TRALJESIC v BOSNIA AND HERZEGOVINA and Another

FEDERAL COURT OF AUSTRALIA

MORTIMER J

18 November 2015, 20 April 2016 — Melbourne

[2016] FCA 383

Criminal law — Extradition — Extradition objections — Whether substantial grounds — Punishment, detention or restriction on personal liberty due to political opinion or religion — Exception to extradition — Statutory construction — Analogy with refugee law — Position under United Kingdom law — (CTH) Extradition Act 1988 ss 3, 5, 7, 12, 15, 16, 19, 21, 21A — (CTH) Extradition (Bosnia and Herzegovina) Regulations 2009 reg 4.

The first respondent, Bosnia and Herzegovina, sought the extradition of the applicant, Rasim Traljesic, in relation to charges of attempted murder and causing general danger. In late August 2015, a magistrate found that Traljesic was eligible for surrender to Bosnia and Herzegovina, pursuant to s 19 of the Extradition Act 1988 (Cth) (the Act). Traljesic gave evidence as to his previous treatment in prisons in that country. Traljesic argued that he had substantial grounds for believing that there was an extradition objection, pursuant to s 7(c) of the Act, in that, if he was surrendered to Bosnia and Herzegovina, he may be punished, detained or restricted in his personal liberty due to his political opinion or his religion. He sought review of the magistrate's decision in the Federal Court of Australia.

Held, dismissing the application and confirming the magistrate's decision:

(i) The term, "admissible", in s 19(6) of the Act did not mean admissible pursuant to the rules of evidence. This would be inappropriate in relation to proceedings of an administrative character. Rather, the term, "admissible", in the context of s 19(6) means that the document can form part of the record upon which the magistrate relies. Therefore, Traljesic's objections to the admission of the evidence should be rejected: at [50], [57].

(ii) The focus of s 7 is not protection, so an analogy to the Refugees Convention is inapposite when construing the exception under s 7: at [77], [78], [100].

(iii) The context of s 7 and its purpose is to provide an exception to the mutual obligation between nation states to facilitate the administration of a state's criminal justice system. Therefore, the exception is intended to capture direct conduct by or on behalf of in which the requesting state will be complicit: at [81].

(iv) The existence of a duty of care by the state to prisoners did not inform the proper construction of s 7 because the issue was directed towards how a magistrate or a court might undertake its fact-finding role in order to determine whether the harm a person may suffer if surrendered would be harm which the state condoned or in which it would be complicit: at [100].

(v) Properly construed, s 7 extends only to harm inflicted on a person in prison while serving a sentence of imprisonment or being detained where the requesting state is involved or complicit in, or condones, the harm and the reasons for the harm: at [106].

(vi) Traljesic had not established that there were substantial grounds for believing that there was an extradition objection within the meaning of s 7. He was therefore eligible for surrender, pursuant to s 19(2) of the Act: at [3], [124], [131], [132], [134].

Application

This was an application for review of a decision of a magistrate to surrender a person to a foreign state, pursuant to the Extradition Act 1988 (Cth).

L G De Ferrari for the applicant (Rasim Traljesic).

K O'Gorman instructed by *Attorney-General's Department* for the first respondent (Bosnia and Herzegovina).

The second respondent filed a submitting notice save as to costs.

[1] Mortimer J. On 20 August 2015, the second respondent Magistrate Holzer determined that the applicant Mr Rasim Traljesic was eligible for surrender pursuant to s 19 of the Extradition Act 1988 (Cth) ('the Act') to the first respondent Bosnia and Herzegovina. Mr Traljesic seeks review of that determination under s 21(1)(a) of the Act.

[2] The only matter which the applicant put in issue on the review is whether the Court should be satisfied that there are substantial grounds for believing there is an extradition objection within the terms of s 7(c) of the Act: namely, that on his surrender to Bosnia and Herzegovina he may be punished, detained or restricted in his personal liberty by reason of his political opinion or alternatively his religion. The applicant does not dispute that he bears the onus of establishing the extradition objection (see *Snedden v Republic of Croatia* (2009) 178 FCR 546; [2009] FCAFC 111 (*Snedden [2009]*) at [41].

[3] For the reasons set out below, the applicant has not satisfied the Court that there are substantial grounds for believing there is an extradition objection within the terms of s 7(c) of the Act and, as such, the Magistrate's orders should be confirmed.

Background

[4] The factual background is not contested. Bosnia and Herzegovina seeks the extradition of the applicant in relation to two extradition offences. Those offences are recorded in the warrant issued by the Magistrate under s 19(9) of the Act as attempted murder and causing general danger contrary to provisions of the Criminal Code of the Federation of Bosnia and Herzegovina. The applicant was convicted of the offences on 14 March 2005 and sentenced to imprisonment for three years and ten months. On 3 January 2007, he commenced his sentence of imprisonment at the Bihac prison in Bosnia and Herzegovina. On 3 July 2007, he escaped during a period of brief leave from prison. His surrender is sought to serve the remainder of his sentence: three years, two months and 14 days' imprisonment.

[5] An extradition request was received by Australia from the first respondent on 13 February 2014. On 28 May 2014, the Minister for Justice issued a Notice of Receipt of Extradition Request under s 16(1) of the Act. On 4 June 2014, a Magistrate of the Australian Capital Territory issued a warrant for the arrest of the applicant under s 12(1) of the Act.

[6] On 28 August 2014, the applicant was arrested in Victoria and remanded pursuant to s 15(2) of the Act.

[7] On 14–15 July, 10 August and 20 August 2015, the Magistrate conducted proceedings pursuant to s 19(1) of the Act to determine whether the applicant was eligible for surrender to Bosnia and Herzegovina. As part of those

proceedings, the applicant gave oral evidence and was cross-examined. That fact assumes some significance in the way the evidence should be treated regarding what happened to the applicant in Bihac prison and what he contends will occur if he is surrendered to Bosnia and Herzegovina.

[8] On 20 August 2015, the Magistrate made orders under s 19(9) of the Act determining the applicant to be eligible for surrender in relation to both extradition offences.

[9] The applicant seeks review of the Magistrate's orders pursuant to s 21(1)(a) of the Act. He contends that the extradition objection under s 7(c) is made out by reference to the beatings and mistreatment he suffered at the hands of other prisoners during his imprisonment at the Bihac prison. He also submits that Bosnia and Herzegovina has failed to establish any material change since 2007 in the prison conditions in that country so as to displace what he contends are the substantial grounds for believing that, if he were to be extradited, he would be treated in the same way again.

[10] In the applicant's statement of claim, this Court's jurisdiction under s 39B of the Judiciary Act 1903 (Cth) is also invoked. The applicant did not develop separate or different arguments to challenge the Magistrate's orders under s 39B to those developed in relation to s 21 of the Act. It was not submitted, correctly in my view, that there was any scope for orders in the nature of certiorari and prohibition to issue if the Court is not persuaded to quash the order under s 21(2)(b) of the Act.

Relevant legislative provisions

[11] Section 3 of the Act sets out the principal objectives of the Act:

> (a) to codify the law relating to the extradition of persons from Australia to extradition countries and New Zealand and, in particular, to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence;
> (b) to facilitate the making of requests for extradition by Australia to other countries; and
> (c) to enable Australia to carry out its obligations under extradition treaties.

[12] Section 19(1) of the Act provides:

> Where:
> (a) a person is on remand under section 15;
> (b) the Attorney General has given a notice under subsection 16(1) in relation to the person;
> (c) an application is made to a magistrate or eligible Federal Circuit Court Judge by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and
> (d) the magistrate or Judge considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;
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> the magistrate or Judge shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.

[13] Bosnia and Herzegovina is declared an "extradition country" within the meaning of s 5 of the Act under reg 4 of the Extradition (Bosnia and Herzegovina) Regulations 2009 (Cth). There is no dispute that the offences of which the applicant was convicted are "extradition offences" as that term is defined in s 5.

[14] Section 19(2) sets out the circumstances in which a person is eligible for surrender, and 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:
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> (a) the supporting documents in relation to the offence have been produced to the magistrate or Judge;
>
> (b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the magistrate or Judge of any other documents — those documents have been produced to the magistrate or Judge;
>
> (c) the magistrate or Judge is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and
>
> (d) the person does not satisfy the magistrate or Judge that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

[15] Under the heading "Meaning of *extradition objection*", s 7 relevantly provides:

> 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:
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> ...
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> (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; ...

[16] It will be recalled that, although this meaning is expressed in objective terms, as if the facts in s 7(c) objectively must exist, the applicable standard (for both the s 19 Magistrate and for this Court on review) is satisfaction there are substantial grounds for believing that there is an extradition objection in relation to the extradition offences: see s 19(2)(d).

[17] The application to this Court is made under s 21. Section 21 relevantly provides:

> (1) Where a magistrate or eligible Federal Circuit Court Judge makes an order under subsection 19(9) or (10) in relation to a person whose surrender is sought by an extradition country:
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> (a) in the case of an order under subsection 19(9) — the person; or
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> (b) in the case of an order under subsection 19(10) — the extradition country;

may, within 15 days after the day on which the magistrate or Judge makes the order, apply to the Federal Court for a review of the order.

(2) The Federal Court may, by order:

(a) confirm the order of the magistrate or Judge; or

(b) quash the order.

...

(6) Where the person or the extradition country:

(a) applies under subsection (1) for a review of an order; ...

...

the following provisions have effect:

(d) subject to section 21A, the court to which the application or appeal is made shall have regard only to the material that was before the magistrate or Judge;

...

