HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

REPUBLIC OF CROATIA APPELLANT

AND

DANIEL SNEDDEN RESPONDENT

Republic of Croatia v Snedden [2010] HCA 14
Date of Order: 30 March 2010
Date of Publication of Reasons: 19 May 2010
S24/2010

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 2 September 2009 and the further orders of that Court made on 4 September 2009 and, in place of those orders, order that:*

(a) In addition to the order made by Justice Cowdroy on 3 February 2009, it be ordered that the orders made by Deputy Chief Magistrate Cloran on 12 April 2007 are confirmed;

(b) Subject to paragraph (a), the appeal be dismissed with costs.

On appeal from the Federal Court of Australia

Representation

M A Perry QC with H Younan for the appellant (instructed by Commonwealth Director of Public Prosecutions)

B W Walker SC with C D Jackson for the respondent (instructed by Schreuder Partners Lawyers)

FRENCH CJ.

Introduction

1. The respondent was born in the former Yugoslavia in 1954 and migrated to Australia in 1969, taking up Australian citizenship in 1975. He was named Dragan Vasiljkovic at birth but changed his name to Daniel Snedden when assuming Australian citizenship. He is said to have been the commander of a Special Purpose Unit of Serbian paramilitary troops during the Croatian-Serbian conflict in the early 1990s following the fall of communism in Yugoslavia**[1]**.

2. On 20 January 2006, the Republic of Croatia ("the Republic") issued a request to the Australian Government for the extradition of the respondent to Croatia. The respondent's extradition was sought so that he could be prosecuted for offences against Arts 120 and 122 of the Basic Penal Code of the Republic of Croatia. The Republic alleged, in its request, that during June and July 1991 in Knin the respondent did nothing to prevent members of the Unit who were his subordinates from mistreating captured members of the Croatian army and police and mistreated one such person himself. It also alleged that, in February 1993, he commanded subordinate members of the Unit to interrogate and then execute two Croatian prisoners of war. Those allegations formed the basis of the claimed contraventions of Art 122. In relation to the alleged offence against Art 120, he is said to have commanded members of the Special Purpose Unit and a tank unit of the Yugoslav People's Army to fire on a church and a school.

3. In proceedings before a magistrate under s 19 of the *Extradition Act* 1988 (Cth) to determine his eligibility for surrender, the respondent contended, inter alia, that there were substantial grounds for believing that if surrendered to Croatia he might be punished by reason of his political opinions. That ground is a defined "extradition objection" under s 7(c) of the *Extradition Act*. If it is made out in proceedings under s 19, the magistrate may not determine that the person raising the objection is eligible for surrender.

4. The respondent failed to satisfy the magistrate that there were substantial grounds for believing that any extradition objection existed. The magistrate determined that he was eligible for extradition. The respondent failed again in review proceedings before a judge of the Federal Court pursuant to s 21 of the *Extradition Act***[2]**. However, on 2 September 2009 the Full Court of the Federal Court of Australia found an extradition objection made out on the basis that, in sentencing for offences of the kind alleged against the respondent, prior service in the Croatian armed forces was treated by Croatian courts as a mitigating factor and was ipso facto not available to those who had fought on the Serbian side of the conflict. It held there were therefore substantial grounds for believing that the respondent might be punished, detained or restricted in his personal liberty by reason of his political opinions**[3]**. The Full Court allowed the appeal against the decision of the primary judge of that Court and directed that the respondent be released from custody.

5. Special leave to appeal against the decision of the Full Court of the Federal Court was granted on 12 February 2010. On 30 March 2010, following the hearing of the appeal, the appeal was allowed and the magistrate's orders confirmed. My reasons for joining in those orders follow.

The reasoning of the Full Court of the Federal Court

6. Before the magistrate the respondent pointed to uncontradicted evidence[4] said to show that service in the Croatian military during the Croatian-Serbian conflict is treated in Croatian courts as a mitigating factor in the sentencing of persons for war crimes committed during the conflict[5]. A submission that such mitigation of sentence implied a heavier punishment for Serbian ex-servicemen by reason of their nationality and political beliefs was rejected.

7. The submission was renewed in written submissions in reply before the primary judge in the Federal Court[6], but was not mentioned in his Honour's reasons for judgment. It was, however, successful on the appeal to the Full Court of the Federal Court, which made the following findings and reached the following conclusions:

1. Reports from the Organization for Security and Co-operation in Europe ("OSCE") published in March and September 2006[7], which were before the magistrate and the primary judge, indicated that the Supreme Court of Croatia had sanctioned lower courts taking into account, in mitigation of sentence for war crimes offences, service by the convicted person in the Croatian armed forces during the Croatian-Serbian conflict[8].

2. The County Courts of Croatia had taken the Supreme Court to have approved the practice of mitigating sentence by reference to prior service in the Croatian army. No evidence had been adduced by the Republic to contradict the inference that such a factor continued to be applied in sentencing[9].

3. There was no evidence that the respondent's sentence would be increased because he had fought on the Serbian side[10].

4. The evidence supported the respondent's submission that the Croatian courts take an holistic approach to sentencing[11].

5. If convicted the respondent would be "detained" and deprived of his liberty for a period longer than a Croatian counterpart[12]. His treatment would thus fall within s 7(c) – subject only to determination of the question whether it arose " by reason of his ... race, religion, nationality or political opinions"[13].

6. The mitigating factor of prior service in the Croatian army could not be said to be based on nationality. It would apply to Serbs who fought in the Croatian army. It would not apply to Croatians who fought with the Serbian forces in support of an independent Republic of Krajina[14].

7. The mitigating factor operated by reference to political beliefs. The relevant political belief held by the respondent was described in his own statement as "the self determination of Serbian people in the Balkans in those areas where they constitute a majority", in particular in the Krajina. The respondent's political belief was that "Krajina Serbs [had] a right to return to their homeland and [were] entitled to an independent state". The extradition request itself referred to the conflict in Knin "between the armed forces of the Republic of Croatia and the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the 'Republic of Krajina'", in which the respondent was a commander[15].

8. There were substantial grounds for believing that the respondent might be "punished" or imprisoned and thereby "detained" or "restricted in his ... personal liberty ... by reason of his ... political opinions"[16].

Ground of appeal

8. There were two grounds of appeal to this Court, only one of which was pressed. Omitting particulars, it was in the following terms:

"The Full Court erred in holding that the Respondent had established an extradition objection in relation to the extradition offences for the purposes of s 19(2)(d) of the *Extradition Act 1988* (Cth) ... on the ground that the Respondent had established substantial grounds for believing that, on surrender to the Republic of Croatia in respect of the extradition offences, he may be '*punished, detained or restricted in his ... personal liberty, by reason of his ... political opinions.*'" (italics in original)

Statutory framework

9. The provisions of the *Extradition Act* most relevant for this appeal are ss 7 and 19. Section 19 provides for the determination by a magistrate**[17]** of eligibility for surrender of a person whose extradition has been requested by an extradition country**[18]**. Section 19(2) sets out the necessary conditions for eligibility for surrender and provides that:

"For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

...

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

"Extradition objection" is defined in s 7, which relevantly provides:

"**Meaning of *extradition objection***

For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

...

