# THE INCORPORATION OF HUMAN RIGHTS FAIR TRIAL STANDARDS INTO AUSTRALIAN EXTRADITION LAW

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**The tension between the obligation to extradite and the protection of an individual's civil liberties**

It is accepted that challenges to deportation in the field of refugee law in the quarter of a century since *Kioa*[1] have greatly fuelled the development of administrative law principles. Although not so prolific, extradition challenges have also played a substantial role in that regard. The two fields overlap but also have distinct features and the High Court has been vigilant in ensuring that deportations do not mask a process of disguised extradition.[2]

In the labyrinthine territory of extradition law, because of its legal complexity aggravated by encrustations of amendments, the arcane systems of foreign law often encountered and the highly charged political profile of the cases entails the risk faced by 'the sojourner venturing into that country from whose dread boundaries no visitor ever returns'.[3] Even then, immigration law and extradition law tend to represent polarities in that challenges brought by refugees are for the most part regarded benignly while those mounted by persons facing extradition tend to be looked upon with suspicion and scepticism. In the public psyche they are apt to be seen as pursued by seriously dangerous or deviously corrupt criminals drawing upon secret funds to advance spurious technical objections. Although a species of criminal proceedings[4] applicants in extradition cases tend not to be accorded the benefit of the presumption of innocence.

It is a commonplace of international extradition law that it exists to facilitate cooperation between states so that perpetrators of serious crimes fleeing from one territorial jurisdiction cannot gain immunity from prosecution by claiming sanctuary in another. Rather, predominantly under bilateral treaty agreements, provision is made for the surrender of criminal fugitives to states seeking their return. Equally, it is also accepted that extradition is a *coercive administrative process* that entails removing a person from his or her place of residence and subjecting the person to criminal process in another country.[5] Even if a person is not surrendered, extradition proceedings result in substantial incursions on liberty, interference with normal life, and usually considerable expense. It is not surprising that extradition arrangements among countries address that problem by importing restrictions on the process to afford protection against arbitrary abuse and violation of the civil and political rights of a person whose extradition is sought. These two objectives, returning offenders to answer criminal charges while nevertheless protecting accused persons against undue incursion into their personal freedoms represent the polarities that create an inherent tension in the extradition process.

This article explores the extent to which the *Extradition Act 1988* (Cth) (the *Act*) incorporates international human rights standards, such as the fair trial standards under the *International Covenant on Civil and Political Rights 1966 (ICCPR),* for the purpose of restraining

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extradition in cases where a requested person is likely to face an unfair trial in the requesting country. It asserts that the *Act*, by giving legal effect to certain 'extradition exceptions' included in bilateral extradition treaties between Australia and other countries may be read as importing fair trial standards in Article 14 of the *ICCPR* into the evaluation process to determine if extradition should be refused.

Further, reference to international fair trial standards arguably amounts to a relevant consideration in determining that issue. Accordingly, they provide a basis for advancing more human rights-enhancing submissions in arguments before the courts.[6] The potential for invoking standards delineated in Article 14 is certainly enhanced if it is accepted that in determining whether a decision to extradite engages unfairness and injustice, regard is not to be had solely to Australian standards, as was held in the recent High Court decision, *Commonwealth Minister for Justice v Adamas* (*Adamas HC*).[7]

This prompts a further question, irrespective of whether Article 14 has been given a statutory status in Australian law: to the extent that Australia is under an *international* obligation to observe the provisions of the *ICCPR,* should the fact that Australia may be in breach of that obligation if the Minister authorises surrender of a person be a relevant consideration when making an extradition decision? While on present authority the stronger view appears to be that it is not,[8] this article concludes that it is an open question and awaits authoritative determination by the High Court.

As a subsidiary consequence, the recognition of the relevance of these international standards opens the way for Australian courts to more readily access, in appropriate cases[9] the *comparative jurisprudence* of other human rights tribunals such as the European Court of Human Rights. Further, if there is a substantive incorporation of international standards there may be greater scope for invoking arguments based on considerations of *proportionality*.

**The relevance of fair trial standards in the International Covenant on Civil and Political Rights and the European Convention on Human Rights**

***The principle of a fair trial***

It is incontestable that a fair trial is one of the fundamental elements of the Australian criminal justice system.[10] This article explores the extent to which a person subject to extradition can resist extradition based on the objection that he or she is unlikely to receive a fair trial in the other country.

***Means of including provisions in Australian extradition law protecting human rights***

For Australian purposes it has been claimed that the *Act* purports to resolve the tension between cooperating to extradite fugitives from justice and protecting the liberty of individuals by 'striking a *balance*[11] between the interests of the extradition country in retrieving those whose return it seeks for violation of its laws, and those of Australia in upholding its dominion over those presently on its territory, and those of the alleged extraditable persons' (emphasis added).[12] Those underlying purposes are not, however, immediately evident from a perusal of the principal objects of the *Act*. Relevantly, regarding extradition from Australia, s 3 expresses the *Act's* objects as 'to codify the law relating to the extradition of persons from Australia to extradition countries … and, in particular, to provide for proceedings by which courts may determine whether a person … is eligible to be extradited … and … to enable Australia to carry out its obligations under extradition treaties.'[13]

To appreciate the extent to which the *Act* affords protection of the human rights of a person whose extradition is sought, it is necessary to have regard to:

- first, statutory objections and prohibitions against extradition expressly set forth in the *Act*; and
- secondly, guarantees and limitations provided for in extradition treaties which are given legal effect so as to modify the operation of Part II of the *Act*.[14]

In the first category, s 7 of the *Act* explicitly provides that a person is not eligible for extradition if:

- the offence for which extradition is sought is a '*political* offence';
- the surrender of the person is sought in order to *punish the person on account of*, among other reasons, the person's *race, religion, nationality, or political opinion*; or
- the extradited person may be *prejudiced* at trial *by reason of such factors*.

Significantly, these restrictions reflect fundamental human rights standards which are the subject of existing human rights instruments.[15]

Protections within the second category[16] are necessarily dependent on *specific provisions* made in *individual extradition treaties* and therefore vary according to the arrangements entered into by the parties to a particular treaty. In many cases these exceptions replicate statutory exceptions within the first category, such as the prohibition on extradition in relation to a 'political offence'.[17] However, most bilateral treaties normally go further and incorporate specific articles which provide, for example, that 'extradition shall not be granted' where a person may be subjected to torture or to 'cruel, inhuman or degrading' treatment or punishment.

One such specific exception common to many recent treaties (referred to hereafter as the 'unjust' exception) is expressed as follows:

> *Extradition may be refused* in any of the following circumstances:
> - 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*. (Emphasis added)

**Applying protective limitations in treaties under the *Extradition Act***

Including a provision like the 'unjust exception' in an extradition treaty prompts the question: 'What is its resulting *legal effect*?' This requires traversing the legislative mosaic set forth in sub-ss 11(1) and (1A) of the *Act*. They relevantly provide that regulations may be made in relation to specific countries that have the effect of applying the *Act* 'subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country.' So where regulations are made under s 11 to give effect to a bilateral treaty, the *Act* applies in relation to extradition arrangements

between Australia and the other treaty country in a *modified form* that adapts the operation of the *Act* to conform to the exceptions provided in the relevant treaty.[18] Hence if a treaty includes a provision like the 'unjust exception' it takes effect as if it were a provision of the *Act*. Consequently, it forms part of domestic Australian law governing extradition between Australia and the other party. In other words, it has *direct* legal effect as if written into the *Act* itself.

The immediate effect of incorporating the 'unjust exception' is to compel the Minister to consider when determining under s 22 of the *Act* whether to surrender a requested person, the personal and other circumstances of the person against the relevant criterion/criteria[19] with a view to deciding whether to *refuse extradition*. Does engrafting the 'unjust exception' into the *Act's* operation directly incorporate *more general international human rights standards,* particularly those relating to *rights to a fair trial established by the ICCPR*, into Australian extradition law?

This is essentially a question of construction.[20] It entails a consideration of whether the notion of an extradition of a person being *unjust, oppressive, incompatible with humanitarian considerations* could include, as part of its textual content, the sense of 'unjust' etc according to the fair trial standards recognised in Article 14 of the *ICCPR*.

***The ICCPR international fair trial standards***

Relevantly, **Article 14 provides:**

1. All persons *shall be equal before the courts and tribunals*. In the determination of any criminal charge against him … everyone shall be entitled to a *fair and public hearing* by a competent, *independent and impartial tribunal* established by law.
2. Everyone charged with a criminal offence shall have the *right to be presumed innocent* until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone *shall be entitled to the following minimum guarantees*, in full equality:
   (a) *To be informed* promptly and *in detail* in a language which he understands *of the nature* and cause *of the charge against him*;
   (b) To have *adequate time and facilities* for the preparation of his defence …;
   (c) To be tried *without undue delay*;
   (d) To *be tried in his presence*, and to defend himself in person or through legal assistance of his own choosing; ……
   (e) *To examine, or have examined, the witnesses against him* and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) ….
   (g) Not to be *compelled to testify against himself* or to confess guilt; …..
5. Everyone convicted of a crime shall have *the right to his conviction* and sentence *being reviewed* by a higher tribunal according to law. …..
7. *No one shall be liable to be tried* or punished again *for an offence* for which he has *already been finally convicted or acquitted* in accordance with the law and penal procedure of each country.[21] (Emphasis added)

Because of their relative specificity the enumeration in paragraph 3 of Article 14 of fairness requirements such as the right to examine prosecution witnesses, identifies archetypal *categoric situations* that detract from a fair trial and thus provides more utilitarian guidance than broader statements about 'equality before the law'.

To similar effect, in relation to extradition treaties with countries that are parties to the *European Convention on Human Rights 1950* (*ECHR*), Article 6 of that Convention

prescribes standards governing fairness of trials that a requesting European country will be obliged to observe when making an extradition request.[22]

Necessarily, the analysis of whether the 'unjust exception' imports Articles 14 of the *ICCPR* and Article 6 of the *ECHR* into the *Act* must extend beyond the mere words used in the unjust exception and have regard to the whole scope and purpose of the *Act*[23] and the other terms of the exception.

