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## DISGUISED EXTRADITION AND THE DOMESTIC CRIMINAL PROCESS: COMPARARTIVE INSIGHTS

### Introduction

1. In *Republic of Argentina v Mellino*,[1] Lamer J of the Supreme Court of Canada succinctly articulated the fundamental principle of comity that underscores the modern approach to extradition law:

> "Our courts must assume that [the defendant] will be given a fair trial in the foreign country. Matters of due process generally are to be left for the courts to determine at the trial there as they would be if he were to be tried here. Attempts to pre-empt decisions on such matters, whether arising through delay or otherwise, would directly conflict with the principles of comity on which extradition is based."[2]

2. The focus of this paper is not, therefore, upon an examination of whether or not the machinery of justice in the State to which a person is to be surrendered, whether Australia or a foreign country, will afford the relevant person a "fair trial" in terms of the substantive criminal proceedings to be brought against him or her upon being remanded within the jurisdiction.

3. The focus of this paper is, instead, upon ensuring that the procedures and processes by which the presence of that person in the geographic territory within which he or she is remanded pending that substantive trial are "fair". This does not involve a qualitative assessment of the mechanisms by which extradition is effected in Australia or a foreign country. Rather, it is directed to assessing the means by which the observation and implementation of those mechanisms, whatever they may be, is enforced. It is implicit that, by enforcing compliance with the applicable extradition process, the surrender is "fair".

4. The contrast that this paper posits is between "extradition proper" (that is, extradition that effected pursuant to the processes and procedures prescribed

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1 [1987] 1 SCR 536.
2 [1987] 1 SCR 536 at 558.

under the *Extradition Act* 1988 (Cth)) and "disguised extradition" (that is, the exercise by the government of some lawful power, but with the actual purpose or consequence of returning the relevant person to a country where he or she is wanted for criminal prosecution without compliance with the 1988 Act).

**Limitations of comparative law in the extradition context**

5. The history of extradition law among the community of nations reveals, by necessity, certain common concepts and themes that run through their provisions. It is, nonetheless, only through the enactment of domestic statutes and the promulgation of regulations thereunder by the proper Australian organs that extradition law exists for the purposes of the Australian legal order. As with the construction of any domestic statute,[3] the principles that attend upon the construction of extradition laws begin with the language of the particular statutory provision, with recourse to legislative history and thematic analysis to help resolve ambiguity.[4]

6. Lord Steyn, in *In re Isamil,*[5] sought to bring those canons of statutory construction to bear in the international and domestic instruments of extradition law, which have as their common object "the need to bring suspected criminals, who have fled abroad, to justice through the extradition process",[6] as follows:

> "There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition."[7]

7. Despite the limitations on comparative law in an area that is regulated by statute, the essential commonality of many provisions and themes result in jurisprudence from other jurisdictions being useful, but only to a certain point and only then within the carefully delimited context of their own legal systems. In some instances, case law from members of the Commonwealth is considered because, having that shared legal heritage with Australia, the antecedent Imperial laws applied equally to them and their successor legislation also

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3 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [44] per Hayne, Heydon, Crennan and Kiefel JJ.

4 *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10 at [21] per Gleeson CJ, McHugh and Heydon JJ.

5 [1999] 1 AC 320.

6 *Cartwright v Superintendent of Her Majesty's Prison* [2004] 1 WLR 902; [2004] UKPC 10 at [15] per Lord Steyn (Sirs John Roch and Swinton Thomas concurring).

7 [1999] 1 AC 320 at 327.

closely mirrors those Acts. In other instances, cases from other common law jurisdictions (such as Canada, South Africa, and the United States) are considered because, notwithstanding the different constitutional framework presented by human rights protections, those judgments helpfully frame the legal or political debate about some aspect of extradition law.

**Extradition: the Australian legislative context**

8. Blackstone, in his *Commenataries on the Laws of England*, wrote:

> "But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal."[8]

9. It was, therefore, a common law right of British citizens, similarly enjoyed by Australian citizens in relation to the territory of Australia, "to enter [the territory] when and where they please and on arrival to go wherever they like within [it]".[9] The principle of requiring a State to admit its own citizens is a corollary of the State's right to refuse permission to aliens to enter or stay within its territory.[10]

10. It is unsurprising that, having regard to the foregoing history, the competence of the Commonwealth Parliament to legislate with respect to extradition within s 51(xxix) of the Commonwealth Constitution, which relates to external affairs, was of concern to early constitutional lawyers. Writing in 1901, Quick and Garran explained the practice of extradition as follows:

> "Extradition is the surrender or delivery of fugitives from justice by one sovereign State to another. It is justified by the principle that all civilized communities have a common interest in the administration of the criminal law and in the punishment of wrongdoers."[11]

11. Underscoring the observations of Blackstone, in the first High Court case that touched upon extradition in 1905,[12] the Court entertained what it described as "a very interesting argument … with respect to the foundation of the law of

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8 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809), Vol 1, p 137. See also *R (Bancault) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453; [2008] UKHL 61 at [44] per Lord Hoffmann.

9 *R v Bhagwan* [1972] AC 60 at 77 per Lord Diplock.

10 *Lukaszewski v District Court in Torun, Poland* [2012] 4 All ER 667; [2012] UKSC 20 at [31] per Lord Mance (Lords Phillips, Kerr and Wilson concurring).

11 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 635.

12 *Brown v Lizars* (1905) 2 CLR 837.

extradition",[13] but ultimately concluded that, even as at that point in history, extradition was not a matter exclusively for the Executive.[14]

12. Griffith CJ stated, "it is impossible to hold that the liberty of individuals can now be interfered with without the sanction of municipal law."[15] It is now indisputable that Australia cannot extradite a person to another country without statutory authority from the Parliament to do so.[16] To the extent that the Crown might have otherwise exercised prerogative power to accede to a request from another country to surrender a person, the 1988 Act and its predecessors have displaced that power to the extent of its terms.[17]

13. The equality of the law under the Constitution means that a person, irrespective of citizenship or nationality, is both subject to, and entitled to protection under, the laws of Australia.[18] Citizenship does, of course, afford certain additional privileges. The High Court has maintained, however, that Australian citizenship does not immunise a person from being removed by Australia to another country pursuant to an extradition treaty.[19] In particular, with respect to the regime under the 1988 Act, the term "extraditable person" does not attach to the nationality of the subject person.[20]

14. The *Extradition Act* 1988 (Cth) is the latest iteration of Australia's extradition law, but its form and structure is, to a large extent, merely a modern restatement of principles, practices and procedures that have been adopted and applied in the British model since colonial times. It governs both the surrender of extraditable persons by Australia to a requesting country, whether an "extradition country" or New Zealand, as well as the receipt by Australia of persons surrendered to it.

