IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B 19 of 2011

BETWEEN:

JULIAN MOTI (Appellant)

and

THE QUEEN (Respondent)

APPELLANT'S REPLY

The witness payments

1. In considering how the payments would be viewed by the right-thinking member of the community, it would be wrong to disregard the political motivation underlying this prosecution. The political origin of this prosecution provides the only plausible explanation for why, according to the respondent, payments such as these are unprecedented and will not be made again.[1] The fact that the appellant was investigated for political reasons also diminishes the public interest in the prosecution proceeding.

2. The learned primary judge accepted that the AFP investigation was prompted by political considerations.[2] Contrary to the respondent's submissions, there is evidence of political matters influencing AFP officers. The evidence reveals, for example, an AFP officer suggesting an attempt be made to have the appellant de-registered as a lawyer in Solomon Islands, because an investigation would not be a short-term solution to his nomination as Attorney-General.[3] AFP officers wrote or contributed to documents concerning the political implications of the appellant's appointment as Attorney-General. In September 2006 the AFP suggested they go public about the investigation as a strategy to prevent the appointment.[4] Mr Cole suggested methods of investigation which were passed on to AFP officers.[5] FA Bond expressed concern about the fate of the Regional Assistance Mission to Solomon Islands ('RAMSI') if the appellant were appointed Attorney-General[6] or were not deported.[7]

[1] See Transcript at 11-70 - 11-74
[2] [200] QSC 407 at [46].
[3] Appeal Book Vol 3 p 1145.
[4] Appeal Book Vol 3 p 1174-1175.
[5] Appeal Book Vol 3 p 1157
[6] Appeal Book Vol 3 p 1186
[7] Appeal Book Vol 2 p 730.

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3. The denial by the AFP of the witnesses' requests to be relocated to Australia or the south of France did not amount to proper limits being placed on the assistance the AFP provided.[8] A direction was given by the Deputy Director of the CDPP that only expenses associated with being a witness should be paid, and any payment must not leave open the inference that it was a payment in return for evidence.[9] The AFP and the CDPP evidently ignored this advice as there was no effort made to restrict the payments to expenses associated with being witnesses.

4. Further, the use to which the payments were put was not properly monitored. Payments to be used for rent were misappropriated with no sanction.[10] The AFP were informed that the complainant's family in Vanuatu were employing house staff and leading an extravagant lifestyle.[11] The payments were provided on condition that the recipients make reasonable efforts to seek paid employment.[12] There is no evidence of any attempt by the AFP to monitor compliance with this condition, or of any reduction in payments on account of any income derived by the witnesses

5. The respondent relies on the public interest in the prosecution proceeding. The public interest is diminished not only by political motivation for the investigation but the delay in commencing it, and the fact that the appellant was discharged at committal on the same allegations in Vanuatu in 1999. The fact that the extraterritorial offences charged were desgined to cover offences not prosecuted in the country in which they were committed is also relevant to the public interest.[13] Ostensibly in support of its argument concerning the public interest, the respondent has included in the appeal books and in a chronology it has filed irrelevant and prejudicial material. This appeal is not an opportunity for the respondent to litigate the case against the appellant.

The unlawful rendition of the appellant

6. The appellant makes two submissions concerning the appellant's rendition:[14]

   (a) first, on the facts found at first instance, it followed as a matter of law that the Australian executive was a party to the appellant's rendition; and

   (b) secondly, some evidence in respect of which there was an erroneous failure to make findings shows that the Australian executive was a party to the appellant's rendition.

7. The appellant's primary argument on the first point is that the failure to characterise the actions of the Australian authorities as amounting to connivance or involvement in the unlawful removal is an error of law.[15] The approach to the facts in the courts

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[8] Contrary to the respondent's submissions at [18] and the reasons of Holmes JA [2010] QCA 178 at [35]
[9] Appeal Book Vol 3 p 1249.
[10] Appeal Book Vol 3 p 1289
[11] Appeal Book Vol 3 p 1242.
[12] *R v Moti* [2009] QSC 407 at [60]; Appeal Book Vol 3 p 1292.
[13] Commonwealth Parliament, House of Representatives, *Hansard*, Tuesday 3 May 1994 p 72.
[14] There is nothing inappropriate in using the term 'rendition'. It refers to the return or surrender of persons to a jurisdiction. It is used in the cases: eg, *Vasiljokovic v Commonwealth of Australia* (2006) 227 CLR 614 at [82], [87] and [105]
[15] Appellant's submissions at [40], citing *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450 (Gleeson CJ, Gummow and Callinan JJ)

below reflects an erroneous understanding of the notion of complicity employed in the disguised extradition cases. Causation is not the test for complicity.

8. On the second argument, the appellant is entitled to challenge the fact-finding exercise undertaken in the Courts below.[16] It is clear that the principles governing the review of discretionary judgments set out in *House v R*[17] apply in appeals concerning orders to grant or refuse a permanent stay of proceedings.[18] Mistaking the facts and failing to take into account relevant considerations are both grounds for appellate intervention in accordance with those principles.[19] Further, as Fraser JA stated in the Court below: "... *what is in question in a "strict appeal" from an order is whether the order was right or wrong on the evidence and the law as it stood at the time of the decision.*"[20] The respondent simply asserts that it is impermissible for the appellant to challenge the fact-finding exercise without citing authority. The relevant evidence is confined and is all before this Court.