**Principles regarding incorporation of international obligations into Australian law**

It is now well established that lacking statutory ratification and endorsement, provisions in an international instrument do not have any immediate and direct legal effect in Australian municipal law.[24] They may, however, perform other functions such as providing guidance in the event of interpretive difficulties with the construction of ambiguous provisions in Australian statutes. They may also constitute a consideration that ought properly to be taken into account in the process of executive administrative decision-making. Finally, in some instances, they may indirectly contribute to the development of common law principles where extension of those principles might otherwise be inconsistent with an international standard or prohibition.[25]

Turning to the *ICCPR* it is virtually a truism, often repeated as a judicial mantra, that it is *not part of* Australian domestic law.[26] That proposition may be accepted in so far as there is no Commonwealth legislation explicitly enacted for that purpose. That is not to say that since the provisions of the *ICCPR* have not been given a statutory status they therefore can be ignored in the course of the Commonwealth decision-making as not constituting a relevant consideration.[27]

However, there can be no debate that, by reason of s 11, the *Act* directly incorporates and gives legal effect to limitations and qualifications in a bilateral treaty, including the 'unjust exception'.[28]

***The standard(s) for evaluating fairness: international or domestic***

This engages a broader issue: In addressing the fairness of criminal procedures in another country, both systemically and in the particular circumstances of the requested person, are the requirements of a fair trial to be *measured by Australian* or *international standards*? To pose the choice as a dichotomy predicates that there may be a divergence between the two although one would normally start from the assumption that the Australian standards are no lower than those recognised in the *ICCPR*. The authoritative position in the light of *Adamas HC* is now cast in negative terms: that the matter is *not* one to be determined *solely* according to Australian standards; the latter may be relevant though not determinative. However that conclusion does not address just how the several standards, domestic and international, can co-exist and interact, particularly if contradictory.

***The starting point: the interpretation of 'unjust', 'oppressive' or 'incompatible with humanitarian considerations'***

Whether the incorporation of the 'unjust exception' in a bilateral treaty when given Australian domestic effect carries as a matter of its content the additional freight of embodying fair trial standards under the *ICCPR*[29] is admittedly contentious. The first difficulty in making a case that the international fair trial standards in Article 14 of the *ICCPR* are now comprehended within the 'unjust exception' is the fact that the criteria of injustice and oppression have long been a feature in the history of extradition legislation of the United Kingdom and other Commonwealth countries.[30] As a bar to surrender the notions go back as far as the *Fugitive Offenders Act 1881* (UK). The criteria of 'unjust' and 'oppressive' have been taken up in later

Australian legislation including that relating to interstate extradition.[31] While not expressly appearing in the *Extradition Act 1988* they are now commonly found in treaties incorporated into the *Act*. Over time, they have taken on a broad meaning that predates Australia's accession to the *ICCPR*. The objection can be raised therefore that each represents a *sui generis* concept that draws no content from the *ICCPR*.[32]

Against this, it may be contended that the concepts of injustice, oppression, and incompatibility with humanitarian considerations are facultative and therefore capable of gravitationally pulling into their notional compass later emerging definitions of rights (such as those in the *ICCPR*) that guide and inform those tests in particular factual circumstances. This article is predicated on the premise that the criteria in the 'unjust exception' are flexible and have no fixed meaning that would create a disconformity or inconsistency with the fair trial standards in the *ICCPR*. Supporting this ambulatory contemporaneous understanding is the addition of 'incompatible with humanitarian considerations', humanitarian principles being the result of more recent evolutionary developments of international norms than the notions of 'unjust' and oppression' in earlier British and Australian statutes.

In approaching the meaning of these expressions it is as well to heed the injunction of Heydon J in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* that words like 'unfair', 'unjust', 'oppressive' or 'prejudicial' are not words of exact meaning.[33] In the first instance, of course, one must start with the way that the notions of unjust, oppressive or not compatible with humanitarian considerations have been interpreted and applied in decisions of Australian courts. This survey will essentially focus on their statutory meanings.

***One test or three?***

The issue is complicated by a prior logical objection. Should the phrase 'unjust, oppressive or incompatible with humanitarian considerations' be read as setting forth a *composite test* to be assessed cumulatively as part of a general evaluation, or may it be regarded as a test comprising three separate and disjunctive criteria to be individually assessed?

In *Foster v Minister for Customs and Justice* (*Foster*)[34] Gaudron and Hayne JJ suggested that the expression 'unjust or oppressive or too severe a punishment' would be better understood as providing a *single description* of the relevant criterion which is to be applied rather than as three distinctly different criteria. They continued:

> The use of the disjunctive 'or' might suggest the need to consider each element of the expression separately but for several reasons we think it preferable not to approach the provision in that way. First, there is the fact that the terms used are, as we have already said, qualitative descriptions requiring assessment and judgment. Secondly, the use of the words 'too severe' suggests a need for comparison with some standard of punishment that is regarded as correct or just or, at least, not too severe. Thirdly, the considerations which may contribute to the conclusion that something is 'unjust' will *overlap* with those that are taken into account in considering the other two descriptions. It would, then, be artificial to treat the three ideas as rigidly distinct. Each takes its content, in part, from the use of the others.[35] (Emphasis added)

An ostensibly different if not contrary view was stated in *New Zealand v Moloney*[36]*.* There the Full Federal Court, Black CJ, Branson, Weinberg, Bennett and Lander JJ said that 'as a matter of construction it seems clear that each component in the composite expression 'unjust, oppressive or too severe a punishment', must be given some separate meaning. This is so even if there is a degree of overlap between them.'[37]

In *New Zealand v Johnston*[38] the Full Federal Court treated the concepts of 'injustice' and 'oppression' in the context of extraditions to New Zealand as forming a composite expression in which the concepts are not entirely distinct. Accordingly, each component in the composite expression should be given some separate meaning even if there is a degree

of overlap between them. Building on this their Honours observed that in the composite expression 'injustice' is directed primarily to the *risk of prejudice* to the accused *in the conduct of the trial* itself and oppression is directed to the *hardship* visited upon the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration.[39]

In *O'Connor v Adamas* (*Adamas FFC*),[40] Barker J, with whom McKerracher J agreed, commented that that, having regard to *Foster*, one should not take an unduly limited view of the meaning of the words 'unjust' and 'oppressive' and that they should have a broad connotation that would comprehend any other sufficient cause, including the passage of time since the offences are alleged to have occurred, the health of the person sought, hardship likely to arise through extradition, the likelihood of conviction, prison conditions in the requesting state, *the prospects of a fair trial*, the issue of natural justice and the gravity of the offence.[41] He went further and added that the concept of 'humanitarian considerations' should be considered an extremely broad concept that may, depending on the circumstances of the case, go beyond the notion of a particular circumstance being 'unjust' or 'oppressive'.[42] His Honour thereby engaged in a dual operation, attributing a broad sense to each of the words in the 'unjust exception' while accepting that those meanings could overlap, and the test overall be satisfied by factors including the prospect of a unfair trial in the requesting country that fall within one or more senses of the individual components of the composite phrase.

In *Adamas HC* the High Court noted that in making its written submissions to the Minister the Attorney General's Department advised that the 'unjust etc' criterion in Article 9(2)(b) of the *Australian-Indonesian Extradition Treaty 1992* involved broad overlapping, qualitative concepts 'which call for the making of assessments and value judgments about which reasonable minds may differ'.[43] The departmental submission did not limit the criterion by reference to standards defined by Australian domestic law and practice, although reference was made to Australian case law on the right to a fair trial. Without specifically endorsing the Departments interpretation on this point their Honours did observe:[44]

> Interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Treaty, the expression 'unjust, oppressive or incompatible with humanitarian considerations' in Art 9(2)(b) of the Treaty admits of no relevant ambiguity. The expression encapsulates *a single broad evaluative standard* to be applied alike by each Contracting State whenever that Contracting State finds itself in the position of the Requested State. The standards applied within each Contracting State are relevant to its application, as are international standards to which each Contracting State has assented, but none is determinative. (Emphasis added)

This statement was primarily directed to whether the issue of the fairness of criminal proceedings in the requesting country is a matter to be determined according to a compound test embracing both domestic and international standards of fairness. It also can be read as accepting that in having regard to particular matters, such as a conviction *in absentia*, the individual components of unjustness, oppression and incompatibility with humanitarian considerations are not matters to be assessed separately and in isolation.

In the end there is no real contradiction between the various views expressed in the cases considered above. Cumulatively they represent a compromise between taking a global approach to the circumstances under consideration and evaluating them according to each of the various criteria without treating the various conditions as mutually exclusive.[45]

Decisions to surrender involving the 'unjust exception' should therefore be approached in a broad manner that favours a cumulative assessment of *all the circumstances*. However, in making that evaluation the Minister should be guided in a case where fair trial is an issue by a correct understanding of particular matters such as whether the proceedings in the

requesting country would be considered unfair according to both Australian and international standards and, as such, fall specifically within the 'unjust' criterion. Alternatively, the same standards can be applied in concluding that the requested person who may have to wait for some time before being subjected to an unfair trial in another country would be pre-eminently subject to 'oppression'. Finally, depending on the particular circumstances of the individual, including the person's health, the third criterion, 'incompatibility with humanitarian considerations' could also come into play.[46]

***Fairness to be determined solely by Australian standards?***

As noted above, if it is accepted that the 'unjust exception' requires the Minister to consider whether a trial in another country would be fair, the question follows: 'fair' by reference to the laws of the requesting country, international standards or, if they are different, Australian standards?[47] The short answer arguably is that the matter primarily falls to be resolved according to the *particular* statutory and treaty arrangements that regulate extradition between the countries involved. On the basis of current authority, it is clear that the matter is to be assessed having regard to a composite evaluation involving both international and Australian standards.