15. There are four principal, independent stages in the scheme for extraditing a person from Australia to an extradition country: (1) commencement, (2) remand, (3) eligibility determination by magistrate or Judge, and (4) surrender

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13 (1905) 2 CLR 837 at 849.
14 (1905) 2 CLR 837 at 852.
15 (1905) 2 CLR 837 at 851.
16 *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128; [1998] HCA 25 at [7] per Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ; *Barton v Commonwealth* (1974) 131 CLR 477 at 483 per Barwick CJ.
17 *Barton v Commonwealth* (1974) 131 CLR 477 at 484 per Barwick CJ.
18 *Re S* [1948] VLR 11 at 11 per Fullagar J.
19 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; [2006] HCA 40 at [48] per Gummow and Hayne JJ (Heydon J concurring); *DJL v Central Authority* (2000) 201 CLR 226; [2000] HCA 17 at [137] per Kirby J (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ concurring); *Barton v Commonwealth* (1974) 131 CLR 477 at 482 per Barwick CJ.
20 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; [2006] HCA 40 at [79] per Gummow and Hayne JJ (Heydon J concurring).

determination by the Executive.[21] It is beyond the scope of this paper to consider each of these stages in any further detail. What is significant for present purposes is to appreciate the existence of procedural safeguards against the arbitrary or whimsical exercise of the power to extradite a person.

16. In what immediately follows, this paper will consider the circumstances in which it might be alleged Australia could engage in "disguised extradition" by exercising powers, otherwise lawful and valid, so as to achieve the same result as extradition to another country.

**Allegations of "disguised extradition" against Australia**

17. In order to better appreciate and understand how allegations of "disguised extradition" might be made against the authorities of a foreign country, it is necessary and convenient to explore how such allegations might be made against Australia. There are three principal ways in which such allegations have been levelled (or could be levelled) in the Australian context: first, in the improper exercise of the power to cancel Australian passports; second, in the improper exercise of the nationhood power to prevent the arrival of persons into Australian territory; and, third, in the improper exercise of the power to deport a person under the *Migration Act* 1958 (Cth).

***The deportation power***

18. Shearer observed that deportation "bears only superficial resemblance to extradition",[22] since the deporting country is unconcerned with where an expelled alien goes following him or her leaving the relevant territory. The practical consequence of requiring a person to leave one nation's territory, however, is that the deportee's destination be determined, which is often the country of the person's nationality. Shearer further observed that where deportation to that person's country of nationality coincides with that State's

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21 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213; [2012] HCA 28 at [44] per Gummow, Crennan, Kiefel and Bell JJ; *O'Donoghue v Ireland* (2008) 234 CLR 599; [2008] HCA 14 at [38] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; [2006] HCA 40 at [29] per Gleeson CJ, at [55] per Gummow and Hayne JJ (Heydon J concurring); *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 547 per Gummow J; *Todhunter v United States of America* (1995) 57 FCR 70 at 73-74 per Black CJ, Gummow and Lindgren JJ; *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389 per Beaumont, Einfeld and Foster JJ.

22 I A Shearer, "Extradition and Asylum in Australia" in K W Ryan (ed), *International Law in Australia* (2nd ed, 1984) at 187.

desire to prosecute so as to result in *de facto* extradition, the removal is not objectionable.[23]

19. It is beyond the scope of this paper to consider the intricacy of Australian immigration law in depth, but the overlap between extradition and the improper use of the deportation power is unavoidable. The phrase "disguised extradition" appears to have been coined by O'Higgins with respect to those circumstances where the Sovereign power of expulsion, which in modern Australia is given effect by an order of deportation, is exercised for the actual purpose of extraditing the deportee.[24] This is the converse situation to *Moti*, applied to Australian circumstances, whereby the Minister administering the *Migration Act* 1958 (Cth) exercises his or her power to order deportation to effect the removal of the subject person from Australia outside the scheme under the 1988 Act, which raises distinct questions of domestic law.

20. The High Court has decried the use of the power to order deportation in substitution for the extradition process both as impermissible,[25] and not otherwise equivalent to extradition.[26] The power of deportation is only exercisable for the purposes authorised by the Migration Act itself,[27] as the High Court explained in *Znaty v Minister of State for Immigration*.[28]

21. In *Schlieske v Minister for Immigration and Ethnic Affairs*,[29] Beaumont J dealt with a complaint of "disguised extradition" and an alleged abuse of the deportation power. Cognisant of the High Court's remarks in *Znaty*, his Honour concluded that, in assessing the exercise of the deportation power, the Court was concerned to answer a question of fact as to whether the power was being used in good faith to deport an illegal immigrant. An overview of the facts of the case show striking similarity with what occurred in *Moti*.

22. Beaumont J concluded that, notwithstanding the testimonial evidence of the intention behind the exercise of the deportation power, the objective evidence tended to suggest that the deportation power was abused to effect the "sham"

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23 *Pedras v Prime Minister* [2015] 3 LRC 771; [2014] TOCA 24 at [47] per Salmon, Handley, Hansen and Tupou JJ; *Meng Ching Hai v Attorney-General* [1990] 2 HKC 9 at 27 per Faud VP for the Court (Faud VP, Clough JA and Kaplan J); *R v Governor of Brixton Prison; Ex parte Soblen* [1963] 2 QB 243.

24 P O'Higgins, "Disguised Extradition: The Soblen Case" (1964) 27 *Modern Law Review* 521.

25 *Barton v Commonwealth* (1974) 131 CLR 477 at 483-484 per Barwick CJ.

26 *Barton v Commonwealth* (1974) 131 CLR 477 at 485 per Barwick CJ.

27 *Barton v Commonwealth* (1974) 131 CLR 477 at 503-504 per Mason J.

28 (1972) 126 CLR 1.

