unreasonable or unfair and unjust to return him to South Africa if he could not be placed in protective custody. South Africa had advised that he would not be. This was not a point which was raised before his Honour, but in any event it has regard to the same allegations concerning the prison conditions which are to be considered in relation to the requirements of reg 5(4)(b) of the Regulations.

CONSIDERATION OF THE APPEAL

[55] The question as to whether the prison conditions referred to in the newspaper articles, concerning the rape of inmates by gang members, amounts to torture was not raised before the Minister. As his Honour's reasons disclose however the conclusion reached by the Minister, that the appellant would not be subjected to torture if surrendered, is correct. It is supported by a consideration of the meaning to be given to the term 'torture.' His Honour held that the reference to torture in the Act is directed to institutionalised conduct by government authorities for the purpose of punishment, intimidation or coercion. I respectfully agree. The conduct identified by the appellant, of inmates towards other inmates, is not of this kind. And it is not converted to institutionalised conduct in the sense referred to by his Honour because some corrupt wardens ignore or even encourage it.

[56] The case put forward by the appellant contained assertions that he was at particular risk of being raped and contracting HIV because of factors personal to him. They were not accepted in the briefing note, on the basis that there was no evidence to support them. The appellant's claims in this regard were mere assertions, unaccompanied by any material to support them. No relevant error is disclosed in such an approach.

[57] There were however newspaper reports which provided the basis for the appellant's claim that male prisoners generally in South African jails were at high risk of infection of HIV as a result of rape by fellow inmates and through overcrowding. The reference in para 38 of the briefing note to figures of 7.75 per 1000 as the rate of natural death in the prison population, caused primarily by HIV/AIDS, may suggest that the higher figures referred to in some newspaper reports were not accepted by the author of the briefing note as being as reliable as the Annual Report of the South African authorities, but that is as far as any assessment of the reports, and the appellant's claims based upon them, goes.

[58] His Honour the primary judge held that there was no reason to believe that the appellant would be raped in prison. With respect, that was not a finding made in the briefing note and is not one which can be attributed to the Minister. The briefing note, drawing upon a reference in the submissions for South Africa, merely observed that it was 'conceivable' that the rate of

HIV/AIDs-related deaths was the same in prison as it was outside, in the general population. It was therefore unknown or 'uncertain' whether the appellant would contract HIV/AIDs if he was in prison.

[59] It was submitted for the Minister that the Court ought to assume that the Minister had read all of the material. In any event the summaries of the newspaper reports drew his attention to the allegations. The Court should therefore infer that the Minister had considered and rejected them.

[60] The difficulty with the submission is that there is nothing in the briefing note to suggest they were given any consideration. It might follow, logically, that if the rate of HIV/AIDs-related deaths was the same in the general population, then an argument that the prison deaths resulted from the rape of inmates or from overcrowding might be substantially undermined. But this conclusion could not be reached because the facts were unknown. The Minister was dealing with a matter about which there was speculation and did not address the matters raised in the newspaper reports. They were simply by-passed to a conclusion of uncertainty. It is that conclusion which needs to be considered, in light of the Act and the Regulations.

[61] I add that the earlier reference in the briefing note to there being 'no substantial evidence' that surrender would be oppressive or incompatible with humanitarian considerations does not in my view disclose that consideration was given to the newspaper reports. It stands as a general summary and does not involve findings. In what follows there is no consideration given to the matters in question. The reference is not even apposite to the conclusion reached in para 38 of the briefing note.

[62] I do not suggest that the failure of the Minister to make findings as to the appellant's case itself involves jurisdictional error. The Minister may be taken to have regarded the question as not material to his considerations: Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [36], [37] and [74]. They were not material to the Minister's decision, one may observe from para 38 of the briefing note, because he considered that, unless one could be certain that the appellant would contract HIV/AIDs , it would not be oppressive or contrary to humanitarian considerations to surrender him. This approach denies the prospect that exposure to a level of risk of infection should be considered as incompatible with humanitarian considerations.

[63] Provisions such as reg 5(4) of the Regulations have been regarded as referring broadly to circumstances where it would be incompatible with humanitarian considerations to surrender the person: EP Aughterson, Extradition: Australian Law and Procedure, LBC, Sydney, 1995, p 171. The author points out that Anderson ('Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception', Mich YB Int'l Leg Stud, 1983, p 153 at p 154) cites three types of humanitarian claims: that the trial in the requesting state will be or was unfair; that the awaiting punishment will be excessive or cruel; and that the requesting country will be unable or does not intend to protect the requested person from assassination attempts. Aughterson (at p 172) also observed that the personal circumstances of the person are to be taken into account.