In summarising his understanding of the Australian doctrine Barker J in *Adamas FFC*, after reviewing various decisions of the High Court (*Foster*) and the Full Federal Court, including *Bannister v New Zealand* (*Bannister*)[48] and *New Zealand v Moloney*[49] concluded that:

> What is common, however, to the decision of the Full Court in *Bannister* and the judgments of Gaudron and Hayne JJ and Kirby J in *Foster*, in my view, is that the question of what might be considered 'unjust, oppressive or too severe a punishment' if extradition of the requested person were to be permitted, is necessarily to be assessed by way of a value judgment, but a value judgment to be informed *by reference to Australian standards*.[50] (Emphasis added)

This dictum while it may remain true in relation to New Zealand and extradition arrangements with other Commonwealth countries must now be reconsidered in the light of *Adamas HC*. Specifically, the High Court ruled that restriction to the Australian standard of fairness was not appropriate in relation to extraditions between Australia and Indonesia, where the standard by which unjustness, oppression and incompatibility with humanitarian considerations is to be evaluated by reference to the international understanding reflected in the relevant Article in the controlling bilateral treaty.

If *international standards* are implicated does that also include considerations set forth in Article 14 of the *ICCPR*?[51] It is submitted that in an appropriate case it does. This is primarily by virtue of the indirect *incorporation* of that Article under the rubric of the 'unjust exception' although it may be assumed that it informs the *common law concept of a fair trial* which should not be assumed to be inconsistent with it.

**The received jurisprudence concerning interpretation and application of the 'unjust exception'**

**a) *Instances of Australian interpretation of the 'unjust exception' involving extradition to countries with similar common law criminal jurisdictions***

An appreciation of the potential impact of Article 14 on Australian extradition decision-making may be gleaned from examining several recent decisions of the High Court and the Full Federal Court where the 'unjust exception' was raised. In reviewing these cases, however, it is necessary to be aware that while some commonalities may exist each case, as mentioned above must be considered in the light of the specific statutory provisions and treaty arrangements that subsist.

In *Foster*, the United Kingdom requested Foster's extradition for a number of fraud charges. Extradition in such cases is regulated by the *Extradition (Commonwealth Countries) Regulations* (Cth). He argued that having spent a substantial period of time in custody in Australia where he had fled after absconding while on bail in England it was unlikely that he would be sentenced to any additional term if extradited. Hence it would be unjust and oppressive to do so. The Minister decided he should be surrendered nevertheless. Foster then claimed that the Minister had fallen into jurisdictional error in failing to ascertain the maximum length of sentence he could receive if extradited as it was relevant to determining what would otherwise be an oppressive surrender. The majority held that the Minister was not bound to make detailed inquiries about the likely sentence which might be imposed in concluding that she was not satisfied that it would be unjust or oppressive or too severe a punishment to surrender him. There being no obligation to make such enquiries, the Court did not have to determine whether the possibility of having to serve further time rendered the surrender unjust or oppressive according to Australian standards.[52]

In *Bannister*,[53] New Zealand sought the extradition of a person on rape charges. Bannister had been charged in New Zealand in 1998 in relation to events alleged to have occurred many years earlier, in 1975. The charges included four which were described as 'representative'. In each case the matters alleged were not the subject of separate detailed charges. A magistrate refused extradition under s 34(2) on the basis that Bannister would suffer considerable hardship if he were surrendered to New Zealand, having regard to the lapse of time and his personal circumstances. That decision was reversed on review by the primary judge. On appeal, the Full Court took an adverse view about the fairness of representative charges, regarding them as discredited in Australian practice and no longer allowed in this country. This reflected a ruling of the High Court that trial on representative charges presented a risk of a miscarriage of justice.[54] As a result, the Full Court concluded that in the circumstances it would be 'unjust or oppressive' to return Bannister to New Zealand to answer the charges. In so doing, the Full Court held that it was permissible to have regard to *the quality of the trial* which the accused person would receive in New Zealand.

In *Moloney*,[55] New Zealand sought the extradition of two members of a religious order who were alleged to have committed various sexual offences against young boys between 1971 and 1980. The respondents claimed that it would be 'unjust' to surrender them to New Zealand. It was accepted that the time that had elapsed since these offences were said to have occurred gave rise to difficulties with respect to the fairness of any trial that might take place. In proceedings before a magistrate to determine whether they were eligible for extradition, they challenged their extradition on that ground that the lengthy period that had lapsed since the offences were allegedly committed meant that their surrender would be unjust. The magistrate did not uphold that objection.

On review, a single Federal Court judge reversed that finding and set aside the magistrate's orders. The judge had particular regard to the fact that, unlike New Zealand law, in an Australian trial where a person was accused of sexual offences long after they were allegedly committed the jury had to be given a special warning (known as a *Longman* warning) about the problem of a conviction after such a lapse of time. A *Longman* caution was seen to be necessary to ensure a fair trial in Australia. The Full Court extensively considered the meaning of 'unjust'[56] and in turn overturned the primary judge's decision, unanimously deciding that while there were differences between Australian and New Zealand law concerning the need for a special warning that did not warrant the conclusion that it would be unjust to return the respondent to New Zealand. In particular, the Full Court concluded that despite the long period that has elapsed since the offences were allegedly committed, it would not necessarily be unjust to surrender the respondent. Whether the long delay was unfair was a matter that *could be left to the New Zealand trial court* to determine.

In *Newman v New Zealand*,[57] the appellant was an 87-year-old man whose extradition was sought in relation to charges of indecent assault of his daughters in a period spanning 1957 to 1961 and 1966 to 1975. In the Full Federal Court he challenged a magistrate's order that he be surrendered to New Zealand, and the subsequent first instance review confirming that order, on the basis that some of the New Zealand charges made against him were 'representative charges'. Accordingly, it would be unjust or oppressive if he were surrendered to New Zealand. The Full Federal Court allowed the appeal on the basis that it would be possible, if he were surrendered, for him to face some charges specified in the warrant that were representative. In that case it would be unjust and oppressive to order his surrender at all. The Full Court followed *Bannister*, observing that there was no conflict between *Foster, Bannister* and *Moloney*.[58]

In *New Zealand v Johnston*[59] New Zealand sought the extradition of a 69 year old male Australian citizen to answer serious charges of sexual interference with a minor alleged to have occurred in the 1970s. Given the lapse of time, there were concerns that materials adduced in the original investigations and relevant testimony might no longer be accessible and capable of cross-examination.

The Full Federal Court held that the loss of such evidence did not render the respondent's surrender to New Zealand unjust. The Court first noted that allegations of sexual assault against a child are very serious matters and the nature of those allegations should weigh very heavily in favour of extradition. It also noted that in cases involving sexual misconduct towards children, delays, and hence the loss or unavailability of evidence, were very common. It could be expected, however, that any prejudice arising would be a matter that would be *assessed by the New Zealand trial court*. The loss of capacity to carry out necessary investigations did not constitute prejudice of such seriousness as to render the respondent's trial in New Zealand unfair. It was not for Australian courts, when determining whether surrender would be unjust, to assess the strength of the prosecution case and whether the person was likely to be acquitted. The Court, however, distinguished that situation from a case where there was *evidently some fatal flaw* or where there was some reason the prosecution was clearly bound to fail.[60]

It may be noted that each of the above cases entailed extradition with other Commonwealth countries, the UK and New Zealand, in which case the *Extradition Act 1988* and earlier legislation have made special provision for extradition to those countries. Necessarily, because they are common law jurisdictions, Australian courts accord a great deal of respect to the fairness of criminal procedures in those countries. Not surprisingly, given the similarity and traditions of criminal process in those instances, Australian courts are well able to evaluate the issues about whether subjecting someone to trial in those countries would be unjust, oppressive, or contrary to humanitarian considerations. Invocation of the international standards of fair trial in the *ICCPR* and the *ECHR* in such cases is unlikely to be particularly informative.[61] The latter standards may, however, have a more relevant application in regard to extradition requests from non-common law countries. Two recent decisions of the Full Federal Court illustrate that potential.

### b) *Two recent cases involving non-common-law criminal systems*

#### i) *Zentai v Hungary*

In *Zentai (No 3)*[62] Hungary sought the extradition of Mr Zentai for *interrogation*[63] regarding the offence of a 'war crime' contrary to s 165 of the Hungarian *Criminal Code 1878*.[64] The offence entailed the killing of a Jewish student in Budapest by members of the Hungarian armed forces, including allegedly, junior officer Zentai. This was alleged to have occurred in November 1944. In making its extradition request Hungary relied on depositions taken before the notorious People's Court in 1947-1948 in trials of the two principal officers

involved in the killing. Those court documents implicated Zentai by recording that he had been present at the time the student was beaten and later when his body was thrown into the Danube. Questions of the reliability and voluntariness of statements in this documentary evidence were raised. This included, among other objections, the fact that one of the officers charged tried unsuccessfully to retract a 'confession' allegedly procured under torture by the political police. Hungary also relied on indirect hearsay statements of other persons who were present in the military barracks but had not seen Zentai doing the alleged acts, relying on the statements of others that he had. There were grounds for believing (not contradicted by Hungary) that all relevant witnesses had died and would not be available, as required by Article 6 of the *ECHR* and Article 14(3)(e) of the *ICCPR*, to be produced for cross-examination by the defendant.