29 (1987) 79 ALR 554.

extradition of the applicant. On appeal,[30] the Full Court set aside the orders made by Beaumont J and tailored the relief to permit the deportation order to operate within its proper scope, but granted injunctive relief to deny its effect beyond the permitted purpose.

23. In *Bar-Am v Attorney-General (Bermuda)*,[31] the Court of Appeal of Bermuda dismissed an appeal from orders of Atswood CJ, sitting in the Supreme Court, dismissing an application for a writ of *habeas corpus* on the ground that a deportation order was a "sham" for an "unauthorised extradition". The Court rejected that argument in the following terms: "the legitimacy of the exercise of the powers of deportation … cannot be judged by the fact that the inevitably result would be that an alien would get into the hands of a foreign power which wanted him … for the quality of an act cannot be determined by its consequences."[32]

24. In *Meng Ching Hai v Attorney General (Hong Kong)*,[33] the Court of Appeal of the Crown Colony of Hong Kong judicially reviewed a decision of the Director of Immigration to deport a person to Taiwan in circumstances where the Director had knowledge that he was wanted in Taiwan in connection with a serious commercial crime. The Court adopted an approach similar to that in the Australian cases, but a curious point of challenge was the rationality of the Director's decision to deport the appellant to his home country, rather than to the country of his choice. The Court explicitly rejected this submission and stated the direction "cannot be rendered unlawful simply because the deportee does not wish to go to the 'specified country' selected since he is wanted there, and has found another country which will admit him."[34]

***The passport cancellation power***

25. As explained by Burchett J, a passport is "a document issued in the name of the Sovereign … to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as [an Australian subject] in foreign countries."[35]

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30 *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 714.
31 [1987] LRC (Const) 878.
32 [1987] LRC (Const) 878 at 917.
33 [1990] 2 HKC 9.
34 [1990] 2 HKC 9 at 26.
35 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 154 ALR 606 at 609.

26. The power to issue passports is created and governed by the *Australian Passports Act* 2005 (Cth). Under that Act, an Australian citizen is entitled to be issued an Australian passport upon his or her application.[36] "Travel-related documents" designed to facilitate removal, deportation and extradition are also dealt with under that Act.[37] The phrase "Australian travel document" is used to denote both Australian passports and such travel-related documents.[38]

27. The power to cancel an Australian travel document, which includes an Australian passport, is in the discretion of the Minister.[39] The Act specifies certain circumstances in which the power may be exercised, but does not otherwise limit the generality of the power.[40] It is trite to observe that, in exercising a power conferred under an enactment, the power must be exercised only for the purposes for which that power is conferred.

28. An important specified circumstance in which the cancellation power may be exercised is if a competent authority makes a cancellation request in relation to the person.[41] Such requests may be made irrespective of whether or not the person is an Australian citizen.[42] Some of the reasons upon which a cancellation request might be made relate to Australian law enforcement matters,[43] and international law enforcement cooperation.

29. The relevant provisions are substantially similar, but it is convenient to set out the provision that relates to international law enforcement cooperation, because such matters are less familiar. Section 13(1) of the Act provides that, if a competent authority believes on reasonable grounds that any of the following apply, it may make a request:

> "(a) a person is the subject of an arrest warrant issued in a foreign country in respect of a serious foreign offence; or
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> (b) a person (including a person who is in prison) is, in connection with a serious foreign offence, prevented from travelling internationally by force of:
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> (i) an order of a court of a foreign country; or

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36 *Australian Passports Act* 2005 (Cth), s 7(1).
37 *Australian Passports Act* 2005 (Cth), s 9.
38 *Australian Passports Act* 2005 (Cth), s 6(1) (definition of "Australian travel document").
39 *Australian Passports Act* 2005 (Cth), s 22(1).
40 *Australian Passports Act* 2005 (Cth), s 22(2).
41 *Australian Passports Act* 2005 (Cth), s 22(2)(d).
42 *Australian Passports Act* 2005 (Cth), s 18(2)(c).
43 *Australian Passports Act* 2005 (Cth), s 12.

(ii) a condition of parole, or of a recognisance, surety, bail bond or licence for early release from prison, granted under a law of a foreign country, or other similar arrangement made under a law of a foreign country; or

(iii) a law of a foreign country, or an order or other direction (however described) under a law of a foreign country; or

(c) if an Australian travel document were issued to a person, it is likely that proceedings (of any kind) under a law of a foreign country in relation to a serious foreign offence that the person committed, or is alleged to have committed, would be compromised …"

30. In *Re Oates and Minister for Foreign Affairs*,[44] Deputy President McMahon of the Administrative Appeals Tribunal reviewed a decision of the Minister to cancel the applicant's passport, under the previous legislation, which the applicant asserted constituted a "disguised extradition". Australian authorities had issued a warrant for the arrest of the appellant, who was residing in Poland at the relevant time. Pursuant to departmental policy, the Minister cancelled the applicant's passport and issued a single-purpose travel document, such that he could only travel to Australia and not rely upon his passport to travel elsewhere.

31. In reliance upon observations by the High Court, considered above, in relation to the improper use of the deportation power, the applicant asserted that the cancellation of his passport in that way constituted "disguised extradition". The Deputy President rejected the submission. This was principally a consequence of the circumstance that extradition proceedings were on foot in Poland, and there was no evidence that those proceedings would, in any way, be impacted by the cancellation decision.

32. The Deputy President did, however, have occasion to consider the statutory context in which the power was exercised. It was relevant that "there was a real possibility that, if [the applicant] retains a valid passport, he could move from Poland to another country … which does not have an extradition treaty with Australia."[45] To that end, there was a clear connection between the applicant maintaining his passport and the proper administration of justice in Australia.

33. That connection, the Deputy President continued, was explained also by reference to the very nature of a passport, the broad discretion conferred under the Act, and the facilitation of the administration of justice:

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44 (1998) 52 ALD 138.

45 (1998) 52 ALD 138 at 148.