[64] That the 'circumstances of the case' include the personal circumstances of the person the subject of the extradition request is clarified by Art 3 para (2)(g) of the Treaty. But the phrase has a wider operation. The identification of three types of claims is not to be taken as exhaustive. There is nothing in reg 5(4) nor in the Act which would suggest any limitation on factors which might arise following upon the surrender of the person which may affect them

in such a way as to be incompatible with humanitarian considerations, nor that certainty is required in coming to a conclusion that there is present in a particular case humanitarian considerations which ought to weigh against surrender. In any event, exposure to the risk of HIV/AIDS may amount to a threat to the life and well-being of the person, in which case it is not dissimilar to the third type of claim. And such a threat, arising from prison conditions, may be viewed as associated with the punishment the person would receive if surrendered.

[65] For the reason that there is nothing in the terms of the Act or its purposes to indicate a limitation upon the circumstances pertaining to the person and their surrender in the context of humanitarian considerations I am unable, respectfully, to agree with His Honour the primary judge that prison conditions are excluded from consideration. Even if prison conditions in the requesting country were addressed prior to extradition arrangements being put in place, circumstances change. It cannot be taken as intended to exclude consideration of circumstances which may well qualify as inhumane. I am also unable to infer that the Minister approached the matter in this way. Whilst no detailed consideration was given the allegations of fact relating to conditions in South African prisons, the rate of deaths in prison was addressed. The Minister did not exclude the entire topic from consideration in connection with the 'circumstances of the case.' In that approach the Minister was correct.

[66] I am not suggesting that any exposure to risk of rape and HIV/AIDS infection would suffice as a humanitarian consideration which would weigh against surrender. As his Honour the primary judge correctly pointed out, prison conditions in countries such as Australia include some such risks. But there may well be a point where the level of risk or threat arising from conditions in the prison of the requesting country is so high as to come within the circumstances of which the regulation speaks. That assessment is one for the Minister.

[67] In my view the Minister's decision involved an incorrect understanding of what may amount to humanitarian considerations for the purpose of reg 5(4) of the Regulations. Jurisdictional error has therefore been made out: Minister for Immigration and Multicultural Affairs v Yusuf at [84]. The notice of appeal did not contain this ground. The respondent however conceded on the hearing of the appeal that he would not be prejudiced if the Court were to treat the notice as amended so as to raise it.

[68] The appeal should be allowed and the orders of the primary judge set aside. In lieu of those orders the determination of the respondent made on 29 January 2004 should be set aside and the warrant signed on 29 January 2004 quashed.

Emmett J.

[69] On 29 January 2004 the respondent, the Minister for Justice and Customs ('the Minister'), made a decision ('the Decision') to approve a recommendation ('the Recommendation') that he:

• determine, under s 22(2) of the Extradition Act 1998 (Cth) ('the Act'), that the appellant, Jacob Johannes de Bruyn ('Mr de Bruyn'), should be surrendered to the Republic of South Africa; and

• sign and date, under s 23 of the Act, a warrant for the surrender of Mr de Bruyn.

The Recommendation was made on 8 December 2003 by the Assistant Secretary of the International Crime Branch of the Attorney-General's Department.

[70] On 26 February 2004, Mr de Bruyn filed an application to the Court in which he sought review of the Minister's decision under s 39B of the Judiciary Act 1903 (Cth). On 8 July 2004, a judge of the Court ordered that Mr de Bruyn's application be dismissed with costs. Mr de Bruyn now appeals to the Full Court from those orders.

[71] The Minister gave no reasons for his decision to approve the Recommendation. However, the Recommendation was accompanied by a briefing paper ('the Briefing Paper') and the proceeding has been conducted on the basis that the Briefing Paper contains the Minister's reasons for his decision.

[72] While it is clear enough that the Minister's decision was made on 29 January 2004, it is in fact dated 29 January 2003. Further, the Briefing Paper advised the Minister that his decision had to be made under the Extradition (South Africa) Regulations 2001 ('the 2001 Regulations'), which repealed the Extradition (Republic of South Africa) Regulations ('the 1988 Regulations'). It is common ground that, notwithstanding their repeal, the 1988 Regulations continued to apply to the request by South Africa for the extradition of Mr de Bruyn, since that request was made in 1997. The primary judge considered that, while the Minister clearly had regard to the wrong regulatory regime, the two regimes were relevantly sufficiently similar for that error to have been of no consequence. Nevertheless, the error gives rise to considerable disquiet, such that the reasoning to be found in the Briefing Paper should be examined with particular care.