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

..."

10. The magistrate's order in proceedings under s 19 can be reviewed upon application under s 21 by the Federal Court or the Supreme Court of a State or Territory**[19]**. Upon such an application for review the court is required to "have regard only to the material that was before the magistrate"**[20]**. The court may by order confirm the order of the magistrate or quash it and make ancillary orders**[21]**.

11. An appeal lies from the Federal Court or the Supreme Court to the Full Court of the Federal Court**[22]**.

The political opinion objection

12. The only extradition objection in issue in this appeal is that defined in s 7(c) by the words "punished, detained or restricted in his ... personal liberty, by reason of his ... political opinions". It is useful to refer briefly to the ancestry of that statutory collocation.

13. Until 1966 the law applicable to the extradition of fugitives to and from Australia was found in the *Extradition Act* 1870 (Imp) ("the 1870 Act"), which applied to

extradition to foreign states, and the *Fugitive Offenders Act* 1881 (Imp) ("the 1881 Act"), which applied to extradition between British Dominions and later the countries of the British Commonwealth. The 1870 Act was expressed to apply to British possessions, which included "any colony ... within Her Majesty's dominions"**[23]**. It prohibited the surrender of a "fugitive criminal" if the offence was of "a political character" or the request for his surrender was made "with a view to try or punish him for an offence of a political character"**[24]**. The 1881 Act, applying as it did to the British Dominions, contained no such restriction**[25]**.

14. The Imperial statutes of 1870 and 1881 were continued in force in Australia after Federation as laws in force in the States at the time of the establishment of the Commonwealth and therefore preserved by s 108 of the Constitution unless and until provision was made by the Commonwealth Parliament**[26]**.

15. In 1957, members of the Council of Europe signed the European Convention on Extradition, which contained, in Art 3.2, a prohibition against extradition if the requested party had "substantial grounds for believing that a request for extradition for an ordinary criminal offence [had] been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of [those] reasons".

16. By the early 1960s the application of Imperial statutes to former British Dominions which had become independent members of the British Commonwealth was seen as "becoming anomalous"**[27]**. As noted earlier, there was no provision for a political objection to extradition under the 1881 Act. This led to the incongruity that "a Commonwealth citizen seeking political asylum in Britain was in a worse situation than an alien"**[28]**. Following the extradition, in 1963, of Nigerian pro-democracy activist Chief Anthony Enahoro to Nigeria on a charge of treasonable felony, the British Government circulated a memorandum proposing changes to the laws relating to extradition between Commonwealth countries**[29]**.

17. In September 1965 and April 1966 conferences of Commonwealth Law Ministers were held in Canberra and London where a "Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth" was agreed**[30]**. The Scheme set out in cl 9 a number of "[c]ircumstances precluding return" including:

"(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial authority or executive authority –

...

(b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."

Clause 9(2)(b) was originally framed in terms similar to those of s 10 of the *Fugitive Offenders Act* 1881. It was subsequently agreed that it should instead reflect the terms of Art 3.2 of the European Convention but that it should be varied to provide a more precise criterion than "prejudice"**[31]**.

18. In 1966 the Commonwealth Parliament enacted Australia's first national legislation relating to extradition. It comprised two Acts, the *Extradition (Foreign States) Act* 1966 (Cth) and the *Extradition (Commonwealth Countries) Act* 1966 (Cth). The first of those replaced the *Extradition Act* 1870 and the second, the *Fugitive Offenders Act* 1881. The restriction on return which had appeared in cl 9(2)(b) of the agreed Scheme

appeared in s 14(b) of the *Extradition (Foreign States) Act* and s 11(1)(b) of the *Extradition (Commonwealth Countries) Act*. If there were substantial grounds for believing that the fugitive would, if surrendered to the requesting country, suffer the consequences described in those paragraphs, the Attorney-General was prohibited from giving a notice authorising the issue of a warrant for the apprehension of the fugitive or from otherwise informing a magistrate of the request for extradition**[32]**. The apprehension of adverse treatment set out in those paragraphs did not form a basis for objection before a magistrate in proceedings under the 1966 Acts.

19. A similarly worded restriction appeared in s 4(1)(c) of the *Fugitive Offenders Act* 1967 (UK), albeit it could be made out before the Secretary of State or the court of committal, or on an application to the High Court for habeas corpus or for review of the order of committal. The words of s 4 required that it appear that the person whose surrender was requested "might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions"**[33]**. The restrictions on surrender so imposed were described as "significantly broader than those contained in Section 3(1) of the [1870 Act], and perhaps more in tune with modern requirements"**[34]**.

20. The *Extradition Act* 1988 (Cth) replaced the two 1966 statutes**[35]**. It was described in the Replacement Explanatory Memorandum to the Extradition Bill 1987 as consolidating Australia's extradition laws by combining the operation of the two repealed Acts**[36]**. Paragraphs (a), (b) and (c) of cl 7, defining extradition objections, were said to "re-enact the statutory safeguards contained in the Extradition (Foreign States) and Extradition (Commonwealth Countries) Acts 1966"**[37]**. In his Second Reading Speech for the Bill the Attorney-General said, in relation to the relevant extradition objections**[38]**:

"The Bill requires extradition to be refused in any case where the surrender is sought for the purpose of prosecuting or punishing the person on account of race, religion, nationality or political opinion. It also requires refusal of extradition where any prejudice on any of those grounds may result."

21. The antecedents of the extradition objection in s 7(c) do not suggest that it is rooted in or confined by concepts of differential treatment. Rather it is directed to protecting people from extradition to a country in which they might be punished on account of the listed attributes including political opinion. It is not necessary, in order to invoke that objection, that it be shown that such a person is treated less favourably than some other person in similar circumstances, but lacking the requisite attribute. On the other hand, demonstrated differential treatment may support an inference and a finding of fact that the requisite causal connection exists between punishment and one of the attributes mentioned in s 7(c).

The application of s 7(c) in the present case

22. The causal connection between punishment and political opinion in s 7(c) is defined by the words "by reason of". Those words have appeared in more than one statutory setting including the definition of "refugee" in Art 1A(2) of the Refugees Convention**[39]**, effectively incorporated by reference into the criteria for the grant of protection visas under the *Migration Act* 1958 (Cth)**[40]**, and various anti-discrimination and equal opportunity statutes**[41]**. In those contexts and others they have been equated to

terms such as "because of", "due to", "based on" and "on the ground of"[42]. Generally speaking "by reason of" has been held to connote a cause and effect relationship[43].

23. The words of s 7(c) require attention to be given to the existence of a causal connection between apprehended punishment and the political opinions of the respondent. It is not necessary in this case to explore the range of matters covered by the term "punishment". The apprehended risk, as asserted on behalf of the respondent, is a term of imprisonment enhanced by reference to the respondent's political opinion. Imprisonment is well within the meaning of "punishment" in s 7(c). In so saying I do not dissent from the general proposition in the joint judgment that the absence of a mitigating factor which could lead to a lesser sentence does not necessarily mean that the offender is punished or punished more because of its absence[44]. The respondent does not really argue to the contrary. Rather he contends that the mitigating factor of prior service in the Croatian army was so connected to his political opinions that he could be said to be at risk, because of those opinions, of a heavier punishment than he would otherwise have suffered. In considering that argument, it can be accepted that a negatively expressed mitigating factor referring to or implying the absence of some attribute could be regarded as giving rise to a risk of greater punishment on account of the presence of that attribute.