> "The issue of [a passport] is not a right or entitlement subject specific statutory provisions. It is a privilege accorded by the government. The actual document recording that privilege remains in the ownership of the government. If the government no longer wishes to extend its protection to any particular person, then it is free to withdraw that protection by cancellation of his or her passport. … If the statute contemplates an exercise of that power in aid of the proper administration of justice in Australia then, in my view, the administrative act is both the correct and preferable decision."[46]

34. On the Deputy President's approach, which has not been disapproved since, an objection to an exercise of the power to cancel an Australian passport as improper on the ground that it constitutes "disguised extradition" would not be sustained. It may be that the consequences of such an exercise of power are substantially similar to a "disguised extradition", but that is not sufficient reason to doubt the correctness of the Deputy President's approach.

***The nationhood power***

35. Separate and apart from engaging the extradition process to surrender a person within Australia's territory to an extradition country, the Minister administering the *Migration Act* 1958 (Cth) has the power, in the alternative,[47] to refuse to admit the person in the first instance.

36. In *Pedras v Prime Minister*,[48] the Court of Appeal of Tonga considered whether that prerogative power to deny or expel aliens from the Sovereign's territory survived the passage of the *Immigration Act* 1969 (Tonga). In contrast to the approach adopted in Australia under *Ruddock v Vadarlis*,[49] the Court of Appeal concluded, upon an orthodox application of settled principles in *Attorney-General v De Keysers Royal Hotel Ltd*,[50] the nationhood power had been supplanted and replaced by the legislation.

**Allegations of "disguised extradition" against surrendering countries**

37. Having considered the circumstances in which an exercise of power by Australia in relation to the surrender of an extraditable person to a requesting country might be rendered improper as constituting "disguised extradition", it is convenient to consider the converse situation: that is, when an exercise of power by a surrendering country in relation to a person being surrendered to Australia is objectionable as constituting "disguised extradition".

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46 (1998) 52 ALD 138 at 149.
47 *Barton v Commonwealth* (1974) 131 CLR 477 at 490 per McTiernan and Menzies JJ.
48 [2015] 3 LRC 771; [2014] TOCA 24.
49 (2001) 110 FCR 491; [2001] FCA 1329.
50 [1920] AC 508.

***A preliminary issue: foreign actors and foreign laws***

38. The common law world came to embrace what is known as the "act of State" doctrine. Fuller CJ of the Supreme Court of the United States, in *Underhill v Hernandez*,[51] stated "the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory".[52] That Court affirmed the principle 70 years later in *Banco Nacional de Cuba v Sabbatino*.[53] At about that time, the House of Lords, in *Buttes Gas & Oil Co v Hammer*,[54] accepted Fuller CJ's proposition of law in *Underhill* as representing the law in England.[55]

39. The veracity of the "act of State" doctrine under the common law of Australia has been weakened compared to the doctrine's operation in other jurisdictions,[56] although the High Court of Australia that the circumstances justifying an Australian court making findings about the lawfulness of the conduct of a foreign government or officers "will be rare".[57]

40. Cases concerning "disguised extradition", at least where the objection is raised in the context of Australian judicial proceedings, will necessarily involve the Court having to call into question either the conduct of agents or officers of a foreign country. The High Court had occasion to comment on its applicability in *Moti v The Queen*,[58] which is considered below.

41. In addition to the "act of State" doctrine, the common law does not permit the enforcement of foreign public laws. The *Spycatcher* litigation resulted in numerous actions in Commonwealth jurisdictions by the Attorney General of the United Kingdom seeking injunctive relief enjoining the publication of a book written by a former officer of the British Security Service. In the Australian case,[59] Her Majesty's Attorney General was refused the relief sought

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51 168 US 250 (1897).
52 168 US 250 (1897) at 252.
53 376 US 398 (1964) at 416.
54 [1982] AC 888.
55 [1982] AC 888 at 933.
56 *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 at [47]-[52] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Cf *Habib v Commonwealth* (2010) 183 FCR 62; [2010] FCAFC 12.
57 *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1 at [48] per French CJ, Kiefel and Nettle JJ (Bell J concurring).
58 (2011) 245 CLR 456; [2011] HCA 50.
59 See, generally, *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

on the basis that an Australian court will not enforce a foreign "public law";[60] that is, the courts will refuse to enforce "foreign governmental interests".[61]

42. Although the latter expression does not have any precise content, Spigelman CJ of the Supreme Court of New South Wales posed the question to be asked to answer whether or not the exclusionary rule applied: "whether, as a matter of substance, the [plaintiff] is seeking to enforce, outside the territory of the [the relevant country], the governmental interests of that nation in the sense of the exercise of powers peculiar to government."[62]

43. In contrast, having regard to the nature of extradition proceedings itself, the *Spycatcher* principle is not engaged: the foreign country, by litigating the amenability of a person to surrender, does not involve that country inviting an Australian court to enforce its criminal laws. An Australian court does not, thereby, determine the guilt or innocence of the subject person by reference to an offence created under the laws of the foreign country. All the Court does in the context of extradition proceedings is determine whether, having regard to the provisions of the 1988 Act, the subject person is one whom the Attorney may, in exercise of the power under s 22 of that Act, determine is eligible to be surrendered by reason of a warrant being issued by that foreign country.

***The High Court's decision in* Moti v The Queen**

44. It is settled in Australian law that an Australian court has the power to stay criminal proceedings as an abuse of process if the defendant was removed from the surrendering country without resorting to the applicable extradition procedures.[63] This reflects the attitude of Australian courts that "the *end* of criminal prosecution does not justify the adoption of any and every *means* for securing the presence of the accused".[64]

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60 (1988) 165 CLR 30 at 40 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ.

61 *Evans v European Bank Ltd* (2004) 61 NSWLR 75; [2004] NSWCA 82 at [1] per Spigelman CJ (Handley and Santow JJA concurring).

62 *Evans v European Bank Ltd* (2004) 61 NSWLR 75; [2004] NSWCA 82 at [58] per Spigelman CJ (Handley and Santow JJA concurring).

63 *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10 at [96] per Gleeson CJ, McHugh and Heydon JJ. In *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 at [69]-[106] Heydon J (dissenting) interrogated the assumption that such rule existed at common law.

64 (2011) 245 CLR 456; [2011] HCA 50 at [60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

45. The High Court considered such an objection in *Moti v The Queen*.[65] In that case, the majority of the Court concluded that an indictment, which charged the appellant as being an Australian citizen who, whilst outside Australia, engaged in sexual intercourse with a person under the age of 16 years, should be stayed as an abuse of process. Both the primary judge and the Court of Appeal of Queensland rejected the submission that, because the appellant was brought to Australia from Solomon Islands without his consent in excess of the Solomon Islands Government's deportation power, the indictment was an abuse of process. The submission was premised on the extent to which Australian consular officials were aware of, and facilitated, the perhaps unlawful manner in which Solomon Islands officials had removed the appellant to Australia.