(f) if:

(i) if an order for the release of the person has not been made; or

(ii) the person has been arrested under an order made under paragraph (e);

the court to which the application or appeal is made may:

(iii) order that the person be kept in such custody as the court directs; or

(iv) if there are special circumstances justifying such a course, order the release on bail of the person;

until the review has been conducted or the appeal has been heard;

(g) if the court to which the application or appeal is made determines that the person is eligible for surrender, within the meaning of subsection 19(2), in relation to an extradition offence or extradition offences — the court shall include in its judgment on the review or appeal a statement to that effect specifying the offence or offences.

[18] Section 21A provides:

21A *Admission of evidence etc on review or appeal*

Scope

(1) This section applies if a person or extradition country:

(a) applies under subsection 21(1) for a review of an order;

(b) appeals under subsection 21(3) against an order made on that review; or

(c) appeals to the High Court against an order made on that appeal.

Admission of evidence

(2) If:

(a) a party to the relevant proceedings under section 19 was prevented from adducing evidence (the excluded evidence) in the proceedings; and

(b) the review court considers that the party should have been permitted to adduce the excluded evidence in those proceedings;

the court may receive:

(c) the excluded evidence; and

(d) further evidence, or submissions, that directly relate to the excluded evidence.

Documents containing deficiencies

(3) If:

(a) a document is:

(i) a document to which the review court must have regard under paragraph 21(6)(d); or

(ii) a document that is received by the review court under subsection (2) of this section; and

(b) the document contains a deficiency of relevance to the review or appeal; and

(c) the court considers the deficiency to be of a minor nature;

the court must adjourn the proceedings for such period as is necessary to allow the deficiency to be remedied.

(4) This section does not entitle the person to whom the proceedings relate to adduce, or the court to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.

Definition

(5) In this section:

review court means the court to which the application or appeal was made.

Relevant legal principles

[19] The features of the four-stage scheme established by the Act has been explained now in many decisions of this Court and the High Court: see for example *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; 228 ALR 447; [2006] HCA 40 at [29] (Gleeson CJ), at [55] (Gummow and Hayne JJ), and at [144] (Kirby J); *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 547; 132 ALR 483 at 495–6 (Gummow J); and, in the Full Court, *Snedden [2009]* at [15]. These steps were set out in *Harris v Attorney–General (Cth)* (1994) 52 FCR 386 at 389; 125 ALR 36 at 38–9, endorsed by the Court in *Snedden [2009]* at [15]:

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

[20] The nature of a review under s 21 is well established. It was described by Hill J in *Republic of South Africa v Dutton* (1997) 77 FCR 128 at 136; 147 ALR 310 at 316–17 (*Dutton [1997]*):

> the review contemplated by s 21 is not a species of judicial review in the sense of a review limited to correcting legal error. It is a rehearing in which the court undertaking the review is authorised to reach its own conclusions on eligibility for surrender ...

[21] What Hill J went on to say about limits on the material that the court can consider must now be read in light of the introduction in 2012 of s 21A of the Act and the limited right to adduce further evidence on the review in the circumstances there set out.

[22] In *Rahardja v Republic of Indonesia* [2000] FCA 1297 at [47], the Full Court described the threshold in s 19(2)(d) of 'substantial grounds for believing' in the following terms:

> ... the inquiry concerns future and hypothetical events. Necessarily, therefore, the Court is required to engage in a deal of speculation. And it is sufficient if the person raising the objection establishes a substantial or real chance of prejudice; it is not necessary to show a probability of prejudice or any particular degree of risk of prejudice.

[23] The Full Court there endorsed, at [47], the submissions of counsel for Mr Rahardja, which it had earlier summarised at [37]–[39]:

> Counsel for Mr Rahardja emphasise the nature of the relevant test: there are "**substantial grounds** for believing" (para 19(2)(d)) that "the person **may** be prejudiced at his ... trial or punished ... by reason of his ... race" (para 7(c)). The inquiry is speculative, because it is concerned with future and hypothetical events, say counsel. In view of the relevant terminology, they submit, "it is inappropriate to apply an inflexible standard, such as the balance of probabilities, and a lesser degree of likelihood is sufficient to establish substantial grounds for the extradition objection". Counsel submit the minimum requirement is that the substantial ground of belief be "not trivial" or merely theoretical. Counsel emphasise it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance.
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> Counsel also put two propositions which, they suggest, derive from *Cabal v United Mexican States (No 2)* (2000) 172 ALR 743; [2000] FCA 445:
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> > "The requirement of substantial grounds for believing that there is an extradition objection should not be applied with undue rigour and must have regard to the legislative purpose of preventing arbitrary or unjust detention and punishment."
> >
> > "The speculative nature of the extradition objection provided for in s 7(c) is such that the evidence relied upon to establish the objection may be indirect or circumstantial in character."
>
> Arguing by analogy with the principles applicable to refugee cases, counsel also submit it is not necessary to establish that "race, religion, nationality or political opinions" is the sole reason for the possible prejudice; it is enough that it is a contributory reason ...
>
> (Original emphasis.)

[24] In relation to the extradition objection in s 7(c) of the Act, the Full Court in *Cabal v United Mexican States* (2001) 108 FCR 311; [2001] FCA 427 (*Cabal [2001]*) stated (at [124]):

> Section 7(b) and (c) appear to derive from Art 33(1) of the Convention Relating to the Status of Refugees 1951, done at Geneva on 28 July 1951. They derive also from Art 3(2) of the European Convention on Extradition 1957. Similar provisions were first enacted in England by the Fugitive Offenders Act 1967 (UK). Those provisions are now to be found in ss 6(1)(c) and 6(1)(d) of the Extradition Act 1989 (UK).

[25] An extradition objection results in the executive being precluded from surrendering a person. It is not a discretionary matter: see *Republic of Croatia v Snedden* (2010) 241 CLR 461; 265 ALR 621; [2010] HCA 14 (*Snedden [2010]*) at [40]. That reflects the critical role of extradition objections in extradition law, and their connection to the concept of the grant of asylum to persons at risk of facing injustice in the criminal justice system of a requesting state.

[26] Section 7(c) was considered by the High Court in *Snedden [2010]*. Its relationship to one of the foundational grounds for resisting extradition — the existence of an extradition offence which bears a political character — is emphasised by the plurality at [69]–[70]:

> 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 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".

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). 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.

(Footnotes omitted.)

[27] At [20]–[21], Gleeson CJ emphasised that the critical aspect of s 7(c) is the causal requirement. His Honour referred to the relevant part of the second reading speech for the Extradition Bill 1987 (Cth):

In his Second Reading Speech for the Bill the Attorney-General said, in relation to the relevant extradition objections:

> "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."

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).

[28] At [22]–[23], Gleeson CJ said of the causal requirement in s 7(c):

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, effectively incorporated by reference into the criteria for the grant of protection visas under the Migration Act 1958 (Cth), and various anti-discrimination and equal opportunity statutes. In those contexts and others they have been equated to terms such as "because of", "due to", "based on" and "on the ground of". Generally speaking "by reason of" has been held to connote a cause and effect relationship.

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. 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.

[29] The 'punishment' aspect of s 7(c) was recently considered by Bennett J in *Kalinovas v Republic of Lithuania* [2015] FCA 961 (*Kalinovas*). At [96]–[98], her Honour stated:

> Section 7(c) of the Act is not directed to what may happen to a person in gaol **by reason of the actions of other inmates or guards, where those actions are merely of individuals and not shown to be caused by or condoned by the state**. There is no evidence that Mr Kalinovas may be prejudiced, punished, detained or restricted in his liberty by the state, or at his trial, or in his sentence after trial.
>
> The extradition objection as defined in s 7(c) of the Act must also be in relation to the offence. Mr Kalinovas' evidence does not go to his treatment in relation to the offence but to his differential treatment from individual Lithuanians in the confined environment of a gaol to which he will be sent, if convicted of the offence. He has not established a causal connection between any sentence of imprisonment and his nationality or religion or that he will be prejudiced or punished as part of Lithuania's criminal process.
>
> It follows that he has not established that there are substantial grounds for believing that there is an extradition objection in relation to the offence and that the application should be dismissed.
>
> (Emphasis added.)

[30] In this proceeding, the applicant contends that her Honour's approach in *Kalinovas* to the meaning of "punished" in s 7(c) is plainly wrong and should not be followed.

[31] As the extract from *Snedden [2010]* at [26] above indicates, aspects of the Act such as s 7 have their origin in a number of international instruments and reflect, to varying degrees, international obligations assumed by Australia. In *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188; [2000] FCA 1204 (*Cabal (No 3)*), French J outlined the general approach to the construction and operation of the Act, stating (at [132]):

> In my opinion the Extradition Act is to be construed consistently with the approach to the construction of the treaties to which it gives effect. This requires an approach based on the ordinary meaning of the words of the Act and its context and purpose. Such principles may not yield a narrowly defined meaning: *Applicant A* at CLR 275 (Gummow J). Any remaining ambiguity or doubt, whether of meaning or application, should be resolved in favour of the liberty of the individual. A narrow technical approach, and the application of interpretations based on technical rules of the local law, is not appropriate.

[32] In the present review, neither the applicant nor the first respondent contended for any narrow or technical construction of s 7(c). Both parties' submissions emphasised — in contrasting ways — not only the text, but also the context and purpose of the provision. Accordingly, in my opinion, the approach outlined by French J in *Cabal (No 3)* does not materially affect the constructional choice to be made in this case.