24. This is a case in which it is said that the unavailability of the relevant mitigating factor to benefit the respondent subjects him to, or indicates that he is subject to, a risk of punishment by reason of his political opinions greater than the punishment to which he would have been subjected had he not held those political opinions. No comparators are necessary to test that proposition. In my opinion the causal connection required by the phrase "by reason of" is direct[45], but even if an indirect causal connection sufficed it could not be made out in the present case.

25. The application of the mitigating factor of service in the Croatian armed forces during the relevant conflict does not evidence any advertence by the Croatian courts to the political opinions of those who are not able to invoke its benefit. That is to say, no factual inference can be made that the non-application of the mitigating factor implies consideration by the sentencing court of the political opinions of the offender. Nor, independently of any such consideration, is there any necessary logical connection. It cannot be said that commitment to the establishment of an independent Serbian republic of Krajina was the other side of the coin of service in the Croatian armed forces. The other side of that coin is non-service in the Croatian armed forces. That does not confer the character of an aggravating factor upon service in the Serbian forces nor thereby upon a political commitment to a Serbian republic advanced by such service. The causal connection was not made out. There is no justification for the finding of the Full Court that the mitigating factor operated "by reference to" the political beliefs of the offender[46]. In any event the range of connections covered by the words "by reference to" is wider than those covered by the term "by reason of". The conclusions of the Full Court were factual conclusions which were not supported by the evidence.

Conclusion

26. For the preceding reasons I joined in the orders allowing the appeal.

27. GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. This appeal from the Full Court of the Federal Court of Australia (Bennett, Flick and McKerracher JJ) ("the Full Court") concerns an extradition request from the Republic of Croatia ("Croatia")

in relation to the respondent, Daniel Snedden. Formerly known as Dragan Vasiljkovic, the respondent is accused of having committed criminal offences against the Basic Penal Code of the Republic of Croatia ("the Croatian Code").

Background

28. The respondent is a citizen of the former state union of Serbia and Montenegro and of Australia. He emigrated with his family to Australia from Serbia (then part of the former Yugoslavia) as a teenager and took his current name when he became an Australian citizen. He is said to have been the military commander of a "Special Purpose Unit" of Serbian paramilitary troops which fought in the Krajina area in the periods of June and July 1991 and February 1993.

29. On 28 November 2005 the Sibenik County Public Prosecutor's Office in Croatia submitted a request to a magistrate of the County Court in Sibenik for investigation into war crimes against prisoners of war and civilians allegedly committed by the respondent.

30. On 12 December 2005 the County Court in Sibenik decided that there was a "well-founded suspicion" that the respondent had committed such offences. On 10 January 2006 the County Court in Sibenik ordered a warrant for the respondent's arrest to be issued. On 19 January 2006 the respondent was arrested in Sydney pursuant to a provisional arrest warrant issued under s 12(1) of the *Extradition Act* 1988 (Cth) ("the Extradition Act"). On 20 January 2006 he was remanded in custody pursuant to s 15 of the Extradition Act.

31. On 17 February 2006 the Attorney-General's Department of the Commonwealth of Australia received a request dated 20 January 2006 from the Minister of Justice of Croatia seeking extradition of the respondent. That extradition was sought for the respondent's prosecution before a court in Croatia in respect of two offences of war crimes against prisoners of war pursuant to Art 122 of the Croatian Code and for one offence of a war crime against the civilian population pursuant to Art 120, pars 1 and 2, of the Croatian Code. The request enclosed a copy of the Sibenik County Court decision and order.

32. The request set out the particulars of the offences alleged. The two Art 122 offences allegedly took place during armed conflict between the armed forces of Croatia and what was described as "armed ... Serbian paramilitary troops" in Knin in June and July 1991 and in the village of Bruska near Benkovac in February 1993. The Art 120 offence allegedly took place in Glina in July 1991. The armed conflict which took place in the territory of Croatia in the period from 1991 to 1995 is referred to as the "Homeland War". The Art 122 offences were particularised as the mistreatment, including torture, of Croatian prisoners of war by the respondent personally, and as a commander of a paramilitary unit of Serbian forces. The Art 120 offence was particularised as the planning and execution of an attack upon civilian objects, including a church and a school, and forcing civilians to flee their homes.

33. The request also remarked that the Art 122 offences were contrary to Arts 3, 13 and 14 of the Geneva Convention relative to the Treatment of Prisoners of War**[47]** and that the Art 120 offence was contrary to Arts 3, 27 and 53 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War**[48]** and Arts 4, 13 and 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)**[49]**.

34. On 18 March 2006 a notice of receipt of the extradition request was issued pursuant to s 16 of the Extradition Act.

35. The Attorney-General of Croatia has indicated to the Attorney-General of Australia that he will request the consent of the President of the Supreme Court of Croatia that the trial of the respondent be held before one of the four County Courts in Croatia specially designated to adjudicate alleged war crimes. The significance of that assurance is twofold. First, the evidence was that those County Courts are located in Osijek, Split, Rijeka and Zagreb, which are not regions where alleged war crimes took place, and secondly, the County Courts are staffed by professional judges. It can also be noted that Art 14 of the Croatian Constitution guarantees equality before the law.

36. For the purposes of the Extradition Act, Croatia is declared to be an "extradition country" by reg 4 of the Extradition (Croatia) Regulations 2004 (Cth)**[50]**, the validity of which was upheld in *Vasiljkovic v The Commonwealth***[51]**.

37. As noted by the Full Court**[52]**, the process of extradition set out in the Extradition Act involves four stages, which were summarised by a Full Court of the Federal Court of Australia in *Harris v Attorney-General (Cth)* as follows**[53]**:

"(1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered."

That approach has been confirmed by this Court**[54]**. This appeal is concerned with the third stage of the extradition process. The respondent was the plaintiff in *Vasiljkovic v The Commonwealth*, which was heard after the first and second stages of the process**[55]**.

The Extradition Act

38. The scheme of the Extradition Act was considered in detail in *Vasiljkovic v The Commonwealth***[56]**. Part I deals with "Preliminary" matters including definitions and Pt II deals with "Extradition from Australia to Extradition Countries". The appellant relies on s 19(2)(d) in Pt II, and s 7(c) in Pt I. Under the heading "Determination of eligibility for surrender" s 19(2)(d) relevantly provides:

"For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

...

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

39. Under the heading "Meaning of *extradition objection*", s 7 relevantly defines an "extradition objection" as follows:

"For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:
...
(c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
..."

40. It can be noted that at the fourth stage of the process, on a surrender determination by the Attorney-General, the Attorney-General must be satisfied that there is no extradition objection in relation to the offence (s 22(3)(a)).

41. The respondent accepted that the party advancing the argument that an extradition objection exists bears the onus of establishing the existence of such an objection**[57]**.