46. The evidence revealed that Australia's Acting High Commissioner believed that Solomon Islands law did not empower the deportation of the appellant to Australia in the circumstances that prevailed and, despite communicating that belief to her superiors in Canberra, the High Commission was ordered to issue a travel document to the appellant, and the Solomon Islands officials who would accompany him, for use in his non-consensual removal from Solomon Islands to Australia. Travel documents were issued to that end.

47. The High Court, by majority, accepted that submission and allowed the appeal. At issue was, first, whether, having regard to the act of State doctrine,[66] an Australian court had jurisdiction to express an opinion as to the lawfulness of conduct by foreign officials; and, second, whether the circumstances justified staying the indictment. The Court also considered, and rejected, the appellant's alternate argument that the indictment should be stayed because Australian authorities had made payments to the complainant and her family "undermine[d] confidence in the administration of justice."[67]

48. The majority emphasised that "there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons

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65 (2011) 245 CLR 456; [2011] HCA 50.

66 As to the act of State doctrine, see *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ. See also *Buttes Gas & Oil Co v Hammer* [1982] AC 888 at 933 per Lord Wilberforce; *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) at 416 per X; *Underhill v Hernandez* 168 US 250 (1897) at 252 per Fuller CJ.

67 (2011) 245 CLR 456; [2011] HCA 50 at [13]-[14] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, at [68] per Heydon J.

through whom such a government has acted".[68] The circumstances in *Moti* presented such an occasion because, in assessing whether to exercise the stay power, the Court was confronted by the preliminary question of the lawfulness of the appellant's removal from Solomon Islands.[69] The majority answered that preliminary question in the negative, insofar as the appellant was removed prior to the expiration of the period within which he might exercise his review rights under the relevant legislation.[70]

49. In approaching the conduct of the Australian officials in connection with that unlawful removal, the majority emphatically emphasised that whether or not acts or omissions by Australian officials might warrant staying a subsequent criminal process as an abuse of process must be assessed by reference to the particular facts of each case.[71] The majority highlighted three facts as demonstrating the abuse in the circumstances that prevailed in *Moti*: first, the belief of the Acting High Commissioner that the deportation was unlawful; second, the belief was obviously correct; and, third, despite those matters, travel documents were issued when it was known they would be used to facilitate an unlawful deportation.[72]

**When to raise "disguised extradition" objections in the criminal process**

50. There are three principal opportunities at which an objection of "disguised extradition" might be raised in the context of criminal proceedings: first, when a person brought within the geographic territory has been taken into custody a writ of *habeas corpus* might be sought; second, the Court might refuse to accept an indictment when it is presented at arraignment; and, third, in the context of mitigating factors submitted during the sentencing process.

**Habeas corpus *directed to gaolers having custody of surrendered persons***

51. The writ of *habeas corpus* is an ancient form of judicial review whereby the Court requires an agent or officer who has the custody of a person to

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68 (2011) 245 CLR 456; [2011] HCA 50 at [51] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

69 (2011) 245 CLR 456; [2011] HCA 50 at [52] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

70 (2011) 245 CLR 456; [2011] HCA 50 at [39] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

71 (2011) 245 CLR 456; [2011] HCA 50 at [60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

72 (2011) 245 CLR 456; [2011] HCA 50 at [64]-[65] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

demonstrate that the custody is lawful.[73] The writ is, therefore, directed to the person in whose custody the petitioner is being held ("the gaoler"),[74] rather than, for example, the surrendering country whose conduct the petitioner seeks to impugn as constituting "disguised extradition".

52. The critical obstacle that faces a petitioner seeking the return of a writ of *habeas corpus* is that it must be demonstrated that his or her detention is unlawful.[75] This is not to suggest a reversal of the burden, insofar as every person is presumed to be entitled to his or her freedom,[76] but to highlight the difficulty that necessarily confronts a petitioner in the context of the formal instruments.

***Permanent stay of proceedings on disguised extradition grounds***

53. As the High Court explained in *Moti*, the appropriate form of relief in criminal proceedings that constitute an abuse of process is for them to be permanently stayed. The circumstances of that case give an example of when the Court might properly intervene in that way, and emphasise the need to connect the conduct of Australian authorities to the abuse of the Court's process. That is a recurring theme in extradition cases, as the jurisprudence relating to abduction, considered below, reveals.

***"Disguised extradition" as a mitigating factor in sentencing***

54. In *AB v The Queen*,[77] the High Court considered what impact, if any, the circumstance that the appellant had been extradited from the United States to Australia had on the sentencing judge's discretion. In that case, the appellant submitted the sentencing judge had erred by failing to discount his sentence because, notwithstanding his right to object to being dealt with for offences other than those for which he was extradited, he waived his extradition rights and confessed to the charges. Gummow and Callinan JJ concluded that those matters were properly factors in mitigation of sentence.[78]

55. *AB* was clearly not a case of "disguised extradition", but rather the prosecution of a person who had been surrendered for certain offences in relation to offences for which he was not extradited. There is, to that extent, some similarity of

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73 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 at 227 per Evatt J.
74 *Hicks v Ruddock* (2007) 156 FCR 574; [2007] FCA 299 at [36] per Tamberlin J.
75 *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 123 ALR 478 at 480 per Deane J.
76 *R v Governor of Metropolitan Gaol; Ex parte Di Nardo* [1963] VR 61 at 62 per Sholl J.
77 (1999) 198 CLR 111; [1998] HCA 46.
78 (1999) 198 CLR 111; [1998] HCA 46 at [55].

approach. Having regard to the fact that Australian courts will assume jurisdiction over a person howsoever they come within the territorial jurisdiction of Australia, the deprivation of extradition rights is similar. It is open to argument whether the Court would accept an analysis premised on that deprivation, however, since their Honours' reasoning was based, to the contrary, on the costs savings to the Australian justice system.