In *Zentai,* the applicant relied on a number of overlapping grounds. These included a combination of factors claimed to support a finding of manifest *Wednesbury* unreasonableness in surrendering a national who was old and ill and could, as an Australian national resident in Australia be prosecuted under Australian war crimes legislation,[65] or, to satisfy the Hungarian request to interrogate him, easily be interviewed in Australia.[66] He also contended that the Minister's determination was flawed by illogical and irrational conclusions to such a degree and was so manifestly unreasonable that it could stand as a proper and genuine discharge of his responsibilities under the *Act*. This challenge was directed both to the *process* by which the Minister made his determination (based principally on misleading observations) and which in *its result* was *so unreasonable*, that his exercise of discretion should be found to have miscarried.[67]

A further ground was predicated on the Minister's refusal to make inquiries about the availability of witnesses in Hungary which might have revealed that the person could not be prosecuted if the Budapest Military Tribunal, applying Article 6 of the *ECHR*, was not prepared to admit documentary hearsay evidence.[68] In particular, Mr Zentai claimed that the Minister had not properly considered whether his extradition would be *unjust, oppressive, and incompatible with humanitarian considerations*.[69] Alternatively, he claimed, in the face of assurances that Hungary, being a party to both the *ECHR* and the *ICCPR* was bound to provide a fair trial, the Minister was under a duty to make direct enquiries of Hungary as to whether it could produce the key prosecution witnesses for examination.[70] Finally, he claimed that it would be unfair for him to be prosecuted given the great lapse of time since 1944 during which essential military documents that could substantiate his alibi that he was not in Budapest at the time had been destroyed.

At first instance, McKerracher J accepted the Commonwealth's submission that in considering whether he was satisfied that surrender would *not* be contrary to the conditions set forth in the 'unjust exception' in the treaty, the Minister was required to make value judgments about which reasonable minds might differ. Given the comprehensive nature of the departmental submissions presented to him it was therefore open to him to be satisfied that extradition would not be unjust, oppressive or contrary to humanitarian considerations. He also held that, particularly for reasons of international comity, the Minister was not obliged to seek further information or documentation about the way that Hungary would seek to comply with its obligations under the various international instruments if Mr Zentai was prosecuted.[71]

The Full Federal Court upheld his Honour on this ground.[72] It held that, particularly given the detailed departmental submissions the Minister could not be said to have failed to take into account a relevant consideration regarding whether Hungary, in the absence of relevant living witnesses, would be able to provide a fair trial in accordance with Article 6 of the *ECHR*. In any event, the *Act* did not require him to do so in the sense of it being an essential precondition to the valid exercise of the power arising under s 22.[73]

Ironically, shortly after the Full Federal Court gave its decision in *Zentai* and before the High Court considered the Commonwealth's appeal on another ground, the Military Division of the Budapest Municipal Court[74] on 19 July 2011 acquitted a Hungarian citizen, Sandor Kepiro, of war crime charges alleged to have been committed in World War II while a member of the Hungarian Gendarmerie. Kepiro was tried for offences involving the deaths in 1942 in Southern Hungary of 30 Jews. This was two years before the alleged murder of the student who was the subject of the proceedings against Mr Zentai. The basis for dismissing the charges against Kepiro was that another Hungarian officer, a Lieutenant Janos Nagy, said to be implicated in the killings as a principal, and whose written testimony was crucial to the case mounted by the Hungarian prosecution,[75] had died in 1985. He could not, in compliance with Article 6 of the *ECHR*, be produced for examination about his recorded statements. Ironically, Kepiro's acquittal vindicated the Hungarian assurances given in the Zentai proceedings about the independence of its judiciary and the fact that it would have regard to the fair trial requirements under the Convention.[76] Assuming the Military Division applied the same reasoning in the case of Mr Zentai it is likely that had he been summoned before the military tribunal in Budapest for interrogation, he would have been immediately released to return to Australia. Whether surrendering in light of such a likely outcome could be justified as reasonable is another question.[77]

**ii)** *Adamas v Indonesia*

The litigation leading up to *Adamas HC*[78] concerned a request by Indonesia for the extradition of the respondent who had been convicted *in absentia* on serious fraud and corruption involving misusing and disappearance of substantial funds of Bank Surya for his own purposes. He had been sentenced to imprisonment for life. Indonesian law did not provide an automatic right of appeal or re-trial if he were returned to Indonesia. Further, Indonesia had provided no evidence that he had been served with any process of a kind that would have made him aware of the charges. His leaving Indonesia would not amount to absconding if he had not been aware that he had been charged. Faced with the need to determine whether in those circumstances it was open to the Minister to decide not to surrender the respondent having regard to the equivalent 'unjust exception' provision in Article 9(2)(b) of the *Extradition Treaty between Australia and the Republic of Indonesia 1992* the Attorney General's Department submission advised him that he could conclude that surrender would not be unjust etc. Crucially, the Department did not advise however, in determining what would be unjust the Minister was bound to apply Australian standards of unfairness.

At first instance Gilmour J held that the Department's analysis, which he took to have been adopted by the Minister, incorporated a wrong legal test in that it failed to recognise that whether surrender fell within the 'unjust exception' was to be determined *solely* according to Australian standards. Further, that if he had applied the correct legal test he could not reasonably have concluded that it would *not be unjust*, oppressive or incompatible with humanitarian considerations for Mr Adamas to be surrendered. As his decision was unreasonable he thereby committed judicial error.[79]

In the Full Federal Court Barker J, with McKerracher J agreeing, found that while there was no bar on extraditing a person convicted in another country *in absentia* it was possible that the Minister had been misled by the departmental submission which merely advised that it was open to him to be satisfied that surrender would *not* be unjust or oppressive, while failing to explain that the matter had to be evaluated according to Australian notions of fairness.[80] Nor had his attention been drawn to salient facts about the respondent's lack of awareness which could be viewed as unjust by reference to that standard. The majority held that the Minister had *constructively failed* to take into account relevant considerations by assuming that the departmental submission had correctly informed him as to his decision-making task when determining whether surrender would be unjust, etc. This was because

the advice he received did not properly identify the question that he should ask himself, namely, whether the *in absentia* conviction of the respondent in Indonesia *in all the circumstances* would be considered unjust by Australian standards.

Relevantly, Barker J addressed at length the respondent's submission that the Minister had failed to take into account Article 14 of the *ICCPR*'s general condemnation of *in absentia* trials[81] as considered in decisions of international courts such as the European Court of Human Rights.

His Honour was, as it happened, able to find independently of Article 14 that in the particular circumstances of the case the extradition of Mr Adamas *would be unfair* by Australian standards. Accordingly, reference to the specific requirements in Article 14 was otiose and unnecessary.

Finally, in answer to the respondent's submission that the Minister might have been misled by *other advice* in the departmental submission about Australia's obligation not to surrender a person contrary to standards consistent with Article 14, his Honour held that the respondent had not demonstrated that the Minister had failed to have regard to Australia's international obligations under the *ICCPR* since the Department's advice had been redacted. Without knowing its contents the Court was unable to draw any conclusions about its accuracy.[82]

Significantly, while his Honour found that the *ICCPR* was strictly not part of Australian municipal law he was prepared, as indicated above, to have regard to the comparative jurisprudence of the European Court of Human Rights in determining whether Mr Adamas had been fairly convicted in Indonesia. He was not prepared, however, to conclude that Departmental advice regarding Australia's international obligations under the Convention contained errors that might have misled the Minister.[83]

On further appeal the High Court noted that the crucial issue that divided the Full Court was whether in determining if surrender would be unjust, oppressive or incompatible with humanitarian considerations, that issue 'must be assessed from an Australian perspective against Australian standards, not by any other perspective or standards that do not form part of Australian law'.[84]

The High Court further observed that in determining the meaning of Article 9(2)(b) of the Treaty a court must have regard to its specific formulation, not a general principle governing all cases in which the 'unjust exception' was in part adopted. Hence, in forming the necessary satisfaction that the conditions set forth in the 'unjust exception' did not exist the Minister was also required broadly[85] to consider at the same time two further qualifying and possibly countervailing conditions, namely, whether 'in the circumstances of the case, including the age, health or other personal circumstances of the person' and 'also taking into account the nature of the offence and the interests of [the Republic of Indonesia as] the Requesting State'.[86] Citing Article 31(1) of the *Vienna Convention on the Law of Treaties 1969,* the Court stated that as a provision in a treaty Article 9(2)(b) should be interpreted in good faith in accordance with the *ordinary meaning* to be given to its terms in its context and in the light of the object and purpose of the treaty. The Court thus firmly planted one limb of the interpretive task in the international arena of related concepts expressed in the 'unjust exception'.

Problematically, however, the Court went on to comment:[87]

> The words 'where the Requested State ... considers' emphasise the qualitative nature of the evaluation to be made by the Requested State in the application of that single standard. They provide no warrant for the application of a different standard by each Contracting State, much less for the

> application by each Contracting State of a standard based wholly on domestic laws and practices prevailing within that Contracting State.

What that formulation arguably fails to settle is the conundrum faced by the Minister where the standard of fairness of trials varies as between each of the contracting states and possibly, where one or other is less than the international norms set forth in Article 14 of the *ICCPR*. That is relevant in circumstances such as those contended for by Mr Adamas where he alleged he had not been made aware of the conviction *in absentia* proceedings in Indonesia.

The ambiguity is compounded when the Court went on to elaborate: [88]

> The circumstance that, under s 22(3)(e)(ii) and (iv) of the Act, the consideration required by Art 9(2)(b) is to be given by a Minister of the executive government is an indication that the standards to be applied are not to be equated with Australian domestic law, the exposition and application of which are the province of the judiciary.

This statement, which appears indirectly to engage the constitutional doctrine of separation of powers, is curiously opaque. It appears to leave the evaluative task of forming the necessary satisfaction required by s 22 entirely in the hands of the Minister. It would be surprising however, if the Court was indicating thereby that decisions of the Minister because of the nature of the subject matter were necessarily entirely immune from judicial review under s 75(v) of the Constitution, assuming the latter is practically feasible.[89]

**The 'unjust exception' post-Adamas**

The decision in *Adamas HC* raises the further question of whether it has overruled previous decisions of the Federal and High Courts regarding the meaning to be attached to the 'unjust exception'. Quite clearly, the Court recognised that the interpretation of Article 9(2)(b) of the bilateral Treaty with Indonesia was not of universal application. It distinguished earlier cases such as *Bannister* and *Foster* on which the respondent had relied as concerned with the particular arrangements for extradition to New Zealand and extraditions governed by the *Extradition (Commonwealth Countries) Regulations* (Cth). It therefore left them untouched. Accordingly, in cases of extradition to countries with common law criminal systems, cases like those considered above, they will continue to provide interpretive guidance.