[33] The construction exercise in this case must be informed by the underlying nature and purpose of the law of extradition, an area of international and domestic law designed to facilitate international cooperation in the surrender of fugitives to requesting states so that they can be brought before the criminal

justice system of those states, subject to the conditions and restrictions that states agree upon. The nature of extradition was described by the Full Federal Court in *Snedden [2009]* at [9]–[10]:

> The law of extradition has a long history ... Relevantly, part of that history is a recognition of the desirability of international co-operation in facilitating the surrender of fugitives to foreign nations so that they may be prosecuted. In *Re Arton* [1896] 1 QB 108 at 111 Lord Russell CJ observed:
>
> > The law of extradition is, without doubt, founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

The material before this court

[34] No application has been made pursuant to s 21A of the Act to have this Court receive evidence excluded from the hearing before the Magistrate. Accordingly, pursuant to s 21(6)(d) of the Act, the material to which this Court may have regard is limited to the material which was before the Magistrate. That material includes significant country information about prison conditions in Bosnia and Herzegovina.

[35] In addition, the Court has before it transcripts of the proceedings before the Magistrate on 14–15 July, 10 August and 20 August 2015, containing the applicant's evidence.

[36] The applicant's oral evidence to the Magistrate was summarised at [16]–[20] of his outline of submissions in this proceeding:

> The Applicant's evidence is that, virtually from the moment he entered Bihac Prison, he was known as:
>
> a. a supporter of Fikret Abdic, against the idea of Bosnia-Herzegovina as a Muslim state, a perceived sympathiser of Serbia;
> b. married to a Serbian Orthodox Christian woman, and with a daughter who was given a Christian name; and
> c. an ex police officer / ex civilian working for the police force, who played a role in having a number of the other prisoners jailed.
>
> The Applicant's evidence is that, in the six months during which he was detained at Bihac Prison, he was regularly subjected to beatings, some examples of which were:
>
> a. he was subjected to 'blanketing', when he was covered with a blanket when he returned to his cell from, for example, having gone to the toilet, and then beaten —'blanketing' was a response to him having complained to the authorities for the violence against him because he was not able to see (hence could not complain about) who was beating him;
> b. he was assaulted with a knife in the laundry area;
> c. he was assaulted in the bathroom, where he was thrown on the ground by prisoners carrying a knife and scissor who then proceeded with a further assault to see whether or not he was circumcised;
> d. he was assaulted in the TV room on occasions when events relating to the Bosnian war were shown.
>
> The Applicant's evidence is that those beatings were inflicted upon him by reason of his political opinion (a supporter of Fikret Abdic / against the idea of a purely Muslim state) and because of his religion (a non-strict Muslim who had married a Christian woman / was sympathetic to Christians). The Applicant knew that these were the reasons because his attackers told him so. The Applicant also knew that some of his attackers were Wahhabi or Mujahideen, by reason of their appearance, and from knowing them personally.

> The Applicant's evidence is that prison authorities knew of the beatings he was receiving (in many cases, saw and also recorded, in medical notes, the physical consequences of those beatings), and knew the reasons why he was being targeted.
>
> The Applicant's evidence is that there was no security in the prison, some of the attackers were connected to the prison authorities, and the prison authorities did nothing to protect him and nothing (certainly, nothing effective) to find the perpetrators and prevent them from further attacking the Applicant. The only thing the prison authorities did do was to tell him to look after himself.

[37] The first respondent submitted that the Court should give different weight to different parts of the applicant's evidence, especially when compared to recent country information. In substance, the first respondent submitted that more recent country information suggested that the applicant would not experience the kinds of problems he claims to have experienced during his period of incarceration.

[38] It appears that the Magistrate accepted this submission in his finding that he was not satisfied that the extradition objection had been made out. He said, in relation to the question of what would occur to the applicant were he to be extradited to Bosnia and Herzegovina:

> ... I have not been shown, to my satisfaction at least, materials that suggest that the conditions in Bihac in 2015 or beyond are necessarily at the same level as those with which Mr Traljesic suffered in 2007.
>
> True it is that in 2007 some of those characteristics as to race, religion, nationality and opinion may have explained some of the behaviours with which Mr Traljesic is said to have suffered but it does not follow that the same level of satisfaction can be confirmed in 2015.

[39] In the s 19 proceeding, the applicant's account of what happened to him in Bihac prison in 2007 was not subjected to any significant cross-examination, save for one issue (to which I return) concerning the involvement of the prison guards. In those circumstances, I consider it is appropriate to proceed on the basis that the account the applicant gave about what occurred to him in Bihac prison in 2007 is a reliable account. Where his evidence went to the reasons given by other prisoners as to why they treated him as they did, that evidence was not the subject of any substantial challenge before the Magistrate, nor of any adverse findings by the Magistrate. It should also be accepted.

[40] What is critical in this review is the evidence, including that of the applicant, about the attitude of the prison guards and authorities to the conduct of the other prisoners. I deal with this below.

The magistrate's decision under s 19

[41] The Magistrate concluded that all of the criteria set out in s 19(2) of the Act had been met, including — and most relevantly for present purposes — that the applicant had not satisfied him that there was an extradition objection within the meaning of s 7(c) of the Act. Accordingly, he determined the applicant to be eligible for surrender in relation to the two extradition offences and made orders under s 19(9) of the Act that the applicant be committed to prison to await surrender, or release pursuant to an order under s 22(5).

[42] The Magistrate gave oral reasons for his decision, which were before the Court on this review through the provision of the transcribed version of those reasons. The parties accepted this to be an accurate record of his Honour's reasons.

Resolution of the applicant's objections to evidence

[43] In s 19 proceedings, a Magistrate does not exercise judicial power, but rather performs an administrative function as *persona designata*: *Pasini v United Mexican States* (2002) 209 CLR 246; 187 ALR 409; [2002] HCA 3 (*Pasini*) at [18]; *Cabal [2001]* at [80]. There being no proceeding in a "court" in these circumstances, the Evidence Act 1995 (Cth) does not apply: see s 4.

[44] In contrast, the Evidence Act has been held to apply to a s 21 review proceeding in this Court: see *Cabal [2001]* at [189]; *Dutton v O'Shane* (2003) 132 FCR 352; 200 ALR 710; [2003] FCAFC 195 at [147]. In *Kalinovas*, Bennett J said (at [74]):

> It follows that the Court, in conducting a rehearing and reaching its own conclusion on eligibility for surrender, is not bound by the evidentiary rulings of the Magistrate, although limited to the material that was before the Magistrate (see [11] above). As pointed out by Cowdroy J in *Snedden v Republic of Croatia* [2009] FCA 30 at [29], this may mean that the Court may be restricted in its consideration of the material that was before the Magistrate.

[45] The distinction between a s 19 proceeding and a s 21 review in terms of the application of the Evidence Act led the applicant to object to certain evidence upon which Bosnia and Herzegovina wished to rely in this court, although that evidence was before the s 19 Magistrate.

[46] The applicant objected to three documents, in both their original and translated English forms:

(1) a letter dated 3 February 2015 from Mirsad Demirovic, Director, Correctional Facility, Bihac;
(2) a letter dated 10 February 2015, also from Mirsad Demirovic;
(3) a letter dated 26 February 2015 from Nikola Sladoje, Assistant Minister, Ministry of Justice of Bosnia and Herzegovina.

[47] These documents concern prison conditions in Bosnia and Herzegovina in or around February 2015, including a statement of adherence of the authorities to international minimum standards and a description (in the first document) of Bihac prison and its prisoner make up. The third document includes an assurance by the executive of Bosnia and Herzegovina to the Australian government that, if Australia extradites the applicant but opposes his return to Bihac prison, the applicant will be imprisoned in a different Correctional Facility.

[48] The applicant contends that these documents are inadmissible hearsay under s 59 of the Evidence Act, or should be excluded because they would tend to be unfairly prejudicial or misleading pursuant to s 135(a) and (b) of the Evidence Act.

[49] The first respondent submitted that these documents were admissible by reason of s 19(6) of the Act, which relevantly provides that: "... any document that is duly authenticated is admissible in the proceedings." The first respondent contended that the word "admissible" in s 19(6) means admissible pursuant to the rules of evidence. On this construction, s 19(6) would have the effect that, as long as a document is duly authenticated within the meaning of s 19(7), it can be admitted into evidence in both s 19 proceedings before a Magistrate and a s 21 review in this Court. The first respondent submitted that the impugned documents satisfied the requirements of due authentication in s 19(7) of the Act, and so could be admitted into evidence in this review proceeding without any need to consider the application of the exclusionary provisions in the Evidence

Act. Thus, for example, authentication was submitted to overcome the usual operation of the Evidence Act to exclude documents containing hearsay statements (as these three documents clearly did).

[50] I do not accept that the term "admissible" in s 19(6) has the meaning for which the first respondent contends. As the first respondent's counsel accepted, to construe "admissible" in s 19(6) to mean admissible pursuant to the rules of evidence would be inappropriate in relation to s 19 proceedings, which are administrative in character. Yet, it is to those proceedings that subs (6) is directed. In my opinion, the term "admissible" in s 19(6) means that the document can form part of the record before the s 19 Magistrate and be relied upon. In this sense, it is admitted into the s 19 proceeding. On review, such a document will come before the court by operation of s 21(6)(d) of the Act.

[51] If, as seems clear, the effect of s 21(6)(d) is that no additional evidence can be adduced before the review court unless it is within the terms of s 21A, then it is difficult to see what role the rules of evidence might play outside the terms of s 21 A. Section 21A has an operation which is limited to the circumstances set out in s 21A(2)(a). It appears, although it is not necessary to determine the matter finally, that in making a decision under s 21A(2) whether evidence excluded in a s 19 proceeding should be received on a s 21 review, the court must apply the rules of evidence, as it must also apply those rules to any additional evidence admitted pursuant to s 21A(2)(d).