56. In *Gomes v The State*,[79] the Privy Council heard an appeal from the Court of Appeal of the Republic of Trinidad and Tobago, which considered the issues at play in determining whether time spent in remand in a surrendering country pending extradition should be taken into account in reduction of any sentence passed upon conviction of the domestic offence. In that case, the Board concluded that to refuse to take it into account "would smack of punishment, rather than deterrence",[80] such that it should be included.

**Three comparative insights**

57. There are three broad areas with respect to which foreign cases can shed light to the benefit of the Australian law of extradition:

(a) first, the distinction between "disguised extradition" (which involves the exercise of governmental power to achieve the same end as extradition, but without using the procedures applicable to the surrender of fugitives) and abduction (which involves the unlawful removal of a person from one country to another without the apparent involvement of government agents or officers);

(b) second, the impact of the availability of the death penalty in many other jurisdictions (whether in terms of its imposition or its execution), and the significance of that sentencing option as a constant reminder of the need to vigilantly ensure the observance of the proper procedures in cases of extradition of persons from Australia to a foreign country; and

(c) third, the significance of the obligation of non-refoulement, owed by Australia as a signatory to the *Convention Relating to the Status of Refugees* (**the Refugees Convention**), on the extradition process itself and its interplay with the deportation power.

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79 [2015] 1 WLR 963; [2015] UKPC 8.

80 [2015] 1 WLR 963; [2015] UKPC 8 at [20].

***Abduction***

58. "Abduction" might be distinguished from "disguised extradition" in the sense that, with respect to the former scenario, the subject person is simply removed from the foreign territory without the involvement of the foreign Sovereign. There are, fortunately, few reported cases of prosecutions being instituted and maintained in Australia following the abduction of a person from another country into Australian territory. This is, perhaps, no more than a result of the absence of any contiguous borders to Australia. Two cases, one from Zimbabwe and one from Uganda, demonstrate competing approaches.

59. The Supreme Court of Zimbabwe, in *Beahan v State*,[81] considered the jurisdiction of Zimbabwean courts in relation to the prosecution of a person who had been abducted from neighbouring Botswana into Zimbabwe. He was taken by Botswana Defence Force officers and, at the border and without his consent, delivered into the custody of the Zimbabwean authorities. The extradition procedure had, plainly, not been followed. The deportation procedure had not been followed. Persons clothed in the authority of the State of Botswana had, without more, collected the defendants and handed them to Zimbabwe.

60. Gubbay CJ, writing for the Court, made plain that Zimbabwean courts should not exercise jurisdiction in cases where the defendant had been abducted by the prosecuting state,[82] but of course, the defendant in the present case had been transferred into the territory of Zimbabwe without the involvement of Zimbabwean agents, but by the Botswana authorities. The Chief Justice observed: "In prosecuting the appellant the hands of the state were not soiled."[83]

61. The case is curious because, in the absence of compliance with the municipal law of Botswana, it is not clear what authority was relied upon to transfer the defendants. It might be questioned whether the conduct was an instance, to use the language of the Chief Justice, of the abductor "acting on his own initiative and without the authority or connivance of his government".[84] It is not clear whether, had Jack Bauer of *24* fame done the same, acting without the official authority of his government, would have been sufficient to elevate the conduct above international law. It is, after all, the affront between nations at stake.

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81 [1992] LRC (Crim) 32.
82 [1992] LRC (Crim) 32 at 44.
83 [1992] LRC (Crim) 32 at 47.
84 [1992] LRC (Crim) 32 at 44.

62. More recently, in *Awadh v Attorney General (Uganda),*[85] the Constitutional Court of Uganda refused to grant a stay of criminal proceedings pending against persons who complained they had been unlawfully abducted from Kenya and Tanzania. The Court relied on reasoning essentially the same as the Court in *Beahan,* such that the course of African authority remains the same. The focus in each of those cases was not on the conduct that preceded the crossing of the national border, but on the conduct of the country's own officers.

63. That trend against "abduction" cases in Australia was bucked in unusual circumstances. In *R v County Court of Victoria*,[86] before the arraignment of the accused on charges of four counts of rape and one count of false imprisonment, the trial judge stayed his prosecution on the basis that he had been brought within the jurisdiction of the County Court of Victoria forcibly, and without his consent, from outside Australia without extradition. The Crown applied to the Supreme Court of Victoria to quash the stay and declaratory relief. Byrne J granted the relief sought.

64. The defendant was a Canadian national and a serving member of the Canadian Defence Forces (Navy) who had been seconded on exchange to the New Zealand Navy. The offences of which the defendant was charged were alleged to have been committed on a New Zealand naval vessel, *HMNZ Te Mana*, which was a foreign warship within Australia with the consent of the Australian Government. It was moored at Williamstown, Victoria at the relevant time.

65. Byrne J was prepared to assume that the common law immunity of foreign warships and their crews from the jurisdiction of Australian criminal courts had been waived.[87] His Honour did so in circumstances where the vessel had left Australian waters for the high seas and enjoyed distinct immunity there,[88] such that the defendant was in New Zealand territory for the purposes of the 1988 Act.[89] To wit, the defendant was put ashore in Australia by the New Zealand authorities without his consent, which the Court assumed was unlawful.[90]

66. Applying the statements of principle in *Levinge v Director of Custodial Services,*[91] which were to the effect that a permanent stay might be granted

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85 [2015] 3 LRC 321.
86 [2003] VSC 213.
87 Cf *Chow Hung Ching v The Queen* (1948) 77 CLR 449 at 470 per Starke J.
88 *UN Law of the Sea Convention*, Art 95.
89 *Extradition Act* 1988 (Cth), s 81(c).
90 [2003] VSC 213 at [24].
91 (1987) 9 NSWLR 546.

where the prosecution had been "either a party to the unlawful conduct or connived at it",[92] his Honour concluded that the stay ought not have been granted because no findings as to the state of mind of the authorities who delivered the defendant into Australia were, or could have been, made.[93]

***The death penalty***

67. An important consideration that weighs against the judiciary countenancing the use of practices that might constitute "disguised extradition" is that adherence to the legislative procedure is the best defence against the continued application of the death penalty in other jurisdictions. Similarly objectionable to the execution of offenders itself is the risk of the Court's implicit sanction of the "death row phenomenon", whereby a person sentenced to death is kept "facing the agony of execution over a long extended period of time."[94]