The appeal in this Court

42. The appeal raises a question as to whether there are substantial grounds for believing that an extradition objection exists for the purposes of s 19(2)(d) of the Extradition Act, such that the respondent should not be extradited. In particular, a question arises as to whether the treatment, by the Croatian courts, of service in the Croatian armed forces as a mitigating factor in the imposition of sentences ("the mitigating factor") establishes an "extradition objection" as defined in s 7(c) of the Extradition Act, for the reason that the mitigating factor is not available to persons who did not serve in the Croatian forces, which includes persons, such as the respondent, who served in the Serbian forces.

The issue

43. The issue for determination on the appeal is whether, in terms of s 7(c) of the Extradition Act, the ineligibility of the respondent for the mitigating factor meant that, on a trial after surrender to Croatia, the respondent may be punished, detained or restricted in his personal liberty, by reason of his political opinions, thereby affecting the respondent's eligibility for surrender in terms of s 19(2)(d).

44. Because the request referred to offences in respect of which the prescribed punishment was a minimum of five years and a maximum of twenty years imprisonment, argument on the appeal inevitably concentrated on punishment by imprisonment and on the mitigating factor, in the context of sentencing to a term of imprisonment. For that reason, it is not necessary to specify, with precision, any overlap between the notions of punishment, detention or restriction in personal liberty. Nor is it necessary to explicate exhaustively the meaning of "punished" as it occurs in s 7(c).

The proceedings below

45. On 12 April 2007, a magistrate of the Local Court of New South Wales (Cloran DCM) determined that the respondent was eligible for surrender to Croatia pursuant to s 19(9) of the Extradition Act. The respondent applied for a review of the magistrate's decision in the Federal Court of Australia pursuant to s 21(1) of the Extradition Act. On 3 February 2009, Cowdroy J dismissed the application for review**[58]**. The respondent appealed to the Full Court, which allowed the appeal on the basis that an "extradition

objection" existed in terms of s 7(c)**[59]**. The respondent relied solely on s 7(c) where previously he had relied on both ss 7(b) and 7(c)**[60]**.

46. Before the Full Court the respondent contended that the primary judge erred in failing to consider that the application of the mitigating factor by the Croatian courts "gave rise to substantial grounds for suspecting that the [respondent] may be prejudiced [the first limb of s 7(c)], and/or detained, and/or punished [the second limb of s 7(c)] by reason of his political beliefs, nationality, or race, in relation to a portion of his sentence." The case on the appeal was confined to the second limb of s 7(c).

47. The appeal before the Full Court proceeded on the basis that it was common ground that submissions based on evidence of such a mitigating factor were advanced by the respondent before the primary judge but not resolved and that it was appropriate for the Full Court to consider this ground.

48. The Full Court had regard to two reports of a body described as the Organization for Security and Co-operation in Europe ("OSCE"), which the respondent contended provided evidence of this mitigating factor. Both parties accepted the independence of this body and both relied on statements in the two reports, though for different reasons.

49. The Full Court quoted the first OSCE report**[61]**, which was apparently published in March 2006, as follows:

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

50. The Full Court also referred to a second OSCE report**[62]**, dated 13 September 2006, the "Executive Summary" of which relevantly stated:

"While diminishing in impact, ethnic origin continues to be a factor in determining against whom and what crimes are prosecuted, with discrepancies seen in the type of conduct charged and the severity of sentencing. ... Service in the Croatian army continued to be used as a factor to mitigate punishment."

51. Croatia did not lead evidence as to the present situation or to rebut or qualify the statements in the OSCE reports. There was evidence that the mitigating factor had been applied on two occasions. On one occasion the Supreme Court of Croatia disapproved of the weight given to the mitigating factor although it did not specifically disapprove of its application**[63]**.

52. The Full Court observed that there was no evidence that the respondent's sentence would be increased due to the fact that he fought on the Serbian side**[64]**. It found that the available evidence showed that the Croatian courts take a "holistic" approach to sentencing**[65]**. It considered that "[f]rom the two OSCE reports, it emerges that the Supreme Court of Croatia considered that the mitigating factor should be applied in the imposition of a sentence."**[66]** The Full Court stated that the respondent, if convicted, "will be 'detained' and deprived of his liberty for a period longer than a Croatian counterpart."**[67]**

53. The Full Court considered the application of the phrase "by reason of" in s 7(c), and correctly stated that s 7(c) required "some causal connection between the matters relied upon and a person's 'race, religion, nationality or political opinions'."**[68]** Critically, the Full Court found that the mitigating factor is applied by reason of a person's "political beliefs", by reference to three factors.

54. First, the Full Court said the respondent's political beliefs concern "'the self determination of Serbian people in the Balkans in those areas where they constitute a majority', in particular in the Krajina"**[69]**.

55. Secondly, the Full Court stated that the respondent played a significant role as a military commander in the military conflict in the former Yugoslavia that began at Knin in June 1991**[70]**.

56. Thirdly, the Full Court noted the terms of the extradition request which referred to the armed conflict in Knin as conflict "between the armed forces of the Republic of Croatia and the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the 'Republic of Krajina'"**[71]**.

57. It was said to follow from those three matters of evidence that the mitigating factor is applied by Croatian courts by reason of a person's political beliefs. Accordingly, the Full Court found that "there are substantial grounds for believing that [the respondent] may be 'punished' or imprisoned and thereby 'detained' or 'restricted in his personal liberty' and that such treatment arises 'by reason of his ... nationality or political opinions'."**[72]**

58. On 2 September 2009 the Full Court ordered that the respondent be released from custody (Order 2). It stayed the operation of this order until 4 September 2009. On 4 September 2009 the Full Court vacated Order 2, quashed the order of the magistrate dated 12 April 2007 and directed a magistrate to order the release of the respondent pursuant to s 21(2)(b)(i) of the Extradition Act. The respondent was released from custody by order of a magistrate (Magistrate Henson) on 4 September 2009. Subsequent orders were made by consent before Gummow J on 25 February 2010, which included an order that the respondent surrender all passports and other international travel documents to the Australian Federal Police.

Submissions in this Court

The appellant

59. The appellant's first submission was that the phrase "by reason of" in s 7(c) requires a direct causal connection between the prejudice, punishment, detention or restriction in personal liberty to which a person may be subject on return and the political opinions of that person. In a variation of that point, and in reliance on *Hempel v Attorney-General (Cth)***[73]**, it was said that "active discrimination" was required to establish the requisite causal link. On the assumption that that construction of s 7(c) is correct, the appellant went on to contend that, on the facts, no direct causal connection could be made between the ineligibility of the respondent for the mitigating factor and his political opinions.

60. In particular, the appellant submitted that there was no evidence to suggest that the political opinions of those who served in the Croatian forces in the Homeland War were relevant to the question of whether the mitigating factor should be taken into

account in sentencing. Further, it was submitted that no inference could be drawn as to the political opinions of those serving in the Croatian forces so as to suggest that the mitigating factor was ultimately directed at benefiting those holding a particular political opinion (assuming that this was a relevant inquiry). The appellant stated that the evidence was that anyone who did not serve in the Croatian forces was treated in the same way as the respondent, irrespective of their personal reasons for not serving and whether or not they fought with the Serbian forces.

61. The appellant also contended that the fact that the respondent would not be entitled to a potential benefit (a discount in sentence) could not constitute punishment, detention or restriction in his personal liberty within the meaning of s 7(c) of the Extradition Act.