[52] If the rules of evidence were to be applied to all of the material before the Magistrate which was then sought to be placed before a review court, much of that material may be ruled inadmissible. Some of the supporting documents themselves have a hearsay character, such as the statement of conduct. The Full Court in *Cabal [2001]* noted these issues at [145], together with some of the earlier authorities discussing the admissibility of hearsay in extradition proceedings. Country information admitted by the Magistrate in respect of an extradition objection (as was the case in this proceeding) would not comply with the rules of evidence and would not be admissible, nor would any assurances given on behalf of the requesting state where the maker of the statement was not called as a witness.

[53] Conversely, if a document simply needs to be authenticated to be admissible before the review court, then the rules of evidence would be entirely circumvented. That is a further reason why, in my opinion, s 19(6) applies only to s 19 proceedings.

[54] A review under s 21, as the authorities have said, is in the nature of a rehearing: see *Cabal [2001]* at [100]; *Dutton [1997]* at [136]. As the plurality in *Pasini* emphasised at [18], the decision of the s 21 review court does not replicate the administrative decision of the s 19 Magistrate; the review court exercises judicial power in its determination as to whether the Magistrate's decision was right or wrong and, if wrong, what alternative decision should have been made. The court must reach its own conclusion on the facts and the law, subject to the restriction in s 21(6)(d), read now with s 21 A. Section 21A did not exist at the time *Dutton [1997]* and *Cabal [2001]* were decided, but see the Full Court's comments in *Cabal [2001]* at [153], which identify the same concerns as those discussed in the second reading speech introducing s 21 A. A review, of its nature, involves considering the decision under review and determining whether it is the correct decision (whether as to the facts or the law, or both).

[55] If, on a s 21 review, the rules of evidence were to be applied to all the material before the s 19 Magistrate, and s 19(6) were to be seen in that sense as nothing more than a limit on new material (subject to s 21A), then the nature of the material to be considered by the review court might be entirely different to that considered by the s 19 Magistrate. That is clearly not the intention of the scheme, nor the function of a review. The intention of the scheme is to control what is before the Magistrate by reference, in part, to the process of due authentication, and otherwise to leave the Magistrate as an administrative decision maker, able to determine what materials are admitted in the proceeding by reference to principles such as relevance, reliability and the like, using the rules of evidence (if it seems appropriate) as a guide, much as the Administrative Appeals Tribunal does: see, for example, *Re General Merchandise & Apparel Group Pty Ltd and CEO of Customs* (2009) 114 ALD 289; [2009] AATA 988 at [139]; *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; 322 ALR 581; 141 ALD 540; [2014] FCAFC 93 at [97]. The existence of s 19(8) would appear to confirm that this approach can be taken.

[56] Once the scope of the material is determined by the Magistrate as part of her or his function under s 19, then by reason of s 21(6)(d) that material is to form the material on review under s 21, subject to the terms of s 21 A. In *Cabal [2001]*, and prior to the enactment of s 21A, the Full Court treated (as the parties and the trial judge in that proceeding also had) the terms of s 21(6)(d) as extending to material sought to be tendered before the Magistrate but not admitted, although the Full Court noted some difficulties in this approach: see [152]–[153]. In that way, the s 21 review represents a fresh consideration, in the exercise of judicial power, of the questions of law and fact presented by the extradition request, in a way which will bind the parties: see *Cabal [2001]* at [102]. However, that fresh consideration is, in accordance with the purpose of the scheme established by the Parliament, to be controlled by the manner in which both the person subject to extradition, and the requesting state, conducted their cases in the s 19 proceeding, and the determinations made by the Magistrate in that proceeding, subject now only to the terms of s 21A of the Act.

[57] Accordingly, the objections made by the applicant to the admission of the letters set out at [46] above must be rejected. There is no occasion to consider the application of either ss 59 or 135 of the Evidence Act, because this material was regularly admitted into the record before the s 19 Magistrate pursuant to s 19(6) of the Act. It is to be considered on the review as s 21(6)(d) contemplates, although on review the weight the court might give it may differ from the weight given to it by the s 19 Magistrate. Determining for itself what weight to afford material considered by the s 19 Magistrate, especially on an extradition objection, is a legitimate aspect of the court's review function under s 21.

The parties' submissions on the extradition objection

[58] Relying both on his own evidence, and on country information before the Magistrate, the applicant contends that he was beaten and mistreated by fellow prisoners during his first confinement in Bihac prison before he escaped and that this treatment was by reason of both his political opinion (as a supporter of Fikret Abdic, against the idea of a purely Muslim state, and a perceived sympathiser of Serbia) and by reason of his religion (a non-strict Muslim who had married a Christian woman and was sympathetic to Christians).

[59] Not only does the applicant contend that the prison authorities were aware of this mistreatment, he contends that some of the attackers were connected to the prison authorities, that the prison authorities did nothing to protect him and nothing (certainly, nothing effective) to find the perpetrators and prevent them from further attacking him. His evidence is that the only thing the prison authorities did do was to tell him to look after himself.

[60] The applicant's contention is that the way he was treated by fellow prisoners in the past provides a reliable basis for the satisfaction required by s 7(c) as to how he would be treated if extradited to Bosnia and Herzegovina. That treatment, he contends, constitutes punishment within the meaning of s 7(c). If (which he denies) any further element of state sanction or acquiescence is required, he contends that this is made out on the evidence by the failure of the prison authorities to do anything effective, or proactive, to protect him despite knowing what was occurring. He submits there is no, or no sufficient, evidence that anything has changed since 2007 which would materially alter the level of risk he faces.

[61] The applicant submits that a '*narrow technical approach*' (picking up the language of French J in *Cabal (No 3)* extracted above) to what constitutes 'punishment' and 'restriction on liberty' should be avoided, and that any doubt as to the extent of the application of the s 7(c) extradition objection must be resolved in favour of the person seeking to resist extradition. He submits that the Act should be interpreted and applied consistently with human rights norms, so as to '*make its safeguards practical and effective*': *Soering v United Kingdom* [1989] ECHR 14 at [87], especially where s 7(c) is based on human rights norms. As I outline below, he also relies on the state's duty of care to its prisoners.

[62] The applicant relies on decisions under Art 3 of the *European Convention on Human Rights* (ECHR) establishing state responsibility for the conduct of individuals (who do not represent the state) when there is an obligation to protect another, such as *A v United Kingdom* [1998] ECHR 85; *Z v United Kingdom* [2001] ECHR 333; and *Pantea v Romania* [2003] ECHR 266 (although redactions from the latter decision mean that resort must be had to the Information Note produced by the Registry of the European Court of Human Rights, which was in evidence).

[63] The applicant submits that nothing in those decisions of the High Court that have dealt with the issue of 'punishment' (for example, *Foster v Minister for Customs and Justice* (2000) 200 CLR 442; 173 ALR 585; 60 ALD 609; [2000] HCA 38; *Snedden [2010]*) stands against the construction he advances. To the contrary, he submits that what has been said in those cases favours a broad construction of s 7(c).

[64] Relying upon the approach taken by Bennett J in *Kalinovas*, the first respondent submits that s 7(c) can have no application unless mistreatment at the hands of individual prisoners can be "shown to be caused by or condoned by the state". The first respondent submits that the applicant's interpretation is incorrect for three reasons.

[65] First, adopting the approach to interpretation articulated by French J in *Cabal (No 3)* at [132], the "ordinary meaning" of the word "punished" requires the punisher to have some authority to inflict the penalty. The first respondent submits that this is further borne out by the context in which that word appears, referring to the other criminal justice terms used in s 7(c): "prejudiced at his or her trial", "detained" and "restricted in his or her personal liberty". By reason of

this context, it submits that the latter phrase must also be taken to refer to restriction on liberty imposed by the state.

[66] Second, this interpretation is said to be supported by the legislative history of s 7(c) and the origins of the provision. The first respondent accepts, as the applicant submits, that s 7 has its genesis in Art 3.2 of the 1957 European Convention on Extradition, which provides:

> [Extradition shall not 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.

[67] The first respondent submits that the only punishment to which Art 3.2 refers is the punishment that the requesting state had in mind when it made the extradition request. In that context, the word 'punishing' is not capable of referring to the suffering that a person is likely to experience at the hands of fellow prisoners, or any other non-state officials, unless that behaviour was "caused by or condoned by the state".

[68] Third, the first respondent contends that the two United Kingdom cases on which the applicant relies support the first respondent's construction of the word 'punished' and not the applicant's. Those cases are *Lodhi v Secretary of State for the Home Department* [2010] EWHC 567 and *R (on the application of Iyayi) v Czech Republic* [2002] EWHC 1324. Both cases deal with the construction of s 13(b) of the Extradition Act 2003 (UK) ('the 2003 UK Act'), which is the equivalent of s 7(c) of the Australian Act. Two further cases dealing with s 13(b) were said, in their outcomes, to reveal the same approach: namely, *Holman v Regional Court in Warsaw, Poland* [2012] EWHC 1503 and *Bziom v District Court Penal Section in Suwalki Poland* [2013] EWHC 2587.

[69] The first respondent also submits that the jurisprudence pertaining to Art 3 of the ECHR is not directly applicable because the text of Art 3 uses the phrase 'treatment or punishment'. The former word, the first respondent submits, is clearly more likely to be construed as applicable to non-state officials. In a similar vein, the first respondent contends that the context of Art 3 and the ECHR more generally is materially different to the context of the Act. The ECHR is an international instrument concerned with individual human rights and freedoms, and the Act's concern is with international crime cooperation. In the absence of individual rights being imported into the Act, the first respondent submits that the safeguards which are present (such as s 7 and the concept of an extradition objection) are "naturally concerned with the conduct of state authorities, and not the conduct of non-state individuals".