This poses a further problem, namely, that there is not a consistent framework of analysis applying universally across the spectrum of all arrangements incorporating various forms of the 'unjust exception'. Given that the scope for invoking the 'unjust exception' is capable of variation across different bilateral treaties it arguably leaves up in the air the matter of the appropriate standards that the Minister is required to apply in each case.

This may not be a matter of any consequence in the end because even if in a particular case, the Minister, after concluding that on all relevant standards, domestic and international, it *would be unfair* to surrender a person, the Minister may, nevertheless, under the residual discretion in s 22 of the *Act* acquiesce in the request of a foreign request by deciding not to refuse. This is because in their own terms, treaties such as the Indonesian Treaty allow the Minister considerable leeway to put a higher premium on international considerations even where there are strong grounds for concluding that surrender would be unjust. In fact diplomatic considerations may assume a special priority in the case of major and sensitive bilateral relations with countries such as Indonesia. In such cases, the Minister is largely free to determine the matter untrammelled by the prospect of judicial review based on the 'unjust exception', particularly in the absence of any requirement to give reasons.

While the prospect might seem abhorrent to many Australians the broad interpretation in *Adamas HC* appears to skew the balance towards diplomatic considerations trumping the

countervailing purposes of the *Act* in providing protection of individual human rights. It offers little basis for optimism even in cases where there could be a clearly demonstrated injustice in surrendering someone for a foreign trial. This may reflect a broader principle that, in cases involving diplomatic sensitivities, courts should be loath to pronounce on the legality of decisions made by the executive branch of government.[90]

***Has Adamas HC rendered resort to Article 14 of the ICCPR unnecessary or irrelevant?***

Each of the *Zentai* and *Adamas* cases considered above challenged extradition to jurisdictions with continental criminal trial systems. In each case the person affected invoked specific matters alleging contravention of fair trial standards in the *ICCPR* as a basis for questioning whether the Minister had properly understood and applied the 'unjust exception'. In both cases, the Full Federal Court contemplated without deciding that the persons whose extradition was sought *could establish jurisdictional error* or an error of law based on the likely contravention of *those international standards*. In *Adamas FFC* the Federal Court, erroneously as it turned out, determined the issue of whether it would be unjust to surrender the person in regard to his *in absentia* convictions in Indonesia solely by reference to *how Australian courts* would regard the conviction in circumstances where the accused had no knowledge of the criminal proceedings against him. It is notable on the other hand that Barker J was prepared to take into account comparative international jurisprudence as *not inconsistent with* Australian standards. In *Zentai* also, neither McKerracher J nor the Full Federal Court went so far as to say that consideration of Article 14 of the *ICCPR* or Article 6 of the *ECHR* was irrelevant in determining injustice or oppression, rather, that Mr Zentai had not been able to demonstrate *on the basis of inference* that the Minister had erred.

***If now indirectly part of Australian extradition law, does the incorporation of Article 14 provide a basis for arguments invoking proportionality?***

Whether proportionality is a ground of judicial review in Australian law or an adjunct of reasonableness standards, including both *Wednesbury* unreasonableness and jurisdictional error founded on irrationality, is a vexed question.[91] Even the relationship between the latter two (*Wednesbury* unreasonableness measured by absurdity of *outcome*, irrationality based on deficiencies or *errors in the reasoning process*, including not addressing a crucial and relevant consideration) is still unsettled in administrative law theory.[92] Arguably the two are porous concepts that do not allow of 'bright-line' distinctions.

The case law on the topic is to this point inconclusive. In *Minister for Immigration and Citizenship v Li*, some members of the High Court appeared to contemplate that proportionality may enter the lexicon of judicial review but again backed away from a definite endorsement.[93] In this relatively fluid and plastic state it is hard to predict how these theoretical conundrums will be resolved. One possibility is development along the lines of Canadian authority, including judicial recognition of institutional integrity as an aspect of executive decision-making.[94]

It is submitted that if proportionality analysis finds a place in or among the grounds of review it will be located in the field of human rights adjudication. In that event if as postulated Article 14 is now entrenched in evaluations about whether a surrender would be legally and factually unjust, it may permit recourse to arguments based on proportionality in the European and international law sense.[95]

***Breach of Article 14 of the ICCPR as a relevant consideration even if not directly incorporated into Australian extradition law***

A further question was posed at the outset about the extent to which standards stipulated in Article 14 of the *ICCPR* are otherwise implicitly *required to be addressed* by the Minister in

responding to extradition requests from other countries. Irrespective of whether Article 14 has been given *statutory status* in Australian extradition law, is the fact that Australia is under an obligation *in international law* to observe the *ICCPR* and may breach that Convention's fair trial standard a relevant consideration to be taken into account when making an extradition decision?[96]

This issue was raised in the first two levels of the *Zentai* challenges and in varied form also advanced in *Adamas*. In *Zentai*, it was claimed that Australia had a duty under the *ICCPR* to consider whether surrender in circumstances where it was likely, in the absence of information about the existence of witnesses, that the Applicant could not be afforded a fair trial, contrary to international human rights law. This was predicated on the premise that there was a *real risk*[97] that the person's human rights would be violated by the requesting state.[98] The European Human Rights Court's decision in *Soering v United Kingdom*[99] was cited in support.

These contentions were not accepted in either case.[100] Further, Davies J in *Snedden v Minister for Justice of the Commonwealth* explicitly denied that the Minister is obligated to consider a breach of Australia's international undertakings when making a surrender determination.[101] However, the logical conundrum remains. If inclusion of the 'unjust exception' is a matter that the Minister is bound to consider in making a surrender determination and he or she must evaluate the fairness of proceedings in the requesting country by, among other factors, international standards incorporated into the *Act*, how can an impending breach be ignored as irrelevant? It is submitted that a High Court decision is necessary to settle the matter.

**The continuing relevance of Article 14 of the *ICCPR* in the Australian extradition process**

Even though it has not yet been authoritatively established that the international ramifications of a breach of the *ICCPR* is a relevant matter for the Minister to consider, it is evident from cases such as *Zentai (No 3)*[102] and *Adamas FFC*[103] that Australian courts have seen international fair trial standards in the *ICCPR* and attendant European jurisprudence as *potentially informing* the notions implicit in the 'unjust exception'. As such, arguably, to that extent the thesis propounded above has been sustained.

There are therefore sound reasons to claim that possible departures from the fair trial standards in the *ICCPR* and the *ECHR* can be invoked in determining whether surrender would be unjust, oppressive or contrary to humanitarian considerations. Nevertheless, it is pertinent to ask: Does it matter in the end? What significant difference can it make?

The better view appears to be that if there are general reasons for concluding on a normal Australian common law approach that surrender would be unjust and unfair, the fact that the evaluation has to be made in the context of the particular circumstances provided for in bilateral treaty arrangements focuses the enquiry on the more ambiguous *intentions of the contracting parties* in the particular case. On the authority of *Adamas HC*[104]*,* that process necessarily entails consideration of the international standards of fair trial as understood by the contracting parties. It is submitted that in more difficult and finely balanced cases recourse to the specific international examples of what is required for a fair trial under Article 14 of the *ICCPR*, such as the right to confront and question adverse witnesses, should at least be taken into account where they can illuminate the analysis and assist in guiding the Minister's conclusion. Whether the Minister can ignore the *ICCPR* standards in a clear case of impending breach, such as where there are no living witnesses, without committing jurisdictional error is arguably another matter still to be determined by High Court.[105]