The respondent

62. The respondent sought to uphold the decision of the Full Court and contended that the result of a longer term of imprisonment for the respondent compared to another person alike in relevant respects (except that he served in the Croatian forces and was entitled to the mitigating factor) amounted to the respondent being "punished, detained or restricted in his ... personal liberty".

63. Next it was contended that the unavailability of the mitigating factor to the respondent meant that a differential result as to sentence between a person alike in relevant respects who served in the Croatian forces, and the respondent, would be "by reason of" the respondent's "political opinions". In support of that proposition it was contended that the length of a term of imprisonment is a reference point for determining whether one person receives a greater punishment than another. The issue of comparison was raised particularly in the context of emphasising that s 7(c) is, on one view, concerned with discrimination of the kind recognised in Art 1A(2) of the Convention relating to the Status of Refugees ("the Refugee Convention"), concerning refoulement**[74]**.

64. It was submitted that it was sufficient for the purposes of s 7(c) that the respondent was in a worse position because of political opinions which he held and which led him to join the Serbian forces. Expressed as a syllogism, the essential argument was that the respondent joined the Serbian forces in a political conflict because of his political opinions, and those same political opinions precluded his joining the Croatian forces; he was ineligible for the benefit of the mitigating factor because he was not a member of the Croatian forces by reason of being a member of the Serbian forces; therefore, he was subjected to punishment "by reason of" his "political opinions". As these reasons demonstrate, that reasoning is flawed and the conclusion drawn from it is wrong.

65. The respondent's counsel recognised that other persons not entitled to the mitigating factor would include people who did not share the respondent's political opinions and those who did not fight at all in the conflict. Counsel also recognised, quite properly, that in the Australian system of criminal justice it cannot be said that the absence of mitigating circumstances itself constitutes or attracts punishment.

The provenance of s 7(c)

66. Article 3.2 of the 1957 European Convention on Extradition provided that extradition was not to be granted:

"if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

This provision informed the text of s 14(b) of the *Extradition (Foreign States) Act* 1966 (Cth) and s 11(1)(b) of the *Extradition (Commonwealth Countries) Act* 1966 (Cth) ("the 1966 Acts"). These were the immediate predecessors to s 7(c) of the Extradition Act. As explained in *Vasiljkovic v The Commonwealth*[75], prior to the 1966 Acts extradition law in Australia was governed by the *Extradition Act* 1870 (Imp) for extradition to foreign states as defined, and the *Fugitive Offenders Act* 1881 (Imp) for extradition between countries of the British Commonwealth.

67. The inclusion in the 1966 Acts of provisions to the effect of s 7(c) of the current legislation appears to have been in response to the case of a naturalised Australian for whom Yugoslavia had sought extradition in 1956 but who alleged that the real purpose of the extradition was to extract information from him respecting his involvement in the anti-communist underground movement. Yugoslavia had sought his extradition for the offence of embezzlement of public funds, which would not attract the "political offence" exception contained in s 3(1) of the *Extradition Act* 1870 (Imp)[76].

68. The provisions in the 1966 Acts were proposed by the Australian Attorney-General, Mr B M Snedden, to the 1965 and 1966 conferences of Commonwealth Law Ministers held in Canberra and London respectively[77]. The Commonwealth Law Ministers agreed to a clause proposed by Mr Snedden in terms resembling Art 3.2 of the European Convention on Extradition[78].

Construction of s 7(c)

69. There was no dispute between the parties that s 7(c) requires a causal connection between the punishment the respondent might suffer on trial, after surrender, and his political opinions. The phrase "by reason of" means that the person may be punished, detained or restricted in his or her personal liberty because of his or her political opinions. Section 7(c) relevantly requires the respondent to show that on trial, after surrender, he may be punished because of his political opinions. This construction is consistent with statements in this Court[79] interpreting the similar phrase "for reasons of" in the context of the definition of a refugee in Art 1A(2) of the Refugee Convention. There, the term "refugee" applies to a person having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

70. As to context and purpose, the provenance of s 7(c) discussed above reveals that the intention of the predecessors to s 7(c) found in the 1966 Acts was to enlarge the "political offence" exception to extradition by reference to Art 3.2 of the European Convention on Extradition. There is nothing in the history of the current Extradition Act to suggest that any different intention applied to s 7(c)[80]. The express intention to enlarge the political offence objection was achieved by a requirement that a court take into account the future possibility, on trial after surrender, of prejudice, punishment, detention or restriction in personal liberty by reason of political opinions.

71. In this case, that inevitably requires consideration, not only of a person's political opinions, as emphasised in argument by the respondent, but also of the position of the requesting State in respect of potential punishment.

72. Political opinions may be the reason why a person refuses to serve in a particular force. However, if such a person is liable for punishment, not for political opinions, but for failure to enlist, political opinions are not the reason why they will be punished[81].

Is there a causal link between the respondent's political opinions and his ineligibility for the mitigating factor?

73. The OSCE report of 13 September 2006 included a general statement: "In 2006, trial courts continued to apply this mitigating factor." The evidence supporting this general statement was slight as only one instance of its application was cited. The report referred to one other case, decided in May 2005. The OSCE report also contained figures for convictions obtained for war crimes as at the end of July 2006. This recorded four final convictions of Croats indicted for crimes against Serbs and four final convictions of Croats indicted for crimes against Croats. However, the appellant did not contest the existence of the mitigating factor. Assuming, for the purposes of this part of the argument, that the differential application of the mitigating factor constitutes punishment, about which something will be said later, the question is whether the differential application was because of political opinions. If it was, that would lead to the further question whether, in those circumstances, the respondent may be punished for *his* political opinions.

74. Acceptance that the respondent had political opinions, and acceptance that such opinions motivated him to join the Serbian forces, and precluded his joining the Croatian forces, is not enough to sustain an objection under s 7(c). It is necessary to show that the courts in Croatia apply the mitigating factor because of political opinions. The evidence supported the contrary conclusion.

75. First, for courts to count war service as a mitigating factor is neither unknown nor uncommon and does not imply homogeneous political opinions in those rendering war service. The fact that there are different sides in a conflict does not prove that those who served on one side have different political opinions from those on the other side. There may be many reasons, including compulsion, which explain a person's service or refusal to serve in a particular force[82].

76. Secondly, those serving in the Serbian forces were not singled out as ineligible for the mitigating factor. Ineligibility applied indifferently to persons who did not serve in the Croatian forces, including persons who did not serve in any force.

77. Thirdly, anyone who did not serve in the Croatian forces was ineligible for the mitigating factor, irrespective of their personal motives, circumstances or political opinions.

78. Accordingly, whilst it may be accepted, for the purposes of the argument, that the respondent joined the Serbian forces because of his political opinions, the differential application of the mitigating factor by the courts of the appellant was not shown to be "by reason of" the respondent's political opinions. For these reasons the respondent failed to establish a causal link between his political opinions and the differential application of the mitigating factor.

Is ineligibility for the mitigating factor a punishment?