Resolution

Construction of s 7(c)

[70] It is important to bear in mind that s 7 applies at three of the four stages of the extradition process under the Act, which again reflects its fundamental place in the scheme of the Act.

[71] It can be accepted that imprisonment is "well within" the concept of punishment (see French CJ in *Snedden [2010]* at [23]) and that, therefore, what occurs to a person while imprisoned must also be capable of being within the concept of 'punished' as that word is used in s 7(c). Otherwise, for example,

placing a prisoner in solitary confinement by reason of that person's political opinion would not be caught by s 7(c). Such a construction would be antithetical to the purpose of s 7, which is to preserve Australia's observance — as a requested state — of a set of minimum normative standards, relating to the fairness and integrity of the administration of the criminal justice systems of other nations.

[72] However, while accepting that starting point, I consider that to construe s 7(c) in the way the applicant contends would take it beyond its purpose and would involve reading the provision out of its context and otherwise than in accordance with its text. Its purpose is tied to the requesting state's administration of its criminal justice system; its context arises from mutual assistance in criminal matters between states rather than more general protection of individuals; and its text focusses, in my opinion, on conduct by the state.

[73] In oral submissions, the applicant relied on the legislative history of s 7(c), and the way that it was drafted differently to s 7(b), although both were drawn from Art 3.2 of the *European Convention on Extradition* (see *Snedden [2010]* at [66]). It was submitted that the requirements of purpose (and links with state conduct) went into s 7(b) not 7(c). I do not accept that the distinction between the two paragraphs is as clear as the applicant contends. While s 7(b) uses the language of purpose, it does so by reference to the purpose for requesting surrender: that is the subject matter of this exception. The subject matter of the exception in s 7(c) is different, but it is nevertheless founded on an assessment as to why a person will be treated as she or he claims, albeit in different language and by reference to the reasons for the conduct. In my opinion, both sub-sections focus on state conduct.

[74] Both parties accept that s 7(c) may have an operation in respect of what are called in refugee law "non-state actors": see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; 187 ALR 574; [2002] HCA 14 (*Khawar*) at [22] (Gleeson CJ), [79]–[80] (McHugh and Gummow JJ), [112]–[114] (Kirby J); cf Callinan J at [149]–[150]. The judgment of Bennett J in *Kalinovas* recognises as much.

[75] In *Khawar*, at [114], Kirby J summarised the approach to the conduct of non-state actors, relying on a decision of the New Zealand Refugee Status Appeals Authority (*Refugee Appeal No 71427/99* (Unreported, 16 August 2000)) at [60] (Haines QC and Member Tremewan):

> This conclusion, which was not really contested in the present appeal, has led to a classification of the cases in terms of the involvement of state agents in the persecution complained of:
>
> "(a) Persecution committed by the state concerned.
> (b) Persecution condoned by the state concerned.
> (c) Persecution tolerated by the state concerned.
> (d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection."

[76] The applicant's contention as to construction may fit within category (d). It would appear that Gleeson CJ in *Khawar* also contemplated a category such as (d) (see [27]–[30]).

[77] The analogy with refugee law, although tempting, breaks down because of the central focus on protection in the Refugees Convention. This focus is emphasised by Gleeson CJ in *Khawar* at [19], and also by McHugh and

Gummow JJ at [60]–[61], although their Honours then go on to discuss what they consider to be unnecessary complexity introduced by concepts such as internal and surrogate protection (see [66]–[75]). The Refugees Convention's focus on protection was also recognised in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231–2; 142 ALR 331 at 333–4 (Brennan CJ), at CLR 247–8; ALR 346 (Dawson J), at CLR 258; ALR 354 (McHugh J) and at CLR 279; ALR 354 (Gummow J). The grant of asylum is the extension by a Contracting State to an individual of the entitlements and protections that the individual might otherwise receive in her or his country of nationality, but cannot avail herself or himself of because of a fear of persecution for one or more Convention reasons. Thus, a core part of the determination whether a State owes protection obligations involves consideration of why a claimant cannot access protection in her or his country of nationality. This leads, in turn, to the categories referred to at [75] above.

[78] Protection is not the focus of the extradition objections in s 7. Those objections exist as exceptions to the general premise underlying extradition arrangements that those charged with or convicted of criminal offences will be returned to the state seeking to prosecute or punish them, to face justice in accordance with the law of that state. These are arrangements of mutual assistance in the administration of criminal justice between nation states. It is apparent from the terms of s 7 that the focus of the exceptions is on the criminal justice system in the requesting state. Although there may be some commonality in the history and development of extradition objections and protection under the Refugees Convention, the exceptions as now set out in s 7 should not be construed as co-extensive with, or necessarily serving the same purpose as, protection under the Refugees Convention.

[79] The distinction was highlighted by Kirby J in *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; 186 ALR 393; 67 ALD 257; [2002] HCA 7 at [102]–[105], in the context of comparing the "serious non-political crime" exception in Art 1F of the Refugees Convention with its antecedent, the political offence exception in extradition law (reflected now in s 7(a) of the Act):

> Most of the judicial decisions cited in cases concerned with the meaning of Art 1F(b) of the Convention have involved the meaning of the phrase "political crimes". An analogous expression long appeared in treaties and municipal laws concerned with extradition. It is in this context, in England, that a number of decisions grapple with the meaning, in the context of extradition, of "a political offence" or "an offence of a political character".
>
> In the course of these decisions, and in decisions in other jurisdictions, distinctions are made between so-called "common crimes", "purely political crimes" and "relatively political crimes". The last are common crimes with some political "overlay". Crimes designated as "purely political" would involve such offences as high treason, capital treason, activities contrary to the external security of the State and so on. In such cases, depending on the facts, no matter how unwelcome the offender might be, the exemption from extradition would apply to protect him or her from forced repatriation.
>
> When the Convention came into force, it was natural that lawyers, familiar with this body of jurisprudence, should turn to it to give meaning to Art 1F(b). There was a recognition of the overlap between the exemption from extradition and the exception from refugee status. Each was concerned with serious crimes. Each was motivated by the (usually unexpressed) fear that the accused might not receive a fair trial if returned to the place where the crimes had allegedly been committed, or might be in mortal

danger if so returned. The need for congruence between extradition law and the law of the Convention was therefore emphasised. The latter was described as containing an "echo" of the former.

However, in using judicial opinion expressed in the context of extradition cases, it is important to remember the significant differences that exist between the operation of the law of extradition and the grant of asylum to refugees. One obvious difference is the way in which the exceptions are expressed. Another is that extradition, relevantly, involves an application by a foreign State for the return to its system of justice, of a person who claims exemption by reason of the political character of the alleged offence. Refugee status, on the other hand, is a right conferred on a person by the law of the country of refuge, pursuant to the Convention. Extradition law is, in a sense, a derogation from one State's sovereignty in favour of another upon conditions to which the two States concerned have specifically agreed. Refugee law involves the imposition upon a State, for humanitarian reasons, of an obligation created by international law, but on conditions that recognise legitimate exceptions.

(Footnotes omitted.)

[80] Further, it is not without significance that each of the descriptions in s 7(c) of what may happen to a person upon surrender is a verb: "prejudice" at trial, "detained", "restricted in his or her liberty", and "punished". They connote an activity or conduct by a person. The use of the modal auxiliary verb "may be" indicates, consistently with the way the provision has been construed, that what is being spoken of is a possibility or a potentiality in the future rather than a present fact. Whilst in a provision dealing with fundamental human rights, technical parsing of text may be unwarranted, I consider it of some importance to note that the restriction on extradition imposed by s 7(c) is expressed through verbs, not nouns. The provision does not create, or invoke, some statutory concept of "punishment". It looks to what may happen to a person through the conduct of others in the administration of the criminal justice system of the requesting state. And, critically, it looks to the reasons any harm or prejudice may befall a person in the administration of that system.

[81] In my opinion, the context of s 7(c) in the Act and its purpose as providing an exception to what is otherwise a mutual obligation between nation states to facilitate the administration of a state's system of criminal justice means that the exception is intended to capture direct conduct by or on behalf of the requesting state and conduct in which the requesting state will either be complicit, or will condone. That is because the focus of the exceptions is on the manner in which the requesting state administers its system of criminal justice. So, for example, systematic (rather than random and individual) targeting by prison guards of prisoners of a particular ethnic minority, and the singling out of such prisoners for physical mistreatment, solitary confinement or suchlike, may well be within the terms of s 7(c), if by reason of its systematic nature that conduct can be attributed to the requesting state, or be found to have been condoned by it. That is not to suggest that condonation by the requesting state of the mistreatment of a single individual could never be proved. Rather, I give this example to emphasise my opinion that the extradition objections in s 7 focus on the requesting state's administration of its criminal justice system.

The comparative authorities

[82] The applicant relied on the United Kingdom cases of *Lodhi* and *Iyayi*. Both of these cases involved extradition decisions made under the Extradition Act 1989 (UK) ('the 1989 UK Act'), the predecessor to the 2003 UK Act.

[83] Section 6(1)(d) of the 1989 UK Act then provided:

> A person shall not be returned under Part III of this Act, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority ...
>
> (d) that he 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.