**Endnotes**

1 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550.
2 *Moti v The Queen* (2011) 245 CLR 456 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
3 With apologies to William Shakespeare, *Hamlet*, Act 3 Sc 1 lines 78-79 referring to death as 'the undiscovered country from whose bourn no traveller returns'.
4 *O'Donoghue v Ireland* (2008) 234 CLR 599 at [23] per Gleeson CJ.
5 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [6] per Gleeson CJ; *R v Governor of Brixton Prison, Ex parte Levin* [1997] AC 741 at [746] per Lord Hoffman.
6 Matthew Groves, 'International Law and Australian Prisoners' (2001) 24 *University of New South Wales Law Journal* 17 at [58] endorses the view that reference to equivalent concepts in European human rights instruments may be instructive to courts, engaging decisions of the European Commission on Human Rights and the European Court of Human Rights. In *Momcilovic v The Queen* (2011) 245 CLR 1 members of the High Court referred extensively to such decisions. Unlike the Victorian legislation considered in *Momcilovic*, however, to have regard to international human rights standards in making surrender decisions does not require a court to make declarations that the *Act* is in some aspect incompatible with those standards.
7 *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59. Throughout this article the term 'Minister' will be used in preference to 'Attorney General'; while the Attorney is designated in the *Act* as the responsible Minister the function is normally delegated to another Commonwealth Minister.
8 *Snedden v Minister for Justice of the Commonwealth* [2013] FCA 1202 at [53]-[53] per Davies J; *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 at [59]; *AB v Minister for Immigration and Citizenship* [2007] FCA 910; 96 ALD 53.
9 As a matter of caution it should be observed that it will only be in specific instances that reference to such comparative human rights jurisprudence will prove illuminating and informative.
10 *Dietrich v R* (1992) 177 CLR 292, 300 at [6] per Mason CJ and McHugh J. It is another thing, however, to attempt to list exhaustively the attributes of a fair trial; ibid, [8]. In *Rivera v United States of America* [2004] FCAFC 154 the appellant sought to invoke the *Dietrich* principle and also rely on Article 14 of the *ICCPR* in relation to the fairness of proceedings before an Australian magistrate under s 19 of the *Act*. The Full Federal Court at [24]-[30] per Heerey, Sundberg and Crennan JJ held that reliance in each case was predicated on a misconception; that the criminal charge against him was being determined in the proceedings conducted under the *Act*. Those proceedings were, however, an *administrative determination* of his eligibility for surrender not a *determination of his guilt*. *Dietrich* was therefore inapplicable. See similarly *O'Donoghue v O'Connor* [2012] FCAFC 47 at [52]-[53] per Keane CJ, Rares and Lander JJ noting that extradition proceedings are civil not criminal; but query that view: see Gleeson CJ note 4 above. In *Momcilovic v The Queen* note 6 above at [96] French CJ observed that in declaring whether statutory provisions were inconsistent with human rights a distinction could be drawn between civil and criminal proceedings.
11 Whether it is possible to objectively perform a 'balancing' calculation as between satisfying another country in meeting its extradition request and preserving the rights of the individual is questioned later in this article. Commenting on the article by Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [83]-[91] drew attention to problems of applying a balancing test in the Australian constitutional context. Regarding the notion of 'balance' in the extradition context see E P Aughterson, 'Australian Extradition Law', paper delivered at the Commonwealth Criminal Law Conference, Sydney, September 2008, p 1.
12 *Director of Public Prosecutions (Cth) and the Republic of Austria v Kainhofer* (*Kainhofer*) (1995) 185 CLR 528 at [48] per Gummow J. To similar effect regarding English law prior to 2002, see Lord Griffiths in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42, 61-62: 'Extradition procedures are designed not only to *ensure that criminals are returned* from one country to another but also to *protect the rights* of those who are *accused of crimes* by the requesting country.' (Emphasis added.) In general concerning the protective object, see Aughterson, above note 11, p 1.
13 Section 3 of the *Act* also includes a further object of providing for 'proceedings by which courts may determine whether a person is to be … extradited, without determining the guilt or innocence of the person.'
14 The distinction is sometimes drawn between express statutory provisions as *objections* and protections under treaties as *exceptions* or *conditions*, the latter reflecting the terms of s 11 of the *Act*. An *objection* to extradition for political offences can be raised to bar extradition; see ss 5 (definition) and 7 of the *Act*.
15 These include the *ICCPR* and the *International Convention on the Elimination of Racial Discrimination 1965.*
16 A measure of protection is also given by the principle requiring 'dual criminality' in many extradition treaties; namely that there must be a measure of substantial correspondence between the extradition offence and offences under Australian criminal law that would be applicable if the relevant acts or omissions of the person occurred in Australia; see E P Aughterson, *Extradition: Australian Law and Procedure*, Law Book Company, Sydney, 1995, 60. For a judicial discussion of the significance of dual criminality as a protection see *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213 at [20]-[29] per French CJ and [68]–[69] per Gummow, Crennan, Kiefel and Bell JJ. The author was counsel for Mr Zentai in the many

and various Australian proceedings concerning his case including the Commonwealth's appeals to the Full Federal Court and the High Court.

17 Such as in Article 3(1) of the *Extradition Treaty between Australia and the Republic of Hungary 1995.*

18 For an analysis of the statutory framework of the *Act* see French CJ in *Minister for Home Affairs of the Commonwealth v Zentai*, note 16 above, at [12]-[16]; also the High Court in *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59 note 7 at [31]-[32]. Judicial comments differ about whether s 11 of the Act actually 'incorporates' the relevant treaty into domestic law. For example Lindgren J in *Oates v Attorney-General for the Commonwealth of Australia* [2001] FCA 84; (2001) 181 ALR 559 at [16] reads s 11 as *not incorporating* the relevant treaty into Australian law, preferring the meaning only that the *Act* 'applies' 'subject to' any limitations, conditions, exceptions or qualifications found in the Treaty that are inconsistent with the *Act*. The Full Federal Court in *Federal Republic of Germany v Gregory Parker* (1998) 84 FCR 323 speaks more emphatically of a bilateral treaty *forming part of domestic law* by force of s 11. These apparently contradictory accounts may disguise a difference in understanding of the incorporation theory of international law as it applies in the Australian constitutional context.

19 Whether the various descriptors in the unjust exception should be treated as separate and individual tests or should be approached as a composite test is discussed below. The preferable view is that they represent an amalgam of conditions with separate meanings but which overlap and tend to work cumulatively.

20 Regarding the primacy of Australian law where an international instrument has been adopted in an enactment, the correct approach is to first ascertain with precision what the Australian law is then to say how much of the international instrument Australian law requires to be implemented: *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 71 [61] per Callinan, Heydon and Crennan JJ, applied in *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* (*Mahrous*) [2013] FCAFC 75; (2013) 213 FCR 532. In *Mahrous,* Kenny, Flick and Kerr JJ at [38]; [52]-[55] noted that the principles set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969* (*Vienna Convention*) guide the process of construing provisions of an international agreement where they have by enactment become part of the law of Australia, citing *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2000) 231 CLR 1 at 14-16 [34]; also *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 186 [70] per McHugh J and *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [24]-[25] per Gleeson CJ and Gummow, Hayne and Heydon JJ. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-6 McHugh J adverted to the general principle that international instruments should be interpreted *in a more liberal manner* than would be adopted if the court is required to construe *exclusively domestic* legislation. See generally R K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 71. Regarding resort to Article 31 of the *Vienna Treaty* see *Minister for Home Affairs (Cth) v Zentai* note 16 above, 246 CLR 213 at 229-230 [36] per French CJ; 238-239 and [65] per Gummow, Crennan, Kiefel and Bell JJ; also *Maloney v The Queen* [2013] HCA 28; (2013) 87 ALJR 755 at [15] per French CJ.

21 This replicates the common law principles of *autrefois convict* or *autrefois acquit* barring double jeopardy for the same offence; this objection is encapsulated in s 7(e) of the *Act*.

22 Where, for example, reliance is placed to '*a decisive extent'* on statements by anonymous witnesses the European Court has held that in accordance with Article 6 defendants to criminal charges must have reasonable means of testing the witnesses' reliability or credibility, particularly where a witness's identification is the only evidence indicating a defendant's presence at the scene of the crime; see *Windisch v Austria* (1990) 13 EHRR 281, *Kostovski v Netherlands* (1989) 12 EHRR 434; *Doorson v Netherlands* (1996) 22 EHRR 330 and *Van Mechelen v Netherlands* (1997) 25 EHRR 647, applied by the House of Lords in *R v Davis* [2008] UKHL 36; at [24]-[25] and [44] per Lord Bingham; [75]-[90] per Lord Mance. Regarding the importance of the opportunity to test evidence of a decisive character under Article 6 ECHR see *Secretary of State for the Home Department v AF* [2009] UKHL 28. The Grand Chamber of the European Court of Human Rights has rather confusedly recognised that in some instances *hearsay evidence of a deceased witness* may be given provided there are reasonable safeguards as to its authenticity; see *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127. In *Al-Khawaja* there were other independent witnesses to the offence. Where there are *no living* witnesses the inability of the defendant to confront them to test the veracity of their written evidence would seem determinative: the defendant could not be given a fair trial in those circumstances.

23 It is well established that the correct approach in determining the scope of a statutory discretion that is unconfined by express statutory criteria is to ascertain the factors that may be taken into account by reference to the *subject matter, scope and purpose* of the statutory provision; see, for example, *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J and *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40 per Mason J; also *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235 at [41] per Allsop CJ, Buchanan and Griffiths JJ.

24 *Polites v Commonwealth* (1945) 70 CLR 60; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 and *Simsek v MacPhee* (1982) 148 CLR 636. The extensive literature on this topic includes Wendy Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing' in H Charlesworth, M Chiam, D Hovell and G Williams (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 82; Stephen Donaghue, 'Balancing Sovereignty and International Law: The Impact of International Law in Australia' (1995) 17 *Adelaide Law Review* 213; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent

Trends' (1995) 17 *Sydney Law Review* 177 and Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.

25 See *Minister of State for Immigration & Ethnic Affairs v Teoh* (*Teoh*) (1995) 183 CLR 273, at [25]-[28] per Mason CJ and Deane J. Regarding the capacity of international standards to affect the development of the common law, it may be argued that provisions such as Article 14 of the *ICCPR* also declare or shape *customary* international law obligations such as the notion of a fair trial; hence they can be taken into account in Australian extradition decisions if they are *not inconsistent* with domestic statute law; see Groves note 6 above at [60]. The issue of incorporation of customary international norms and prohibitions in the field of human rights is vexed; see *Nulyarimma v Thompson* [1999] FCA 11; (1999) 165 ALR 421.

26 *Teoh*, ibid, at [17] per Mason CJ and Deane J: 'Ratification of the *ICCPR* as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the *ICCPR* are not incorporated into Australian law *unless and until specific legislation is passed* implementing the provisions.' To similar effect see *Dietrich* note 10 and *Coleman v Power* (2004) 220 CLR 1 at [17]-[21] per Gleeson J: see also [223]-[267] per Kirby J.

27 In *Dietrich* note 10 several members of the Court considered how the *ICCPR* conformed to the common law concept of a fair trial.

28 The argument advanced in this article, however, is that s 11 of the *Act* has achieved a *limited incorporation* by effectively drawing in treaty obligations such as those in the *ICCPR* through the medium of the 'unjust exception'.