79. A rational sentencing system will accommodate mitigating factors arising from the circumstances of the offender and the offence. In that context, ineligibility for a mitigating factor at the sentencing stage of a trial cannot be said to be punishment. Conceptually, the absence of a mitigating factor does not constitute or attract punishment. In particular, the absence of a mitigating factor is not an aggravating factor. Thus, while a plea of guilty is a mitigating factor, a plea of not guilty is not an aggravating factor.

80. Mitigating factors are generally factors regarded by the courts as sufficient to reduce the sentence imposed but, as Gleeson CJ observed in *Engert***[83]**:

"It is ... erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances."

81. The most which can be said generally is that a person who does not qualify in respect of a recognised mitigating factor does not qualify for a reduction in sentence by reference to that factor. It cannot be said that that person is punished, or punished more, because of the absence of a mitigating factor. That general analysis is not altered by the fact that, in the circumstances here, the mitigating factor might lead to differential treatment between the respondent and a person with a similar conviction who served in the Croatian forces. It was not demonstrated on the evidence that the respondent's ineligibility for the application of the mitigating factor was a punishment.

Conclusion

82. For these reasons we joined in the orders made on 30 March 2010.

83. HEYDON J. I joined in the orders made on 30 March 2010 because the factual substratum for the respondent's submissions about the "mitigating factor" was not made out.

84. The expression "mitigating factor" was used in these proceedings to refer to an alleged practice of the Croatian courts of reducing the sentence given in relation to crimes committed during Croatia's "Homeland War" in 1991 to 1995 if the defendant had fought in the Croatian armed forces. The respondent, who had fought on the Serbian side, contended that this prejudiced him on the ground of his political opinions within the meaning of s 7(c) of the *Extradition Act* 1988 (Cth), and hence constituted an extradition objection.

85. On 6-8, 11-12 and 21-22 December 2006, a magistrate heard the appellant's application to extradite the respondent. The magistrate recorded that on 22 December 2006 the appellant "sought an adjournment for the purpose of making written submissions ... with the benefit of [the] transcript". The respondent consented to that course. A timetable was set which, it may be inferred, gave leave to the respondent to file written submissions in reply to those of the appellant. That timetable was later extended by three weeks because the transcript was unavailable.

86. The "mitigating factor" entered these proceedings only when the respondent's written submissions were filed in reply to those of the appellant, weeks after the hearing. It may be inferred from the magistrate's references to the respondent's written submissions that the document was very lengthy. The document dealt with the "mitigating factor" briefly. The magistrate said that he did not agree with the respondent's "submission in reply that *if* members of the Croatian armed forces have their sentences mitigated then clearly a Serb military commander will be punished because of his

nationality and political beliefs because that mitigating factor is absent" (emphasis added). The magistrate did not make any finding that members of the Croatian armed forces actually did have their sentences mitigated in the manner described.

87. There was no reference to the "mitigating factor" or any argument based on it in the respondent's further amended application for review to the Federal Court of Australia, filed on 5 June 2008. An agreed joint outline of issues was filed, presumably as the result of an order by the Court to do so. That was a sensible course in view of the mass of rather diffuse materials, dealing with many topics, which had been tendered to the magistrate and was before Cowdroy J in the Federal Court. That document, dated 25 August 2008, did not refer to the "mitigating factor" either. In these circumstances it is not surprising that Cowdroy J said nothing about the "mitigating factor" in his judgment. But it is surprising that the respondent's second ground of appeal to the Full Court of the Federal Court raised the "mitigating factor". It is also surprising that that ground commenced with the claim that Cowdroy J "erred in failing to consider whether evidence that service for the Croatian forces was treated as a mitigating factor ... gave rise to substantial grounds for suspecting" that the respondent may be punished by reason of his political beliefs. In upholding that ground, the Full Court stated: "It was common ground that submissions based upon [evidence of the 'mitigating factor'] were advanced before the primary judge but not resolved."

88. Although the correctness or incorrectness of that statement is not decisive for the outcome of this appeal, a significant question mark must be placed over it. The parties in this Court agreed in their written submissions that submissions about the "mitigating factor" had been put to Cowdroy J "for the first time only in written submissions in reply after the conclusion of the hearing on 10 September 2008 pursuant to leave." The parties corrected that statement in oral argument: as indicated above, reliance was first placed on the "mitigating factor" in written submissions in reply before the magistrate. If submissions of that kind had been advanced to Cowdroy J, they would have been advanced outside the parameters for argument defined by the agreed joint outline of issues, and in defiance of any order that led to that document. It is impossible to see how Cowdroy J can be said to have "erred in failing to consider" something which the agreed joint outline of issues never invited him to consider, in circumstances where the respondent has not pointed to evidence of any attempt to amend that document.

89. It is true that the appellant's notice of appeal in this Court did not challenge the Full Court's assumption that the "mitigating factor" existed. It is also true that the appellant's written submissions to this Court did not challenge it. But it was strongly challenged in the appellant's oral argument to this Court. The appellant submitted that the Full Court had made a finding of fact not made by either the magistrate or Cowdroy J. It submitted that there was no foundation in the evidence for that finding. It submitted that the evidence in relation to the "mitigating factor" was "very flimsy" and went "nowhere ... near establishing" what it was said to establish. And it also contended that these submissions were a complete answer to the respondent's case. Those four submissions are correct.

90. The relevant ground in the respondent's notice of appeal to the Full Court referred to certain evidence.

91. The relevant evidence is to be found in two documents emanating from the Organization for Security and Co-operation in Europe ("OSCE").

92. The first document is a four page document relating to the "OSCE Mission to Croatia" headed "News in brief: 22 February–7 March 2006". One section, half a page in length, discussed a re-trial which concluded on 2 March 2006 relating to incidents in the Lora military prison in Split. That section included the words: "the court cited the role of the accused in defending Croatia against armed aggression as a mitigating factor." The document also said: "The prosecution has indicated that it may appeal against the sentencing."

93. The second document is described as being from the Headquarters of the OSCE "Mission to Croatia". It is headed "Background Report: Domestic War Crime Trials 2005" and is dated 13 September 2006. It is 54 pages in length. Its Executive Summary stated: "Service in the Croatian army continued to be used as a factor to mitigate punishment." The support for that statement rested on two cases. In relation to one, called the "Paulin Dvor" case, a defendant named Nikola Ivankovic was sentenced by the Osijek County Court to 12 years imprisonment. One of the mitigating circumstances apparently taken into account by the trial court was the "mitigating factor". On 10 May 2005, the Supreme Court found that the brutality of the crime was not properly assessed by the trial court, which, in the words of the Supreme Court, "attributed too much significance to the mitigating circumstances, while on the other hand aggravating circumstances were not appreciated sufficiently." The other was the Lora case. That case was given as the sole and exhaustive basis for the statement: "In 2006, trial courts continued to apply this mitigating factor." There are other parts of the report which repeat the portions just discussed. Those parts dealing with the "mitigating factor" are a very small fraction of the whole, which dealt with many other subjects.

94. The evidence thus disclosed two relevant instances. The first instance is one in which the prosecution successfully appealed against a sentence by a court which gave too much weight to the "mitigating factor". The second instance is one in which the "mitigating factor" was supposedly taken into account, but the prosecution said it might appeal.