[84] For reasons that are explained in *Lodhi* at [8], the Divisional Court's decision on the application of s 6(1)(d) was not directly in issue because Mr Lodhi was challenging the Secretary of State's decision (that is, the equivalent of the Attorney-General's decision under s 22 of the Australian Act). In that way, what came to be in issue before the Administrative Court was not the construction of s 6(1)(d) — although that was relied on to some extent — but the application of Art 3 of the ECHR, which provides that: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". I do not accept that *Lodhi* assists the applicant on the point of construction. That case proceeds on the basis that the Court is looking for some kind of official involvement, tolerance or acquiescence in the conduct said to constitute punishment for any of the four proscribed reasons: see *Lodhi* at [66], [71], [80], [110]. At [75] the Court said:

> A new prison with a capacity for 6000 prisoners opened in Dubai in 2006, which must have reduced the effects of the overcrowding described in the evidence. The Foreign Affairs Committee concluded that Dubai's prisons met international standards, and the Dubai police in 2007 opened in 2007 a new Human Rights Department. There is some evidence of access by NGOs. It may be that a real risk of treatment in breach of Article 3 by reference to the standards of overcrowding, bedding, sanitation, and food no longer exists, but the evidence is quite strong that it was extremely poor, and the evidence that it has changed is scanty. We are however not concerned solely with the generalities of conditions but with the reality of the risk to a Pakistani, perhaps facing interrogation and torture or serious ill-treatment during it, and then quite probably a long term in prison, without local support, with brutal treatment or torture by guards a relative commonplace, all in what may be still very poor conditions.

[85] It is apparent from this passage, as from many other passages in the judgment, that the Court was in no doubt, as a matter of fact, that the treatment which Mr Lodhi alleged would be meted out to him, and about which he adduced evidence relating to the treatment of others, was either directly carried out by state officials, or condoned by them as part of the general operation of the prison system.

[86] The Court's approach in *Iyayi* is different, and in principle more supportive of the applicant's approach.

[87] *Iyayi* dealt with a person who had, like the applicant, served some of his sentence of imprisonment and therefore based his claims at least in part on how he had been treated while imprisoned. The requesting state was Czechoslovakia. The applicant was of Nigerian nationality and was black. His claim was based on racist treatment. It was unsuccessful on the facts before the primary judge, and his judicial review was also unsuccessful.

[88] However, at [41], read with [44], it is clear that on judicial review the Court found no error in the primary judge proceeding on the basis of what was described as "the definition of punishment in the wider sense contended for ... that is to say to include treatment received from prison officers and individual prisoners without the actual encouragement, consent or condonation of the authorities".

[89] As the Administrative Court's reasons make clear, the primary judge assumed this construction of punishment in favour of the applicant, and proceeded accordingly. However, there was no analysis, either at first instance or on review, of any competing construction arguments. I therefore do not find this decision of any particular assistance.

[90] I do not consider *Bziom* of any assistance to either party, as it was a case decided on its facts. *Holman* is more on point, the issue in that case being described at [4] of the Administrative Court's reasons for judgment as:

> if extradited to Poland and owing to his Afro Caribbean ethnicity, the appellant will be subjected to treatment that will breach his rights under Article 3, or will result in his being punished, detained or restricted in his personal liberty by reason of his race within the meaning of section 13B of the 2003 Act.

[91] Section 13(b) of the 2003 UK Act relevantly provided:

> A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that —
>
> ...
>
> (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

[92] Thus, although the categorisation of extradition countries had altered, and the reason for the prohibition had changed (to "extraneous considerations"), the language of the exceptions remained the same. At [8] Owen J accepted the respondent's contention that the provision was "not directed to racially prejudiced behaviour on the part of fellow prisoners", and at [10] further accepted that the evidence showed that, "in any event, the prison authorities in Poland responded to his complaints of being subjected to racially prejudiced behaviour by taking steps to prevent its recurrence".

[93] The reported decision does not reveal any analysis of the proper construction of s 13(b), nor any detailed consideration of relevant authorities. I do not consider that this decision advances the first respondent's construction arguments very far.

[94] Thus, although the key phrase in both the current and former United Kingdom extradition legislation is the same as that used in s 7(c), I do not consider any of the United Kingdom decisions to which the Court has been referred to be of any particular assistance in resolving the construction issue before it.

[95] I note that there is commentary in Nicholls C QC, Montgomery C QC, Knowles JB QC, Doobay A, and Summers M, *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd ed, OUP, 2013) at [5.51] to support the first respondent's construction. As the applicant submits, that extract refers to *Holman*, which was an ex tempore decision made without any detailed reasoning on this question. I do not consider that the commentary in this text takes the matter of the construction of s 7(c) any further.

Does the existence of a duty of care (or similar obligations) by the state to prisoners inform the construction of s 7(c)?

[96] This was a matter on which the applicant placed some considerable emphasis. The applicant submitted that the construction for which Bosnia and Herzegovina contends (and which was accepted by the Magistrate in this case

and by Bennett J in *Kalinovas*) fails to recognise the special position of the state in relation to a prisoner. That special position arises, the applicant contended, precisely because the requesting state is lawfully able to deprive a person of his or her liberty. That is, the special position arises because of the sentence of imprisonment imposed by the requesting state, or other lawful circumstances of detention. Relying on the High Court's decision in *New South Wales v Bujdoso* (2005) 227 CLR 1; 222 ALR 663; [2005] HCA 76 (*Bujdoso*), the applicant submitted that the state owes prisoners a duty to take reasonable care, and that the content of that duty includes an affirmative obligation to take care in the control of other prisoners so as to prevent them from intentionally harming the person who has lawfully been deprived of her or his liberty. If it is known that a particular prisoner is potentially at greater risk of suffering violence at the hands of other prisoners, the affirmative obligation may extend to taking greater care and implementing further supervision: see *Bujdoso* at [47].

[97] Anticipating a potential weakness in his argument, the applicant went on to submit that this was no mere matter of Australia's domestic law and that such duties are recognised in international law, including treaties to which Australia is a party. He referred to Art 7 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits, among other matters, cruel, inhuman or degrading punishment and Art 10(1) of the ICCPR, which provides that persons who have been deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. He also referred to Art 3 of the European Convention on Human Rights, the equivalent of Art 7 of the ICCPR, and to the United Nations Standard Minimum Rules for the Treatment of Prisoners (revised in 2015 and now known as 'the Nelson Mandela Rules'). The Nelson Mandela Rules are the primary international standards on the treatment of prisoners and, whilst not legally binding on member states, provide guidelines for the international community on the development of correctional laws, policies and prison management. The existence of these obligations, recognised by the common law and in international law, was said by the applicant to lead to the conclusion that a state is responsible for beatings inflicted on a prisoner by other prisoners, when it fails to ensure proper supervision of other prisoners and, if beatings occur repeatedly, when it fails to enact measures to prevent that harm. Such a failure to act constitutes, the applicant contended, *acquiescence* in the infliction of the harm, especially if the state is on notice of the risk of that harm being inflicted on the prisoner.

[98] It will be noted that the end point of this submission was to arrive at the construction for which the first respondent contends, rather than a wider construction of s 7(c) as including harm inflicted on a person in custody by other prisoners for one of the reasons set out in s 7(c), without the acquiescence, or condonation of the state. That is, on this point at least, the applicant's argument is really about what kind of conduct by the requesting state should be seen as acquiescence or condonation. There are a number of logical steps required for this argument to reach the point of a conclusion of acquiescence or condonation, some of which are in my opinion problematic. For example, the exercise of determining whether the state is liable for a failure to supervise other prisoners under domestic law will be highly fact dependent, involving consideration of what was reasonable for the authorities to know, and to do, in any particular circumstance. Any conclusion about breach of obligations under international law is likely to have similar qualifications.

[99] The principles concerning duty of care towards prisoners, in both domestic and international law, on which the Applicant relies, cannot be doubted. Whether or not Bosnia and Herzegovina has assumed such obligations under international law, or has similar obligations in its own domestic law, was not addressed in the evidence or the submissions. Unless those obligations exist in relation to Bosnia and Herzegovina, it is difficult to see how this line of reasoning could be used to characterise any failure by Bosnia and Herzegovina to adequately supervise other prisoners as acquiescence or condonation. Even if those obligations existed, there would still be the factual difficulties regarding breach to which I have referred.

[100] In my opinion, this aspect of the applicant's submissions is not a submission about the construction of s 7(c) at all. Rather it is a submission about how the court, or a s 19 Magistrate, might go about its fact finding in order to determine whether the harm a person claims she or he may face on surrender is harm that the requesting state can properly be said to condone, or be complicit in. I will return to this matter when I consider the evidence.

[101] At the level of general principle however, in my opinion it is difficult to imply into a provision such as s 7(c) an intention to capture omissions, even if they are omissions where there is a duty to act. This is especially so where liability for omissions may differ from one requesting state to another, as might the circumstances in which any such duties that do exist will be breached.

[102] In my opinion, if state condonation of, or complicity in, the actions of non-state actors is to have a role in s 7(c), then the kind of condonation or complicity which would accord with its context and purpose would be restricted to circumstances where what could be attributed to the state was first, clear knowledge of the conduct of non-state actors, and second, some kind of support for or acceptance of the (prohibited) reasons actuating the non-state actors. In other words, there would need to be state condonation of, or complicity in, not only the conduct, but also the reasons for it.