68. In *Tsebe v Minister of Home Affairs*,[95] Botswana had requested South Africa extrude two of its nationals on charges of murder. Each would be liable to the death penalty. Mojapelo P recorded the lack of respect that Botswana had paid to human rights considerations in its implementation of the death penalty,[96] including "secretive hangings" that had, unsurprisingly, "led to shock and outrage".[97]

69. Having considered the unique legal considerations under South African law, the High Court declared the deportation, extradition or removal of the applicants to Botswana unlawful, and prohibited the respondent from taking any action to do so. This reflected the constitutional duty cast upon the State to "respect, protect, promote and fulfil the rights in the Bill of Rights,"[98] which protected the right to freedom and security of the person.[99] An appeal to the Constitutional Court of South Africa was dismissed.[100]

70. As the earlier case of *Mohamed v President of the Republic of South Africa*,[101] upon which both the High Court and the Constitutional Court premised their

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92 (1987) 9 NSWLR 546 at 554 per Kirby P, at 565 per McHugh JA, and at 567 per McLelland AJA.
93 [2003] VSC 213 at [35]-[37].
94 *Pratt v Attorney-General (Jamaica)* [1994] 2 AC 1 at 29, 33 per Lord Griffiths for the Board.
95 [2012] 1 LRC 747.
96 [2012] 1 LRC 747 at [61]-[67].
97 [2012] 1 LRC 747 at [67].
98 *Constitution of the Republic of South Africa* 1996 (SA), s 7(1).
99 *Constitution of the Republic of South Africa* 1996 (SA), s 12.
100 *Minister of Home Affairs v Tsebe* [2013] 2 LRC 268; [2012] ZACC 16.
101 [2001] 5 LRC 636.

reasons in *Tsebe*, made clear, the protection of the right to freedom and security of the person under the Constitution operated irrespective of whether the removal was to be effected either by deportation or extradition. It is plain that the African courts are concerned to not condone the death penalty, irrespective of whether or not "disguised extradition" is employed.

71. There is, of course, a distinction between the passing of a death sentence and the actual execution of that sentence by whatever means. This distinction is reflected in Australian constitutional law, insofar as the High Court in *Elliott v The Queen*,[102] observed, "the exercise of judicial power … was spent upon the subsequent imposition of sentences upon [the appellants]. The controversy represented by the indictment had been quelled and … the responsibility for the future of the appellants passed to the executive branch of government of the State".[103]

72. It is on the basis of that distinction that, in the 1988 Act, surrendering an extraditable person to a requesting country cannot be objected to on the ground that, even if the death penalty is imposed on the person, it will not be carried out.[104] In the English experience, the Court will, generally, not go behind the assurances of the requesting country to prevent the surrender of the person to the requesting country.[105]

73. There are, of course, real concerns about whether the surrender of a person to the jurisdiction of a requesting country, whether through the extradition process or otherwise, might result in the execution of the death penalty. The imposition of that penalty is no more real and concerning than in circumstances of political offences or recognised grounds of persecution. These concerns are met by extradition objections under the 1988 Act, and Australia's obligation of non-refoulement under the Refugee Convention.

***Non-refoulement***

74. Although the law of extradition might have emerged as a response to the readiness of Ancient States to grant asylum to fugitive offenders,[106] the

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102 (2007) 234 CLR 38; [2007] HCA 51.

103 (2007) 234 CLR 38; [2007] HCA 51 at [5] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

104 *Extradition Act* 1988 (Cth), s 22(3)(c)(iii).

105 See, for example, *Government of Ghana v Gambrah* [2015] 1 All ER 654; [2014] EWHC 1569 (Admin) at [3]-[10] per Moses LJ (Silber J concurring).

106 Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911) at 358-359.

obligations imposed on modern States that have entered into the Refugee Convention as to non-refoulement loom large over the contemporary extradition process.

75. The latest battleground concerning the obligation of non-refoulement under the Refugee Convention has been its proper role in the exercise of the Minister's discretion, under s 501CA of the *Migration Act* 1958 (Cth), whereby the Minister exercises a personal discretion to revoke a mandatory, earlier decision to cancel a person's visa. The circumstances that compel the revocation decision, typically, involve the person's failure to satisfy the character test.

76. In its most recent judgment concerning the interplay between s 501CA and the non-refoulement obligation, *BCR16 v Minister for Immigration and Border Protection*,[107] the Full Court of the Federal Court has emphasised the different and distinct role the obligation plays as a relevant consideration on exercising the s 501CA discretion, as opposed to its explicit and determinative role in deciding applications for protection visas under s 65.

77. In *BRC16*, using language that is reminiscent of the Supreme Court of Canada, in its consideration of the relationship between the obligation and the exercise of surrender powers in the extradition context, Bromberg and Mortimer JJ stated:

> "[The] circumstances in which consideration of non-refoulement occurs are quite different as between an exercise of the revocation power in s 501CA(4) and an exercise of power under s 65 of the *Migration Act*. … That returning an individual to a country where there is a real possibility of significant harm, or a real chance of persecution, may contravene Australia's non-refoulement obligations, is also a matter to be weighed in the balance of deciding whether to revoke a mandatory visa cancellation. Its place in an exercise of discretionary power is quite distinct, and is capable of playing a quite different role in the exercise of the statutory discretion.
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> In contrast, both in terms of text and of authority, s 65 involves a qualitatively different exercise. In the task required by s 65, the Minister or his delegates are to be "satisfied" of certain criteria, some of which, if considered, may involve assessing the risk of harm to a visa applicant if returned to her or his country of nationality. The delegate, or the Minister, may or may not be "satisfied" to the requisite level about the existence of any such risk, or about its nature or quality. Non-satisfaction requires refusal of the visa."[108]

78. The discussion in *BRC16* is relevant to the extradition context because, in making a surrender determination under s 22 of the 1988 Act, an extraditable person must not be surrendered if an "extradition objection" exists. To that end,

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107 [2017] FCAFC 96.

108 [2017] FCAFC 96 at [48]-[49].

the discretionary power of the Attorney to surrender a person to a requesting country, which is conferred by s 22(2), may only be exercised if the Attorney "is satisfied that there is no extradition objection in relation to the offence".[109]

79. Section 7(a), (b) and (c) articulate the three relevant extradition objections:

(a) "the extradition offence is a political offence in relation to the extradition country";

(b) "the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country"'

(c) "on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions".