THE SCHEME OF THE ACT

[73] Section 22(1) of the Act provides that an eligible person is a person who has been committed to prison by order of a magistrate made under s 18 of the Act or s 19(9) of the Act. It is common ground that Mr de Bruyn was an eligible person at relevant times. Section 22(2) provides, in effect, that the Minister shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered.

[74] However, s 22(3)(e) of the Act relevantly provides that an eligible person is only to be surrendered in relation to a qualifying extradition offence if, where, because of s 11, the Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that surrender of the person in relation to the events may be refused in certain circumstances. Nevertheless, where the Minister is satisfied either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused, the Minister in his or her discretion may determine that the person is to be surrendered to an extradition country. Section 11(1) relevantly provides that the regulations may state that the Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country or may make provision, instead, to the effect that the Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications.

[75] Regulation 4 of the 1998 Regulations provided that the Act applies in relation to the Republic of South Africa subject to the limitations, conditions, exceptions or qualifications specified in reg 5. Regulation 5(4)(b) provides that the Minister may decline to issue a surrender warrant in relation to a person if the Minister, while taking into account the nature of the offence to which the extradition request relates and the interests of the requesting country, is nevertheless of the opinion that, in the circumstances of the case, it would be

unjust, oppressive or incompatible with humanitarian considerations to surrender the person to that country.

[76] Regulation 4 of the 2001 Regulations provides that the Act applies to South Africa subject to the Treaty on Extradition between Australia and the Republic of South Africa, a copy of which is set out in Sch 1 to the 2001 Regulations. Paragraph 2(g) of Art 3 of that Treaty relevantly provides that extradition may be refused if the Requested State, while also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

THE BRIEFING PAPER

[77] In the Briefing Paper, while the Minister's attention was directed to para 2(g) of Art 3 of the Treaty, his attention was not directed to reg 5(4)(b) of the 1998 Regulations. The Briefing Paper drew specific attention to the discretionary grounds upon which extradition might be refused, including the ground in para 2(g). The Briefing Paper then addressed that ground by observing that Mr de Bruyn had made a number of representations claiming that his surrender to South Africa would be oppressive. The Briefing Paper then said:

… there is no substantial evidence supporting a claim that the surrender of [Mr de Bruyn] to South Africa would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

[78] After dealing with 'Submission 1' by Mr de Bruyn, that he would be permanently separated from his family if convicted in South Africa of the crimes alleged, the Briefing Paper addressed 'Submission 2', that Mr de Bruyn 'believes that the conditions in South African prisons are unfavourable'. The Briefing Paper referred to several news articles provided by Mr de Bruyn that detailed conditions in some South African prisons, copies of which were attached to the Briefing Paper. The thrust of the news articles is concerned with the risk that a prisoner might contract HIV/AIDS as a consequence of rape in South African prisons.

[79] In response to Mr de Bruyn's claims of the high incidence of HIV/AIDS in their prisons, the Briefing Paper then stated that the South African authorities commented that it has not been established how many deaths occur as the result of HIV/AIDS and that, in an annual report for 2001/2002 concerning South African prisons, it was stated that the number of HIV/AIDS related deaths in prison reflects the pandemic outside prison and it is, therefore, not possible at the present time to indicate the incidence of contracting HIV/AIDS whilst in prison in South Africa. A copy of the annual report referred to is attached to the Briefing Paper. Thus, the South African authorities do not take issue with the assertion that the incidence of HIV/AIDS in South African prisons may be high.

[80] Departmental comment on Mr de Bruyn's 'Submission 2' was then set out in the Briefing Paper as follows:

The Annual Report to which the South African authority refers, states … that the natural death rate (ie those deaths caused by illness) among the prison population was 7.75 per 1000 and that 'natural deaths appear to be mostly caused by HIV/AIDS'. When compared with the

incidence of HIV/AIDS in Australian prisons (which is around 0.2 per cent), this percentage appears quite high. Australia, however, does not suffer from a HIV/AIDS pandemic as does South Africa. It is conceivable that the HIV/AIDS related deaths in prison reflect the situation in South Africa outside the prisons. There is no certainty that [Mr de Bruyn] will contract HIV/AIDS if made to serve a sentence in a South African prison.