Kalinovas

[103] *Kalinovas* concerned a number of challenges on a s 21 review to a surrender warrant issued by a s 19 Magistrate, one of which concerned an extradition objection made by Mr Kalinovas. Mr Kalinovas contended there were substantial grounds for believing that, if he were surrendered to Lithuania, he would be prejudiced at his trial because of his Russian nationality, or alternatively his Jewish religion. Mr Kalinovas also contended that on surrender to Lithuania there were substantial grounds for believing that any punishment imposed on him would be imposed because of his Russian nationality or Jewish religion. As [93] of her Honour's reasons records, Lithuania made a submission that s 7(c) was confined to what would occur at a person's trial and the nature of the sentence imposed. In dealing with Mr Kalinovas' contention, and Lithuania's submissions, Bennett J said at [96]:

> Mr Kalinovas' evidence is not directed to prejudice at trial. It is not directed to prejudice in punishment, detention or restriction of liberty by the state. Section 7(c) of the Act is not directed to what may happen to a person in gaol by reason of the actions of other inmates or guards, where those actions are merely of individuals and not shown to be caused by or condoned by the state. There is no evidence that Mr Kalinovas may be prejudiced, punished, detained or restricted in his liberty by the state, or at his trial, or in his sentence after trial.

[104] It is not clear whether Bennett J accepted Lithuania's argument that the phrase "prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty" was confined to what occurred at trial and in the imposition of any sentence. One way to read the second sentence of [96] is that her Honour did accept Lithuania's argument. However, in my opinion, the last part of the second sentence suggests that her Honour accepted that how a person is treated while she or he is detained, or serving a sentence of imprisonment, is capable of coming within s 7(c), provided that the causal nexus required is met and — critically — provided that the treatment occurs at the hands of, on behalf of, or with the acquiescence of the requesting state. It appears from her Honour's reasons that — perhaps because of the number of issues raised in the review in *Kalinovas*— the Court was not given the benefit of a detailed and comprehensive construction argument, such as that presented on behalf of the applicant in this case. Nevertheless, I am in substantial agreement with the approach her Honour took.

Conclusion on the construction of s 7(c)

[105] In conclusion, I do not accept that the phrase "may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty" in s 7(c) is properly to be construed as extending to harm inflicted on a person in prison while serving a sentence of imprisonment, or being held in some other form of state detention, unless the requesting state can be said to be involved in, complicit in, or condoning of, both the harm, and the reasons for the harm.

[106] Section 7(c) has, to be sure, a protective function insofar as the individual whose surrender is sought is concerned. However its context and purpose is different from the Refugees Convention. The scheme established by the Act is intended to facilitate the prosecution, trial and punishment of fugitive offenders, in accordance with the conditions and limitations agreed upon by the particular requesting state and Australia. In that sense, Australia's concern as evinced in the Act is with the conduct of the requesting state in the manner in which its system of criminal justice is administered, and applied to an individual. Section 7 is concerned with reasons, related to the conduct, practices or attitudes (and, in relation to provisions such as s 7(a), the politics) of the requesting state, as a polity. It does not have a more general protective function.

[107] The first respondent's construction of s 7(c) is to be accepted and will determine the orders of the Court on the s 21 review.

[108] Having reached that conclusion, and given the construction issue was the most significantly contested issue on the review, in my opinion it is appropriate for the Court to make findings on the evidence on the review by reference to both competing constructions, in order to determine whether the extradition objection is made out.

[109] Before turning to the fact finding, it is necessary to refer to the applicant's submission about onus. This arose from the particular circumstance that the applicant is able to give direct evidence about what happened to him in Bihac prison in 2007, which has been substantially accepted. Bosnia and Herzegovina relies on material to demonstrate that there has been a change in prison conditions, and, if requested by Australia, that there will be a change in where the applicant will be incarcerated if he is surrendered.

[110] The applicant submitted that, because extradition proceedings are adversarial, and the adversary is the extradition country, then once a person has shown that what happened to him in the past would, if repeated upon her or his

extradition, constitute harm for one of the reasons set out in s 7, the evidentiary onus should shift to the requesting state to show that there has been a material change in circumstances. The applicant relied on the shift in evidentiary burden recognised in some circumstances by the common law, referring to *Purkess v Crittenden* (1965) 114 CLR 164; [1966] ALR 98 and *Gould v Vaggelas* (1985) 157 CLR 215 at 238; 62 ALR 527. Given the findings I have made, it is unnecessary to address this argument.

Factual findings

[111] The first respondent relied on the following evidence given to the Magistrate by the applicant:

> 'how many times did you report these assaults to the authorities? — I reported it a number of times but (indistinct) when I suffered a physical beating however when those people who are responsible for having done were called to report about that, they would just deny it.'—'I want to ask you details about the first time you reported. I want to understand what actually happened. When you went to report it, who did you go to? — The person in charge who was around, walking around and looking, he asked me what happened, I told him what happened, and then he said he was going to report it to the high authorities. Is that what happened? — So, yes, and I was called to — told directly to the manager of the position, high position, and I spoke to him and he asked me questions and I told him what happened, I told him who did it to me and he said he was going to call those responsible and tell what happened.
>
> Were you there when that happened? — That was in the office so it was me first and then he said he was going to call those responsible. Do you know if he did call the responsible persons? — They did go there, they did not admit of having done anything but what followed after that was that blanketing and then I was told, "Now you can't report anything because you [can't] see."'—'do you remember whether you told the guard about that incident and what they said to you, if anything? — Well, we were — in that particular incident, I was sitting in the TV room and then during the news the man sitting next to me, he actually hit me with his elbow like that and I fell off the chair. So I walked out of the room and there was an officer and I told the officer what happened, the officer went in and he asked — inquired about it and others said, "No, no, nothing happened, didn't happen to, no-one did anything." The problem in prison is you will never have witnesses who would say that they witnessed something because they are scared for their own life particularly if someone who endangers (indistinct) because they know if they say anything they would be next'...
>
> 'Did you see where the guards were during that incident? — Well, shower time is usually after lunch but those people who assault they also know as to where the guard was at that particular moment so if they wanted to assault them they would do any place where guards were not present.' 'Did the guards ever come to your assistance when you were being blanketed at night? — (Through Interpreter) When blanketing is happening no-one can do anything about it but after that I would go out, go to the toilet or to wash my face and if I say to the guard, "I've been blanketed again," they said, "Well, why don't you look after yourself?" Because no-one can help with that.'

[112] In my opinion, this does not show, as the first respondent contended, that the prison authorities took steps to investigate the allegations. Taken as a whole, it shows a disdain, or disinterest in the applicant's complaints and in what had happened to him, and might continue to happen to him, at the hands of other prisoners. This evidence also reveals the retribution exacted by the other prisoners after the applicant complained.

[113] The first respondent relied on one part of the applicant's evidence to a considerable extent:

> ... do you know if any of the men who attacked you were ever punished? — Yeah, they could be locked in the solitary cell or would not get weekend leave.

[114] As the applicant's counsel pointed out, it is necessary to read this answer in the context in which it was given. Some of the applicant's evidence before this answer made it clear that, so far as he was concerned, none of the prisoners had been punished for what they did to him. After he gave this answer, his then counsel sought to ask some further questions, to which counsel for Bosnia and Herzegovina objected. Before the Magistrate could rule on that objection, there was an intercession by the interpreter, which resulted in the interpreter completing what the applicant had said after the evidence I have extracted above. The complete answer included the following:

> I thought I was asked how people would be punished in case they did something, that was my understanding of the question asked and the answer I gave earlier.

[115] That evidence is consistent with the interpreter's use of the verb "could" in the previous answer.

[116] Then there were the following questions and answers:

> And what I'm asking you is whether or not the guards ever did anything, as far as you're aware, to find out who did it or to punish them? Was there ever any consequence that you're aware of from your complaint? — (Through Interpreter) The guard (indistinct) asked the question, "Did anyone do this?" and they would just say, "No," and then he would just caution them or warn them not to do such things, and that was the end — I mean the guard warned people in that cell and that would have been the end of it.
>
> And after that morning, did it happen again? — Yes, normally. This goes on all this beating. It all happens because there are no witnesses. It's a different story if there is a stabbing or someone killed then the matter has to go further but no-one admits anything and it just keeps on going.
>
> Was that your experience, that it kept on going all of the time you were there? — Yeah, that kept happening throughout the entire period.

[117] The only cross-examination of the applicant concerned whom he had told about what happened to him in Bihac prison, although no submission of recent invention was ultimately made to the Magistrate. After a series of objections and argument, the critical question and answer on this was as follows:

> Since 2014 have you told anyone, except for your lawyers, about the occasions on which you complained to prison guards in the Bihac Prison? — Well, I did not tell anyone in my case because — and also I don't remember having told anyone, I didn't feel I needed to tell anyone other than my solicitors.
>
> Thank you, Your Honour, no further questions.

[118] The applicant's account of what happened to him was not challenged by Bosnia and Herzegovina as to its accuracy and reliability. The single answer the first respondent sought to rely on was, in my opinion, taken out of its context in submissions. The applicant's evidence, as a whole, was not that any prisoner had in fact been disciplined or reprimanded for what they did. I have set out the summary of his evidence as put by his counsel on the review at [36] above. In the circumstances, there is no reason to consider that evidence to be unreliable and I proceed on the basis that his account should be accepted. The applicant's evidence shows that on several occasions he was seriously mistreated by other prisoners by reason of, at least, his political opinions as I have outlined them at [36] above. Although his marriage to an Orthodox Christian woman and his

daughter having a Christian name were also identified as reasons, it is not clear that these matters fit easily within "his ... religion" in s 7(c). There is no evidence the applicant himself is a Christian, or that he was perceived to be one in the prison. In submissions, the Court was not directed to any evidence that the applicant otherwise had religious beliefs which caused other prisoners to single him out for mistreatment.

[119] On the applicant's own evidence, I accept that there were, at the time he escaped custody in 2007, substantial grounds for believing that if he were to be surrendered to Bosnia and Herzegovina, and placed back into a prison in Bosnia and Herzegovina, he would be seriously mistreated by other prisoners by reason of his political opinions, actual or perceived.