29 A wider issue is whether the interpretation of terms in the *Act* such as 'accused' (see definition of 'extraditable person' in s 6) should be considered primarily as a *matter of domestic Australian law* or *according to their international meaning.* That is something that requires separate consideration. French CJ in *Maloney v The Queen* note 20 at [15], for example, discusses the interpretive difficulties that arise where domestic law incorporates criteria drawn from international instruments, the text of which may lack precision and clarity. He referred to Gummow J in *Applicant A v Minister for Immigration and Ethnic* Affairs (1997) 190 CLR 225 at 275. While the issue cannot be sufficiently addressed in this article, the preferable view in light of the High Court's decision *in Minister for Home Affairs of the Commonwealth v Zentai* note 16 above at [65]-[72] per Gummow, Crennan, Kiefel and Bell JJ appears to be that construction of terms such as 'accused' is *essentially a domestic matter*, although capable of being *informed by* the relevant jurisprudence of international tribunals. See also *Minister for Immigration v Haji Ibrahim* (2000); 204 CLR 1 at [136] per Gummow J holding that a treaty should be construed by first giving its terms their ordinary meaning but bearing in mind the Convention as a whole, including its context, object and purpose, citing McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (*Applicant A*) (1997) 190 CLR 225 at 272-275. McHugh J there referred to the interpretive guidelines in Article 31 of the UN *Vienna Convention on the Law of Treaties 1969.* For an ostensibly contrary English approach see the majority in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22 where primacy was given to the *European* rather than British understanding and practice in interpreting the notion of a 'judicial authority' charged with issuing extradition warrants as *not requiring the officer to be independent* of government.

30 *New Zealand v Moloney* [2006] FCAFC 143; (2006) 154 FCR 250 at [38]-[39].

31 The unjust and oppressive test was incorporated in s 18(6) of the *Service and Execution of Process Act 1901* (Cth) based on the *Fugitive Offenders Act 1881* (UK).

32 A similar argument was dismissed by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [64]-[65]. He rejected a submission that the Constitution should be read contemporaneously in accordance with international instruments even though they had been entered into long after the Constitution had been enacted.

33 (2009) 239 CLR 75 at [58].

34 (2000) 200 CLR 442 at [43].

35 Ibid at [41].

36 Note 30 above.

37 Note 30 at [65]. It may be objected that, as noted by Barker J in *O'Connor v Adamas* (2013) 210 FCR 364 (*Adamas FFC*) at [325] the qualification found in s 34(2) of the *Act* differs in form from the terms in which the 'unjust exception' is expressed in treaties and regulations made under the *Act*. Section 34(2) does not require the Minister to take into account the nature of the offence or the interests of the requesting state. The relevant Article in the Treaty with Indonesia does contain that enlargement. This was seen to be significant in *Adamas HC* note 7 above. Further, s 34(2) of the *Act* contains a mandatory prohibition while the Treaty provision is only discretionary. Against this, it may be said that the core of the 'unjust exception' test in each case is substantively the same.

38 [2011] FCAFC 2; (2011) 274 ALR 509.

39 At [72]. The Court referred to Aughterson, above note 16, 163–164.

40 Note 37 above. The decision of the Full Federal Court was overturned on appeal to the High Court in *Adamas HC* note 7 above but not with respect to this issue of whether the three criteria are separate integers or represent a composite notion with a common core.

41 *Adamas FFC* note 37 at [323]-[331], [335].

42 At [355]; regarding 'incompatible with humanitarian considerations' his Honour referred to Aughterson, above note 16, 171-172; see also *de Bruyn v Minister for Justice* (2004) 143 FCR 162 at [63] per Kiefel J.

43 Note 7 at [18].

44 At [34].

45 To do so does not, it is submitted, entail the kind of error noted by Gordon J in *Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68; (2013) 212 FCR 252 at [34]. Regarding the interrelationship between the meaning to be attributed to individual words in a phrase in construing and applying that phrase Gordon J identified the task as one of *construing the language of the phrase as a whole in context* rather than selecting the *disaggregated meaning of individual words* divorced from context and then attempting to reassemble a composite provision by combining the dictionary meanings of its component parts (citing *XYZ v Commonwealth* (2006) 227 CLR 532 at [102] and *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at 397). The interpretive process proposed by Barker J in *Adamas FFC* does not attempt such an impermissible disaggregation in isolation of context.

46 For example, to subject a person of limited intellectual capacity to complex foreign proceedings in a country recognised as not having a competent judiciary and legal profession and where legal aid is not assured could be regarded as infringing this criterion.

47 There is some ground for concluding that the Department sometimes considers that extradition for trial in a foreign country is sometimes preferable to domestic criminal proceedings due to more flexible fair trial standards in the requesting country. In the case of Mr Zentai considered in *Zentai v Honourable Brendan O'Connor (No 3*) *(Zentai (No 3)* [2010] FCA 691; (2010) 187 FCR 495 the Department in its submission to the Minister, after referring to the advice of the Commonwealth Director of Public Prosecutions that an Australian prosecution for war crime would face difficulty in the absence of living witnesses, advised, at [119] that:

In these circumstances, any potential difficulties that may be identified with prosecuting Zentai in Australia for an offence allegedly committed in Hungary may not be difficulties which arise in Hungary under its different criminal justice system and which would support refusal. (Emphasis added),

Commonwealth, *Extradition - a Review of Australia's Law and Policy*, *Joint Standing Committee on Treaties*, Report No 40, (2001) para 2.13 recognised that one of the potential difficulties in extraditing people between countries is the existence of two distinct systems of law: the common law or 'adversarial' system that originated in England and applies in Commonwealth countries throughout the world, and the civil law or 'inquisitorial' system that developed from Roman law and applies in many European countries and their former colonies.

48 [1999] FCA 362; (1999) FCR 417.

49 Note 37 above.

50 At [336]-[345]. He added at [403] that this required the Court to identify *Australian law and practice* in relation to *in absentia* convictions.

51 In the case of a European matter Article 6 of the *ECHR* relevantly applies.

52 The duty to make enquiries of the requesting country is a vexed issue. In *Zentai (No 3)* note 47 at first instance and in the Full Federal Court on appeal, Mr Zentai, relying on *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 and *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 submitted that enquiries should have been directed to Hungarian prosecution authorities regarding whether there were any living witnesses to give evidence at his trial, otherwise extradition would be unreasonable. The Court in each instance held there was no obligation. See further *O'Connor v Zentai* [2011] FCAFC 102; (2011) 195 FCR 515 at note 72 below.

53 Note 48.

54 *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.

55 Note 30 above.

56 At [74]-[128].

57 [2012] FCAFC 133. In *Newman* at [22] the Full Federal Court queried whether the approach in *Moloney*, note 30 was consistent with the views expressed by Gummow and Hayne J in *Foster*. It is submitted that even if it was inconsistent, the view of Barker J in *Adamas FFC* note 37 above sums up the current situation.

58 Note 30, [26]-[28]; [40]-[44].

59 Note 38.

60 Ibid at [127]-[136].

61 It may be argued to the contrary that paragraph 3(a) of Article 14 of the *ICCPR*, requiring persons to be informed in detail of the nature of the charges against them could provide guidance in relation to the cases dealing with representative charges above; and that paragraph 3(c) requiring the person be tried without undue delay might inform cases in which there were large time gaps between the alleged conduct and the institution of charges (although the provision seems to be primarily concerned with ensuring *promptness of trial* after arrest rather *than lapse of time* issues).

62 Note 47.

63 A separate issue was raised in the course of the litigation concerning Mr Zentai: whether a person merely *wanted for interrogation*, as against *for trial* and possible conviction, could be said, as a jurisdictional fact, to be 'accused' and hence an 'extraditable person' within the meaning of s 5 of the *Act*. The distinction was drawn by Gummow J in *Kainhofer* note 12, 185 CLR 528, at [88] between proceedings which are 'merely *investigativ*e or *preliminary*' in contrast to those where 'one can suspect a person in a manner which is the product of a more advanced state of affairs, in particular, *accusation by the laying of charges*' (emphasis added). McKerracher J on this ground held that Zentai was not liable to extradition. The Full Federal Court reversed his decision on this aspect, holding that the issue of whether he was an 'extraditable person'

ceased to be relevant once the magistrate had made a decision under s 19 of the *Act* that he was 'eligible' for extradition. This aspect was not pursued on appeal to the High Court. Similar issues regarding whether a person mistakenly identified can be an 'extraditable person' for the purposes of the *Act* were raised in *Marku v Minister for Home Affairs (No 2)* [2013] FCA 1015 (Gordon J) and *Marku v Republic of Albania* [2013] FCAFC 51 but were rejected on jurisdictional grounds on the basis of *Kainhofer.* The issue in that case could still reach the High Court via s 39B *Judiciary Act* proceedings challenging the Minister's ultimate decision. Whether a person can be said to be '*accused*' if only wanted for interrogation remains a live issue. It was raised by Julian Assange in English proceedings resisting his extradition to Sweden for *questioning* about sexual offences. It is apparently a contention that may be raised in relation to the request for extradition to Peru of six Australians alleged to have been implicated in the killing of a hotel employee in Lima. In cases of this sort, given modern electronic media such as video conferencing, or interrogation *in situ*, questions of the unreasonableness of extraditing merely to be questioned can be posed.

64 The offence of 'war crime' in Hungarian statutory criminal law was created retrospectively in 1945 after the relevant events were alleged to have occurred. In *Minister for Home Affairs v Zentai* note 16 above the High Court upheld the decisions of the judge at first instance and the Full Federal Court majority that the respondent was not liable to be extradited for the offence of 'war crime' as it did not exist as a Hungarian offence in November 1944. This was due to a bar upon retrospective offences in Article 3(2) of the *Extradition Treaty between Australia and Hungary 1995*. Significantly the prohibition in Article 3(2) did not contain the usual exception in the case of war crimes or crimes against humanity as established in international law, usually provided in instruments like the *ICCPR*, Article 15. The evolution of the international concept of war crimes is discussed in *SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42; 147 FCR 1 (Merkel, Finkelstein and Weinberg JJ); see Peter Johnston and Claire Harris, 'SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs: War Crimes and the Refugee Convention - Case Note' (2007) 8 *Melbourne Journal of International Law* 104. Regarding the effect of retrospectivity in Australian law see *Polyukhovich v Commonwealth* (*War Crimes* Case) [1991] HCA 32; (1991) 172 CLR 501. The High Court did not find it necessary to determine issues of retrospectivity in *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20; see also Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' (2007) 1 *The Indian Journal of Constitutional Law* 140. Retrospectivity was not a bar to prosecution for war crimes in Canada given the way the offence was framed in Canadian criminal law: see *R v Finta* (1994) 1 SCR 701.