80. The power in s 22(2) is discretionary, but its proper exercise is conditioned by the jurisdictional fact that the Attorney be satisfied that an extradition objection does not exist. The absence of each of the available extradition objections is the relevant triggering event for the lawfulness of the surrender determination. As the Full Court observed in *BRC16*, however, the principle of non-refoulement also weighs as a relevant consideration in the exercise of the discretion itself.

81. The Supreme Court of Canada explored the relationship between the State's obligation as to non-refoulement with its right to surrender persons in *Nemeth v Canada (Minister of Justice)*,[110] and *Gavrila v Canada (Minister of Justice*).[111] In *Nemeth*, the Minister of Justice had ordered the extradition of persons who had been determined to be refugees to the Republic of Hungary. In *Gavrila*, the Minister ordered the extradition of refugees to Romania, but the Court in that case applied the approach explained in the *Nemeth* case.

82. The effect of the Court's analysis was the extent to which conclusions made under the *Immigration and Refugee Protection Act* 2001 (Can) as to the status of the appellants as refugees impacted upon the exercise of the Minister of

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109 *Extradition Act* 1988 (Cth), s 22(3)(a).
110 [2010] 3 SCR 281; [2010] SCC 56.
111 [2010] 3 SCR 342; [2010] SCC 57.

Justice's discretion under the *Extradition Act* 1999 (Can) to order the surrender of the appellants to the Republic of Hungary, which was the country from which they had originally sought, and obtained, asylum in Canada.

83. Cromwell J delivered the judgment of the Court. His Honour applied *Lake v Canada (Minister of Justice*).[112] *Lake* is Canada's modern iteration of the principle in *Wednesbury*, except that Canadian courts defer to administrative decision-makers to a greater degree than Australian courts. The *Lake* approach is that the Minister must apply the correct legal test and, if that test has been applied, the decision must be upheld unless the conclusion is, despite having applied the correct test, itself unreasonable.[113]

84. In *Nemeth*, the Court concluded that the prior determination of refugee status was not binding on the Minister or did not otherwise preclude the Minister from surrendering the appellants,[114] which is also the position in Australia.[115] The Minister had, in any event, applied the wrong legal test.

85. The approach in *Nemeth* is curious from an Australian perspective because it explicitly connects the Canadian equivalent of s 7(b) of the 1988 Act, which creates the "actual purpose" extradition objection, to the obligation of non-refoulement under the Refugees Convention.[116] Cromwell J makes this unambiguously clear. His Honour states, "[the objection] is Canada's primary legislative vehicle to give effect to Canada's *non-refoulement* obligations when a refugee is sought for extradition",[117] and "[the objection], when applied to the situation of a refugee whose extradition is sought, must be understood in the full context of refugee protection."[118]

86. To be clear, both Australia and Canada have acceded to and ratified the non-refoulement obligation in their domestic laws. Further, s 44(1)(b) of Canada's *Extradition Act* 1999 (Can) and the extradition objection in s 7(c) of the 1988 Act are in substantially similar terms, and both provisions operate to preclude the exercise of the power to surrender the relevant person to the requesting country. Statutory construction, of course, remains a purely domestic exercise.

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112 [2008] 1 SCR 761; [2008] SCC 23.
113 *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761; [2008] SCC 23 at [41] per LeBel J.
114 [2010] 3 SCR 281; [2010] SCC 56 at [52], [55].
115 E P Aughterson, *Extradition: Australian Law and Procedure* (1995) at 35-36.
116 [2010] 3 SCR 281; [2010] SCC 56 at [77]-[86].
117 [2010] 3 SCR 281; [2010] SCC 56 at [77].
118 [2010] 3 SCR 281; [2010] SCC 56 at [86].

87. The Full Court of the Federal Court, in *Traljesic v Bosnia and Herzegovina*,[119] considered the status of the non-refoulement obligation as against s 7(c) of the 1988 Act. It was, perhaps surprisingly, somewhat different from the approach of the Supreme Court of Canada, and does not appear to reflect the approach developed in the admittedly different statutory context of s 501CA in *BRC16*. While there is much to commend the analysis of the unanimous Full Court in *Traljesic*,[120] it is an interesting example of both the strengths and limitations of comparative law in the extradition context.

**Conclusion**

88. This paper has sought to demonstrate the common approach of jurisdictions to issues of "disguised extradition", and to highlight the failure of the structure of extradition law, focused as it is on the relationship between nation states rather than the concerns of individual citizens, to address potential civil rights abuses that bear out only in the consequences of an otherwise unimpeachable domestic criminal process. The counterpoint to such concerns about "disguised extradition", and the risks posed to individual citizens by abusive governments, is the obligation of non-refoulement enshrined in the Refugees Convention.

89. The nuanced interplay between the seeking of asylum by an individual and the granting of extradition by the hosting nation state is quaint. This is because, as between the nations of Antiquity, extradition was seen as the mechanism by which the indignity of the hosting nation state might be expunged. Although the Ancient practice of extradition stemmed from religious roots, the secular dimension of the practice came to overshadow that beginning, as Phillipson describes:

> "[In] international relationships it was universally conceived in antiquity, especially in the earlier ages, that the delivery of an offender to the offended State operated *ipso facto* as an exculpation on the part of the State, of which the guilty individual was a subject. For the presence of the tainted individual, as well as of tainted property, was thought to pollute the whole country, and consequently to bring down upon it the anger of the gods."[121]

90. The approach of the Full Court in the recent judgment in *Traljesic*, which quite properly remarking upon the distinct statutory environments in which concerns about individual liberty manifest, are somewhat at odds with the approach of the

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119 [2017] FCAFC 70.

120 [2017] FCAFC 70 at [63]-[66] per Griffiths, Perry and Bromwich JJ.

121 Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911) at 363.

Supreme Court of Canada. That is entirely uncontroversial. The motivations of Canadian Parliamentarians and those of Australian Parliamentarians to ratify the identical international obligation into domestic law might have been distinctly different. The contrast, however, highlights the fundamental impact that the status of the asylum-seeker has had in the development of extradition law, and invites debate about the proper function of the State in both arenas.