[120] Were there, in 2015, still substantial grounds for that belief?

[121] Bosnia and Herzegovina submitted that less weight should be given to the applicant's evidence because it related to events in 2007, and the situation in Bosnia and Herzegovina, and in its prisons in particular, was much changed by 2014.

[122] The first respondent largely relied on reports by the US State Department dated 24 May 2012 and 27 February 2014, both of which note that the state body responsible for monitoring prison conditions visited and monitored conditions in several prisons, including Bihac prison. In its submissions, the first respondent placed significance on the fact that the two reports highlight that the monitoring body had raised concerns about the conditions in other prisons, including, in some instances, in relation to inter-prisoner violence, but did not raise any issues about Bihac prison:

> In a report of the US State Department dated 24 May 2012, the US State Department notes that 'the Council of Ministers' commission monitoring conditions in prisons visited prisons in Zenica, Doboj, Tuzla and Bihac.' The report notes that 'There were also significant problems with prisoner-on-prisoner violence or intimidation at Zenica and Foca prisons' but does not note that there were any problems with inter-prisoner violence at Bihac prison ...
>
> In a report of the US State Department dated 27 February 2014, the US State Department notes that 'the state-level parliament's Commission for Monitoring Conditions in Prisons' visited prisons in Mostar, Trebinje, Zenica, Banja Luka, Bihac, Doboj, Orasje, Foca, Tuzla and Bijeljina. While the report notes issues with the conditions of imprisonment at Zenica and Trebinje, and noted a concern about prisoner hygiene in relation to unspecified prisons, the report does not note any concern about Bihac prison, and no generalized concern about inter-prisoner violence in the prisons that had been visited.
>
> (Footnotes omitted.)

[123] It was at this point Bosnia and Herzegovina also sought to rely on the correspondence admitted before the Magistrate, to which the applicant objected under the Evidence Act. I have ruled that the correspondence should properly be before the Court on the s 21 review. However, in my opinion, it is not possible to place any real weight on it, in the absence of an opportunity for the applicant to cross-examine the authors of the correspondence, or at least someone called on behalf of Bosnia and Herzegovina to depose to the truth of what is in that correspondence. This was the issue at the centre of the applicant's extradition objection, and this material remains wholly untested, by reason of a forensic choice made by Bosnia and Herzegovina. In my opinion, it is not possible to give the evidence any real weight, in relation to the determination of the extradition objection. The situation may be different if aspects of this correspondence are

subsequently put to the Attorney-General under s 22, and in effect become an assurance relevant to the Attorney-General's residual discretion under s 22(3)(f).

[124] I am not satisfied, on the material before the Court, that there is sufficient probative and reliable material for the Court to be persuaded that circumstances in prisons in Bosnia and Herzegovina have changed so much that there is no real possibility the applicant will be subjected to the kinds of harm I have accepted he was subjected to in 2007 at the hands of other prisoners, and for the reasons I identified: namely, his actual or imputed political opinions. The assurance given by Bosnia and Herzegovina was general, unsworn and untested and is insufficiently probative to change my view. The assurance was also, of course, self-serving in the sense of being advanced for the purpose of securing the applicant's surrender. That is one factor which made all the stronger the need for it, and the other material submitted by the requesting state, to be tested.

[125] Having made these factual findings on the evidence on the review, I turn to consider how those findings should be applied, to s 7(c), according to both the construction I accept is correct (the first respondent's) and, in case I am wrong, the construction I have found to be incorrect (the applicant's).

If the applicant's construction is correct, application to the facts

[126] If the applicant's construction is correct, then it matters not that the evidence rises only to the point of proving that the prison guards and prison authorities were agnostic about what was happening to the applicant at the hands of other prisoners. The evidence suggests that neither the guards nor those in charge of the prison were minded to take action against the alleged perpetrators, or even to investigate the allegations in any serious way.

[127] If all that is required by the applicant's construction is for the harm to occur while a person is undergoing "punishment" by way of serving a sentence of imprisonment, and for that harm to occur for one of the reasons set out in s 7(c), then my factual findings would lead to a conclusion in favour of the applicant. The extradition objection in s 7(c) would be made out on the applicant's evidence about what happened to him at the hands of other prisoners in 2007, and why they acted as they did, together with my finding that I am not satisfied that there is sufficiently probative material to establish a change in circumstances in prison conditions in Bosnia and Herzegovina.

[128] If, on the other hand, what is required by the applicant's construction is a positive finding of some breach of a duty of care by the prison authorities (falling short of acquiescence or condonation) and if, contrary to my conclusions, this second construction suggested by the applicant should be preferred, I would not be satisfied that the extradition objection was made out.

[129] On the findings I have made, the prison guards failed to supervise and control the conduct of other prisoners towards the applicant, in circumstances where it was more than "on the cards" (see *Bujdoso* at [44]) that he would continue to be harmed. It could be said that some of the prison guards knew why he was being harmed, but stood by, expecting him to protect himself. If the common law applied, one might be some way towards a finding of a breach of duty of care. But the common law of Australia cannot be applied to the conduct of officials in Bosnia and Herzegovina. If international law applied, one might be some way along the road to a finding of breach of certain international obligations. But the Court does not know (and the Magistrate did not know) whether Bosnia and Herzegovina has assumed any such obligations. If on the

evidence there was an omission by the prison guards (and perhaps, by inference, by the prison authorities at Bihac prison), the Court cannot, and the Magistrate could not, have determined whether it was an omission to which a legal duty attached.

[130] In these circumstances, where there could be said to be evidence of omissions but no evidence of a correlative legal duty, I cannot see how on the applicant's second construction, there is an extradition objection available to the applicant under s 7(c).

If the first respondent's construction is correct, application to the facts

[131] If the first respondent's construction is correct, which I have found it to be, the evidence does not rise to the point of the Court being able to say that there are substantial grounds for believing that the prison authorities of Bosnia and Herzegovina (assuming for the purpose of this argument that those authorities can be equated with the state of Bosnia and Herzegovina) were complicit in or condoned the mistreatment of the applicant by the other prisoners, and condoned or were complicit in the reasons for that treatment. It might be said that the evidence shows an abject lack of concern for the applicant's welfare. Whether that was for lack of resources, personality, apathy, indifference, or a reflection of general community attitudes to prisoners in Bosnia and Herzegovina, or for some other reason, is not apparent on the evidence.

Conclusion

[132] I have concluded that the applicant has not established an extradition objection pursuant to s 7(c) of the Act. As such, the decision of the Magistrate should be confirmed and the application under s 21 of the Act, and the application under s 39B of the Judiciary Act, should be dismissed.

[133] However, I have found that the applicant's evidence about what happened to him in Bihac prison in 2007 at the hands of other prisoners was reliable and should be accepted. I have also found that there is insufficient evidence of any material change in the current prison conditions in Bosnia and Herzegovina — and in particular the prisoner demographics in various prisons and the level of effective supervision and control of prison guards by Bosnia and Herzegovina — to displace my opinion that the applicant may face serious physical harm from other prisoners during any incarceration or detention in Bosnia and Herzegovina. It would be appropriate for those matters to be drawn to the Attorney-General's attention for the purposes of the decision to be made under s 22 of the Act, although of course better and further information may well be available at that stage.

[134] Accordingly, I determine that the applicant, Rasim Traljesic, is eligible for surrender, within the meaning of s 19(2) of the Extradition Act 1988 (Cth), in relation to the following extradition offences:

(1) attempted murder in violation of Art 166, paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina in conjunction with Art 28 of the Criminal Code of the Federation of Bosnia and Herzegovina; and

(2) causing general danger, contrary to Art 323, paragraph 3 of the Criminal Code of the Federation of Bosnia and Herzegovina.

[135] I have decided that it is not appropriate to make an order for costs on the review. The applicant is subject to a coercive process, designed to remove him to Bosnia and Herzegovina. As part of that process, and according to law, he is

deprived of his liberty. The Act gives him a right to contest the extradition request on certain grounds, and he has exercised that right, but only in a limited fashion and on arguable grounds. He has not caused any delay, nor has he by unsustainable arguments occasioned unnecessary cost for the first respondent. The review was conducted efficiently and co-operatively, with the hearing completed in a single day. In those circumstances, the interests of the administration of justice are best served where persons in the position of the applicant are able to access the processes for which the Act provides so as to challenge an extradition request, without apprehension of any undue or unsustainable financial burden being imposed upon them if their reasonable and arguable challenges are, in the end, unsuccessful.

[136] Finally, counsel for the applicant appeared pursuant to a referral made by the Court under r 4.12 of the Federal Court Rules 2011 (Cth). Her careful and thorough arguments were of great assistance to the Court, and the Court acknowledges the significant contribution to the administration of justice which was made by her acceptance of the referral in this proceeding.

Orders

THE COURT ORDERS THAT:

1. The order of Magistrate Holzer (the second respondent) dated 20 August 2015, made under s 19(9) of the Extradition Act 1988 (Cth), is confirmed.
2. The application for judicial review under s 39B of the Judiciary Act 1903 (Cth) is dismissed.
3. There be no order as to costs.

THE COURT DETERMINES THAT:

1. The applicant is eligible for surrender, within the meaning of s 19(2) of the Extradition Act 1988 (Cth), in relation to the following extradition offences:
   (a) attempted murder in violation of Art 166, para 1 of the Criminal Code of the Federation of Bosnia and Herzegovina in conjunction with Art 28 of the Criminal Code of the Federation of Bosnia and Herzegovina; and
   (b) causing general danger, contrary to Art 323, para 3 of the Criminal Code of the Federation of Bosnia and Herzegovina.

DR DAVID ROLPH