95. Of these two incidents the Full Court said the following**[84]**:

"The [appellant] submits that evidence that the Supreme Court has 'approved' this practice is limited to one appeal where the Court indicated that the mitigating circumstances had not been properly balanced against other aggravating circumstances and that the Court did not deem the mitigating factor to be inappropriate *per se*. The [appellant] further submits that this does not necessarily suggest positive or general approval of the practice. However, it is also apparent, and has not been contradicted, that the County Courts of Croatia have taken the Supreme Court to have approved the practice and that, in any event, they continue to apply it as a factor to be taken into account in sentencing those who served in the Homeland Army.

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

96. This reasoning has the following difficulties.

97. First, it is unclear why the Full Court said that it was "apparent" that the County Courts of Croatia had taken the Supreme Court to have approved the practice of taking

into account the "mitigating factor". The scanty materials do not suggest that there is any linkage between what the trial court did in the Lora case and what the Supreme Court did in the Paulin Dvor case. Nor do they suggest that the Supreme Court "approved" taking the "mitigating factor" into account.

98. Secondly, the assertion that the "County Courts of Croatia ... continue" to apply the "mitigating factor" depends on a passage in the second OSCE report which is supported by evidence that it happened in one single case. The conduct of a single court on one occasion by itself says nothing about the practice of other courts on other occasions.

99. Thirdly, the respondent defended the remarks of the Full Court in relation to the appellant's failure to contradict any "inference" to be drawn from the material by saying that no-one could be better placed than those representing the appellant to explain whether the "mitigating factor" exists. The respondent submitted that counsel for the respondent had put together the material relating to the two trials. It was submitted that OSCE had noted a "phenomenon" which it thought it to be worthwhile to draw attention to "as being a feature of the judicial system in Croatia which had a shortcoming systemically." This defence of the Full Court is unconvincing. If the Full Court was intending to rely on the appellant's failure to call evidence before Cowdroy J, the reasoning must be rejected. It was not possible for the appellant to call evidence to contradict the inference before Cowdroy J, because s 21(6)(d) of the *Extradition Act* 1988 (Cth) provided that he was to have regard only to the material that was before the magistrate. If the Full Court was intending to rely on the appellant's failure to call evidence before the magistrate, the significance of any inference to be drawn by the material depends on the time when it became known that the magistrate was to be invited to draw that inference. The procedural background described above indicates that that time was well after the time when the evidence before the magistrate had closed. It was not then possible, without leave, for the appellant to reopen its case, well after the evidence had closed and after the addresses had been completed, to adduce evidence to contradict the inference of which the Full Court spoke. If the respondent is to be taken as submitting that the material about the two cases had been specifically selected to make the point relied on by the Full Court, the submission must be rejected. The most probable inference is that that material was tendered to support various other points which the respondent was then advancing, but its use in the manner in which the Full Court used it was very much an afterthought before the magistrate. It was not revived until, at the earliest, the argument before Cowdroy J, if it was indeed revived then. Since the appellant had no reason to suppose that the point was being relied on while it was open to it to call evidence, and since it was only relied on once the opportunity to deal with it in submissions had passed, the failure of the appellant to meet the supposed inference has no significance. A failure to adduce evidence to counter a point distinctly raised at a time when the appellant still had a right to call evidence may be one thing. A failure to adduce evidence to meet a point belatedly raised is, in the circumstances of this case, quite another.

100. Fourthly, it was suggested by the respondent that the OSCE reports had been accepted by the parties as having "authoritative status" in relation to the way in which Croatian sentencing laws were being administered. That is not so. Before the magistrate the parties agreed that OSCE was "a reliable and respected monitoring body". The Full

Court recorded that the parties accepted the "independence of ... OSCE". It does not follow that the parties agreed that OSCE had authoritative status in relation to Croatian sentencing practice, let alone in relation to the extremely vague, indirect and second hand statements relied on by the respondent. It is no derogation from OSCE's status as reliable, respected and independent to conclude, which it is necessary to do, that the materials relied on to prove the "mitigating factor" are no more than uncorroborated assertions by unidentified persons of unproved legal training or experience sometimes relying on unknown sources.

101. Fifthly, in assessing the significance, such as it is, of the two cases relied on, which took place more than four years ago, it would be necessary to examine material giving reasonably clear information about what sentencing policies were followed in other trials in Croatia of persons alleged to have committed war crimes while fighting on the Croatian side. It would also be necessary to read the sentencing remarks and the statements of the Supreme Court in all relevant cases in order to have a first hand appreciation of how the Croatian courts approach sentencing. This Court was not directed to any materials of these kinds before the magistrate.

102. The respondent's contention that his surrender might cause him to be punished for his political opinions rested on an alleged particular feature of Croatian sentencing practice. The respondent bore the burden of proving that that particular feature existed. While the conclusion that it did exist must be drawn if the evidence satisfactorily supports it, the drawing of that conclusion is not a light matter. In this particular case, the respondent's endeavour to prove that conclusion came too late, and the materials it relied on to support that conclusion were too feeble.

103. Since the key factual substratum of the respondent's case has not been made out, it is unnecessary to deal with the legal issues which would arise if it had been made out.

---

[1] For a brief review of the relevant history of the conflict see *Travica v The Government of Croatia* [2004] EWHC 2747 (Admin) at [7]- [10].

[2] *Snedden v Republic of Croatia* [2009] FCA 30.

[3] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 559 [55].

[4] See (2009) 178 FCR 546 at 557 [41].

[5] "War crimes" is the term used in the reports of the Organization for Security and Co-operation in Europe on which the respondent relies.

[6] Submissions were filed by leave after the close of the hearing.

[7] Organization for Security and Co-operation in Europe, Mission to Croatia, "News in brief: 22 February–7 March 2006"; "Background Report: Domestic War Crime Trials 2005", 13 September 2006.

[8] The relevant decision of the Supreme Court of Croatia was *RH v Nikola Ivankovic* ("Paulin Dvor"), I Kz 1196/04-5, 10 May 2005 (confirming the conviction by the Osijek County Court) and referred to in the judgment of the Full Court at (2009) 178 FCR 546 at 556-557 [38] and 557 [40].

[9] (2009) 178 FCR 546 at 557 [40]-[41]. In fact only one decision of a County Court applying the mitigating factor was cited in the later OSCE report other than the decision appealed to the Supreme Court in *RH v Nikola Ivankovic*.

[10] (2009) 178 FCR 546 at 558 [43].

[11] The word "holistic" appears to be an attempt to summarise the respondent's submission that, instead of applying a sentence and then declining to apply a mitigating factor, the Croatian courts "apply the various factors, including aggravating ... and mitigating circumstances, as part of the process of deciding the sentence". The respondent submitted that "the sentencing process itself involves a balancing of factors, so that the failure to apply the mitigating factor constitutes a positive act": (2009) 178 FCR 546 at 558 [44].

[12] (2009) 178 FCR 546 at 558 [46].

[13] (2009) 178 FCR 546 at 558 [47].

[14] (2009) 178 FCR 546 at 559 [52].

[15] (2009) 178 FCR 546 at 559 [53].

[16] (2009) 178 FCR 546 at 559 [55].