[81] The Briefing Paper then addressed 'Submission 3' by Mr de Bruyn, that his extradition would effectively be sentencing him to capital punishment, because he thinks it is a certainty that he will contract HIV/AIDS if sent to a South African prison. The Briefing Paper recorded that Mr de Bruyn asserts that, as the potential for contracting HIV/AIDS in a South African prison is high, his imprisonment therefore would amount to a 'death sentence' and then referred to comments from the South African authorities that there is no evidence that Mr de Bruyn will contract AIDS whilst in a South African prison and it is simply speculation on his behalf.

[82] The only Departmental comment on Mr de Bruyn's 'Submission 3' was:

There is no certainty that [Mr de Bruyn] will contract HIV/AIDS if made to serve a sentence in a South African prison.

The briefing paper then observed:

You may be satisfied that none of the discretionary grounds for refusal of an extradition request under the Treaty are made out in this case.

REASONING ON APPEAL

[83] The Briefing Paper does not direct attention to the possibility that the risk of contracting HIV/AIDS in a South African prison is so high that extradition would be oppressive or incompatible with humanitarian considerations. Rather, the reasoning in the Briefing Paper seems to be that, because there is no certainty that Mr de Bruyn would contract HIV/AIDS if made to serve a sentence in a South African prison, no question of oppression or incompatibility with humanitarian considerations arises. That reasoning is untenable.

[84] It may well be that, upon due consideration, the Minister might take the view that, although the risk of contracting HIV/AIDS is higher in a South African prison than in Australia, the risk does not amount to oppression and is compatible with humanitarian considerations. On the other hand, there must be a possibility that exposing an individual to a risk of contracting a potentially deadly disease that is considerably greater than the risk of contracting that disease in an Australian prison is oppressive or is incompatible with humanitarian considerations.

[85] In any event, comparison between the risk of contracting HIV/AIDS in a South African prison and the risk of contracting HIV/AIDS in an Australian prison is an irrelevant comparison. Further, a comparison between conditions in prison and out of prison in South Africa is also irrelevant. The relevant comparison is between the risk of contracting HIV/AIDS in a South African prison and the risk of contracting that disease while at liberty in Australia. The only relevant comparison is between the position in which Mr de Bruyn would find himself if he is not extradited and the position in which he would find himself if he is extradited and imprisoned in South Africa. There is no suggestion that Mr de Bruyn would be imprisoned in Australia if he were not extradited.

[86] All that the Minister did was to conclude that it was not oppressive or incompatible with humanitarian considerations simply because there is no certainty that Mr de Bruyn would contract HIV/AIDS if made to serve a sentence in a South African prison. The Minister did not address the question that he was required to address, namely, whether, in the circumstances of the case, it would be oppressive or incompatible with humanitarian considerations to surrender Mr de Bruyn to South Africa when there is a risk of contracting HIV/AIDS considerably greater than if he is not surrendered.

[87] The Minister's decision was made on the basis of a clear misconception of the question before him. He did not turn his mind to the correct question and, as a consequence, failed to exercise the power conferred by the Act. Accordingly, he acted outside any power conferred by the Act.

CONCLUSION

[88] The appeal should be upheld and the orders of the primary judge should be set aside. In lieu of those orders, there should be an order setting aside the Decision. In the absence of a determination under s 22(2) of the Act, there would be no authority for the issue of a warrant for the surrender of Mr de Bruyn to South Africa. As it appears that the Minister has already signed a warrant, that warrant should be quashed. However, there is no reason to think that the Minister would issue a warrant in the absence of a determination under s 22(2) of the Act and, accordingly, it would be inappropriate to order an injunction restraining the Minister from signing and dating a further warrant.

[89] It is by no means clear that the ground upon which the appeal succeeds was squarely raised by Mr de Bruyn, either at first instance or on appeal. However, the Minister does not object to the matter being decided on that ground. Mr de Bruyn was self-represented on the appeal and a great deal of irrelevant material was included in the appeal papers. Mr de Bruyn was represented by legal aid counsel at first instance. In the circumstances, it not appropriate to make any order as to the costs of the appeal or of the proceeding at first instance.

Order

1.

The appeal be allowed.

2.

The orders of the primary judge be set aside.

3.

In lieu of those orders, the determination of the Minister for Justice and Customs made on 29 January 2004 be set aside and the warrant signed on 29 January 2004 be quashed.

4.

There be no order as to the costs of the appeal or of the proceeding before the Honourable Justice Dowsett.

Note: Settlement and entry of orders is dealt with in O 36 of the Federal Court Rules.

The appellant appeared in person.

Counsel for the respondent: Mr P Hack SC with Ms M Brennan

Solicitors for the respondent: Australian Government Solicitor