65 The unredacted version of the Departmental submission to the Minister revealed that on advice from the Commonwealth DPP the Australian Federal Police decided in the absence of living witnesses not to proceed to a war crimes prosecution in Australia; see *Zentai (No 3)* note 47 above at [234]-[238] per McKerracher J.

66 This could be conducted either by investigating Hungarian police or prosecution officers in Australia or by video interview under international mutual assistance arrangements.

67 Mr Zentai relied on *Minister for Immigration v Eshetu* (1999) 197 CLR 611, at 626 [40]-[44] per Gleeson CJ and McHugh J and at [124]–[126] per Gummow J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 at [82] per McHugh, Gummow and Hayne JJ, and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

68 This contention was founded on *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, (2009) 83 ALJR 1123 at [19]–[25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 321per McHugh J; *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, (2004) 78 ALJR 992 and *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594, that in a significant matter, Commonwealth decision-makers were obliged to make enquiries about matters that could be readily ascertained and which were central to the subject matter of the decision.

69 Within the meaning of Article 3(2)(f) of the *Extradition Treaty between Australia and the Republic of Hungary 1995*.

70 See note 49 above.

71 *Zentai (No 3)* note 47 above at [260]-[291]. There the applicant argued that comity should not preclude making further enquiries about issues central to whether a person will receive a fair trial in the requesting country. The contrary view expressed by McKerracher J seems to be inconsistent with that taken by the Full Court in *Habib v Commonwealth* [2010] FCAFC 12; (2009) 175 FCR 411 per Black CJ at [6]-[12]; Perram J at [23]-[37] and [46] and Jagot J at [51]-[56] and [72]-[135]). There the Court rejected an argument that comity and the 'act of state' doctrine precluded making embarrassing enquiries of the conduct of officials of the foreign state.

72 *O'Connor v Zentai* [2011] FCAFC 102; (2011) 195 FCR 515.

73 Ibid, at [192]-[197] per Jessup J with whom North and Besanko agreed.

74 The same tribunal before which Mr Zentai would have been interrogated if extradited. Its presiding judicial officer, Brigadier General Dr Bela Varga, exhibiting his independence from Hungarian prosecuting authorities, had earlier provided representatives of Mr Zentai in Hungary with a statement (accepted as correct by the Hungarian Government) that his extradition was sought *only for the purpose of preliminary investigation* regarding his involvement in the alleged war crime and he was *not charged* with any offence; see *Zentai (No 3)* note 47 above at [129] per McKerracher J.

75 The testimony of a Lt Nagy was claimed to be unreliable and needing to be tested in cross-examination because it had arguably been obtained under the notorious customary torture administered during interrogation by the pro-Russian political police. This was similar to allegations made about one of the convicted officers (remarkably also called Nagy) in the *Zentai* proceedings.
76 On the other hand there were concerns that a six year delay in prosecuting Kepiro violated his right to a fair trial under Article 6 *ECHR*. This was not upheld.
77 Barker J in *Adamas FFC* note 37 at [344] accepted that the consequences of sending an eligible person to the requesting country, including what is likely to happen once *in situ*, could be taken into account in assessing injustice.
78 Note 7.
79 [2012] FCA 227; (2012) 291 ALR 77 at 91-95, [81]-99].
80 Taking a broad view of the composite criteria in the 'unjust exception' and referring to *Binge v Bennett* (1988) 13 NSWLR 578.
81 As well, the respondent contended that the Indonesian conviction in his absence prevented him exercising his right to examine prosecution witnesses, contrary to Article 14(3)(e). This did not figure in the result.
82 See *Adamas FFC* note 37 above at [448]-[478] per Barker J.
83 Extensive redaction is one of the factors that can render judicial review of such decisions practically ineffective.
84 At [25].
85 See High Court passage quoted at note 44 above.
86 At [29].
87 At [35].
88 At [36].
89 The almost insurmountable difficulties of mounting a challenge to Ministers' extradition determinations where no reasons are given and inferences are left to be made almost wholly on the basis of departmental submissions will be addressed in the second part of this article to be published in a subsequent number of the AIAL Forum.
90 This did not seem to deter the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 (the 'Malaysian Solution' case).
91 The notion of unreasonableness may also elide into jurisdictional error where a decision lacks a reasoned basis.
92 See Peter Johnston, 'Proportionality in Administrative Law: *Wunderkind* or Problem Child? (1996) 26 *University of Western Australia Law Review* 138; Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543 and John Basten, 'Judicial Review under Section 75(v)' [2011] *University of New South Wales Faculty of Law Research Series* 56. For an English view see Sir Phillip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223 discussing the possibility of replacing *Wednesbury* unreasonableness with proportionality in UK public law (admittedly in the context of cases concerning the *Human Rights Act 1998* (UK)).
93 [2013] HCA 18; (2013) 87 ALJR 618, at [23] per French CJ and [63[-[78] per Hayne, Kiefel and Bell JJ. The role of proportionality was also extensively considered in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289. That was in the context of the constitutional validity of municipal by-laws and not discretionary executive powers; it was discussed without reference to international conceptions of proportionality.
94 Arguably *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 laid the foundation in Canada for a duty of reasonableness owed by public officials in their discretionary determinations; see Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law' (2003) 66 *Saskatchewan Law Review* 129 and Lorne Sossin, 'Administrative Justice in an Interconnected World' (2013) 74 *AIAL Forum* 24. Since *Baker,* Canadian administrative law has developed principles of reasonableness review, parallel with a notion of correctness review, which diverge from the classical Australian model: see *Dunsmuir v New Brunswick (Board of Management)* [2008] SCC 9; [2008] 1 SCR 190. In a flurry of recent cases, *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2010] 1 SCR 364; *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals* 2011 SCC 59, [2011] 3 SCR 616; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654 and *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 the Canadian Supreme Court seem to have arrested this development and allowed greater scope for judicial deference to administrative expertise. There may be room for convergence between the Canadian approach and that adopted recently by the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18, embracing a standard of *legal reasonableness* applicable to failures in the exercise of discretion; see [22]-[30] per French CJ discussing the relationship between reasonableness and irrationality; [63]-[76] per Hayne, Kiefel and Bell JJ; c.f. Gageler J at [107]-[113] adhering to the *Wednesbury* standard.
95 In the case of *Zentai* the fact that Hungary was a party to the *ECHR* arguably introduced an element of *proportionality* according to European notions. Could a failure to comply with Article 6 because of inability to produce key prosecution witnesses be offset by a need to pursue World War II war crimes before the perpetrators are all dead, giving greater leeway to admitting documentary hearsay testimony? Could the request by Hungary to interrogate Mr Zentai be proportionately satisfied by the alternative of an interview in

Australia, given his age, health and infirmity? In *Leask v Commonwealth* (1996) 187 CLR 579 various members discussed the European concept of proportionality holding that it had no application to questions of *constitutional* validity of Commonwealth laws but not foreclosing its application in administrative law.

96 In *AB v Minister for Immigration and Citizenship* [2007] FCA 910 at [27] Tracey J observed that Australia's *unenacted* international treaty obligations relating to refoulement of persons within the jurisdiction are matters to which decision-makers are entitled, but *not bound*, to have regard when exercising powers under s 501 of the *Migration Act 1958* (Cth). In the absence of legislative requirement they are not bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will therefore occur. If they choose to have regard to treaty obligations but, in some way misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. If, however, as this article contends Article 14 of the *ICCPR*, by reason of s 11 of the *Extradition Act*, is enacted with statutory the opposite result arguably follows.

97 The analogy here is drawn with 'real chance' under the *Refugee Convention 1950*: see *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379.

98 Roda Mushkat, '"Fair Trial" as a Precondition to Rendition: An International Legal Perspective' Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Occasional Paper No 5 (July 2002).

99 In *Soering v United Kingdom*, ECtHR, 1989 the European Court held that the fact or even the risk that an actual human rights violation would take place outside the territory of the requested state does not absolve that state from responsibility for any foreseeable consequence of extradition suffered beyond its jurisdiction. See also the ruling of the UN Human Rights Committee in *Ng v Canada* [(1993) 98 ILR 479. In *Regina v Secretary of State for the Home Department; ex parte Bagdanavicius* [2005] UKHL 38 the House of Lords in considering *Soering* recognised that the expulsion of a person by a state party to the *ECHR* (read also the *ICCPR*) may engage the responsibility of that state under the Convention where substantial grounds exist for believing that the person in question, if expelled, would face a real risk of being subjected in the receiving country to treatment contrary to a provision of the Convention.

100 See *Zentai (No 3)*, note 52 above, McKerracher J at [261]-[291] finding that it was not open on the materials before the Minister to infer that he failed to seriously consider the fair trial question; affirmed on appeal *O'Connor v Zentai*, note 72 above, see [291] per Jessup J finding similarly that it was not open to infer that he failed to seriously consider the fair trial question. Regarding *Adamas FFC* note 37 above, see Barker J at [445]-[479]. *Soering* was specifically mentioned in *Adamas*.

101 Note 8 above at [53]-[53]. Her Honour held that the relevant articles of the Geneva Conventions regarding prisoners of war were not mandatory relevant considerations and could not found jurisdictional error, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [101], as Australia's international obligations did not condition the lawful exercise of the statutory power under s 22(2) of the *Act*. No consideration appears to have been given to whether the Conventions engaged specific treaty requirements of justice and fairness.

102 Note 47.

103 Note 37.

104 Note 7.

105 This assumes that the decision is transparent as to the Minister's reasoning. If 'submerged' by a countervailing exercise of the Minister's general discretion under s 22 of the *Act* not to refuse the matter is probably immune from review.