[17] The determination by the magistrate is an administrative and not a judicial process: *Pasini v United Mexican States* (2002) 209 CLR 246; [2002] HCA 3.

[18] An "extradition country" is defined under s 5 to mean, inter alia, "any country ... that is declared by the regulations to be an extradition country". The Republic of Croatia is declared to be an extradition country by the Extradition (Croatia) Regulations 2004 (Cth).

[19] In undertaking such review the court exercises judicial power: *Pasini* [2002] HCA 3; (2002) 209 CLR 246.

[20] *Extradition Act*, s 21(6)(d).

[21] *Extradition Act*, s 21(2)(a) and (b).

[22] *Extradition Act*, s 21(3).

[23] 1870 Act, ss 17 and 26.

[24] 1870 Act, s 3(1).

[25] Section 10 of the 1881 Act empowered a court to discharge a fugitive whose return was sought when, inter alia, by reason of the application for return not being made "in good faith", return would be "unjust or oppressive or too severe a punishment".

[26] *McKelvey v Meagher* [1906] HCA 56; (1906) 4 CLR 265 at 279 per Griffith CJ, 286 per Barton J and 295 per O'Connor J; [1906] HCA 56.

[27] Forde, *The Law of Extradition in the United Kingdom*, (1995) at 5.

[28] de Smith, "Political Asylum and the Commonwealth", (1963) 16 *Parliamentary Affairs* 396 at 396.

[29] Fugitive Offenders Bill 1967 (UK), Second Reading Speech, Lord Stonham, HL Debates, 17 April 1967, vol 282, cc 50-51.

[30] A Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth, reproduced as Appendix XX in Hartley Booth, *British Extradition Law and Procedure*, (1980), vol 1 at 315. The events leading to the adoption of the Scheme were outlined in the Second Reading Debate in the House of Lords for the Bill which became the *Fugitive Offenders Act* 1967 (UK): HL Debates, 17 April 1967, vol 282, c 51.

[31] The variation appears to have been urged by the Commonwealth Attorney-General, the Hon B M Snedden, who circulated at the meeting a copy of the European Convention and the Bill which was to become the *Extradition (Foreign States) Act* 1966 (Cth). Clause 14(b) of that Bill provided that the Attorney-General should not authorise the apprehension or order the surrender of a fugitive if the Attorney-General has "substantial grounds" for believing that the fugitive, upon return, "may be prejudiced by reason of his race, religion, nationality or political opinions": see Meeting of Commonwealth Law Ministers, London, April/May 1966, *Minutes of Meetings and Memoranda* at 204.

[32] *Extradition (Foreign States) Act*, ss 14(b) and 15(1); *Extradition (Commonwealth Countries) Act*, ss 11(1)(b) and 12(1).

[33] *Fugitive Offenders Act*, s 4(1)(c).

[34] HL Debates, 17 April 1967, vol 282, c 52.

[35] The two 1966 Acts were repealed by the *Extradition (Repeal and Consequential Provisions) Act* 1988 (Cth).

[36] Australia, House of Representatives, Extradition Bill 1987, Replacement Explanatory Memorandum at 1.

[37] Australia, House of Representatives, Extradition Bill 1987, Replacement Explanatory Memorandum at 6.

[38] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 October 1987 at 1617.

[39] Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967. The precise words used in Art 1A(2) are "for reasons of".

[40] See s 36.

[41] *Racial Discrimination Act* 1975 (Cth), s 9(1A); *Sex Discrimination Act* 1984 (Cth), s 5(1); *Disability Discrimination Act* 1992 (Cth), s 5 ("on the ground of"); *Age Discrimination Act* 2004 (Cth), s 14 ("on the ground of").

[42] *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 at 321 per Lockhart J and authorities there cited; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* [1993] FCA 547; (1993) 46 FCR 191 at 204 per Lockhart J; *University of Ballarat v Bridges* [1995] 2 VR 418 at 424 per Tadgell J, 438 per Teague J (agreeing); *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J; [1991] HCA 49.

[43] *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* [1998] FCA 1650; (1998) 91 FCR 8 at 31 per Weinberg J, approved by the Full Court in *Victoria v Macedonian Teachers' Association of Victoria Inc* [1999] FCA 1287; (1999) 91 FCR 47 at 49 [8] in which the words "by reason of" were held to be narrower than the words "based on".

[44] Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [81].

[45] *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641 at 663.

[46] (2009) 178 FCR 546 at 559 [53].

[47] Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

[48] Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

[49] Opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

[50] Which came into force on 8 December 2004.

[51] (2006) 227 CLR 614; [2006] HCA 40.

[52] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 550 [15].

[53] *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389.

[54] *Vasiljkovic v The Commonwealth* [2006] HCA 40; (2006) 227 CLR 614 at 628 [29] per Gleeson CJ, 635-636 [55] per Gummow and Hayne JJ, 657 [144] per Kirby J. See also *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 547 per Gummow J; [1995] HCA 35.

[55] [2006] HCA 40; (2006) 227 CLR 614 at 636 [57] per Gummow and Hayne JJ.

[56] [2006] HCA 40; (2006) 227 CLR 614 at 622-628 [16]- [29] per Gleeson CJ, 635-637 [52]-[60] per Gummow and Hayne JJ, 657-661 [143]-[155] per Kirby J.

[57] *Cabal v United Mexican States* [2001] FCA 427; (2001) 108 FCR 311 at 343 [126].

[58] *Snedden v Republic of Croatia* [2009] FCA 30.

[59] *Snedden v Republic of Croatia* (2009) 178 FCR 546.

[60] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 551 [18].

[61] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 556 [38].

[62] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 556-557 [38].

[63] It can be noted that in *Spanovic v Government of Croatia* [2009] EWHC 723 (Admin) at [60] it was recorded that Croatia is a signatory of the European Court of Human Rights and that any decision of a court in Croatia would be reviewable on appeal both in Croatia and, in the last resort, to the European Court in Strasbourg.

[64] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 558 [43].

[65] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 558 [45].

[66] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 558 [45].

[67] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 558 [46].

[68] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 558 [49].

[69] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 559 [53].

[70] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 559 [53].

[71] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 559 [53].

[72] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 559 [55].

[73] (1987) 77 ALR 641 at 663 per French J.

[74] Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

[75] [2006] HCA 40; (2006) 227 CLR 614 at 640 [74].

[76] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 October 1966 at 1820 and 20 October 1966 at 2046-2047.

[77] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 October 1966 at 1814, 1816, 1820.

[78] A Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth, cl 9(2)(b), reproduced as Appendix XX in Hartley Booth, *British Extradition Law and Procedure*, (1980), vol 1 at 315.

[79] *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 at 240 per Dawson J, 257 per McHugh J; [1997] HCA 4.

[80] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 October 1987 at 1615-1618.

[81] See, for example, *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 at 873 [27] per Lord Hoffmann; [2003] UKHL 15; [2003] 3 All ER 304 at 321.

[82] *Immigration and Naturalization Service v Elias-Zacarias* [1992] USSC 11; 502 US 478 at 482-483 (1992) per Scalia J.

[83] (1995) 84 A Crim R 67 at 68.

[84] *Snedden v Republic of Croatia* (2009) 178 FCR 546 at 557 [40]-[41].