9. Mr Wickham and Mr Suri did not give evidence at the hearing. Whether the views they expressed about the legality of the deportation were held in good faith does not matter, but must be doubted given the thoroughly specious nature of those views.

10. The fact that Ms Bootle and FA Bond were not lawyers is irrelevant. Members of the executive do not need to be legally qualified to be amenable to the application of the principle recognised in *Bennett* and *Levinge*. In any event, they were constantly communicating with Canberra in order to obtain legal advice, and sent copies back to Canberra of relevant judgments, legislation, and of the injunction obtained by the appellant. There is no room for doubt that the Australian authorities knew full well of the blatant illegality of what was proposed.[21] FA Bond's denials in oral evidence that he knew of the illegality of the proposed deportation were exposed as false.[22]

11. The respondent submits that the Australian government "pressed" for the appellant's extradition after the change of government.[23] The Australian government did nothing to "press" for the appellant's lawful return by extradition beyond sending a further formal request. It did so knowing it would not be acted upon. Australian officials followed the advice from Canberra not to discuss the means of the appellant's return, and not to express a preference for extradition or deportation.

12. The fact that Mr Marshall had received from another source the same 'legal advice' FA Bond passed on to him does not alter the fact FA Bond's conduct clearly amounted to connivance in and encouragement of the unlawful deportation. The test for complicity is not whether the secondary party caused the actions of the principal.

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[16] *Australian Iron & Steel Pty Ltd v Luna* (1969) 123 CLR 305 at 320 (Windeyer J) and *Mickelberg v R* (1989) 167 CLR 259 per at 267 (Mason CJ)

[17] (1936) 55 CLR 499 at 505

[18] See *R v Carroll* (2002) 213 CLR 635 at 657 [73] (Gaudron and Gummow JJ).

[19] See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [75].

[20] [2010] QCA 178 at [62]. His Honour cited numerous decisions of this Court in support of that formulation. To these may be added *Roads and Traffic Authority v Royal* (2008) 245 ALR 653, a case in which this Court saw fit to intervene to correct an error of fact made in the Courts below

[21] The respondent's position at first instance was that, if the deportation was illegal (which was not conceded) it was not illegal to the knowledge of any Australian official or entity: see Appeal Book Vol 3 p 1058-1059

[22] See T 6-87 Appeal Book Vol 1 p 233; and T 8-49 Appeal Book Vol p 286; and Appeal Book Vol 3 p 1219. This email was only disclosed to the appellant after FA Bond had given evidence on day 6 of the hearing

[23] Respondent's submissions at [6].

Justiciability

13. The respondent's reliance on the principle of non-justiciability is misplaced. The principle is not applied in any of the leading cases concerning disguised extradition. In *Levinge*,[24] for example, Kirby P and McHugh JA clearly treated as justiciable the question of the legality of the conduct of the FBI in taking the accused from Mexico to the United States. In *R v Mullen*, the Court had regard to the fact that domestic Zimbabwean legislation concerning deportation was breached.[25] The jurisdiction to relieve against abuse of process in these cases could not function effectively if Courts could not make relevant findings concerning events occurring in foreign countries.[26]

14. The respondent argues that *Bennett's* case effects no change to the applicability of non-justiciability because in that case there was a finding of complicity.[27] This implies that, if there were a finding of complicity in this case, then the question of the legality of the appellant's arrest and removal might become justiciable.[28] This is illogical. In *Levinge*, McHugh JA said that, *logically*, the first issue to consider is the legality of the appellant's removal.[29] The question of complicity can then be considered by reference to identified conduct. This is the approach which should have been followed in the courts below. The illogical nature of the respondent's submissions is reflected in the grounds of the respondent's Notice of Contention These are circular and as a consequence beg the question.

15. The respondent seeks to stretch the application of the act of state doctrine beyond its limits. In doing so the respondent seems to ignore the judgments in *Habib v Commonwealth of Australia*[30] and *Re Ditfort, Ex Parte Deputy Commissioner of Taxation*.[31] The limits of the act of state doctrine could be seen to explain why it is not applied in abduction cases. The principle of non-justiciability does not extend to:

    (a) cases where "judicial or manageable standards" govern the issues;[32]

    (b) conduct by a State which breaches human rights and international law;[33] and

    (c) matters which require determination in the exercise of federal jurisdiction flowing from Ch III of the Constitution.[34]

16. With respect to the first point, the terms of the Deportation Act (SI) clearly:

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[24] *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546.
[25] [2000] QB 520 at 528-529
[26] See further [18] below.
[27] Respondent's submissions at [32] There was no finding of complicity as such in *R v Horseferry Magistrates' Court; Ex Parte Bennett (No 1)* [1994] 1 AC 42, in which a question of law was referred to the House of Lords. The finding of complicity on the facts was made later in *R v Horseferry Road Magistrates' Court; Ex Parte Bennett (No 4)* [1995] 1 Cr App R 147
[28] This also seems to be the approach adopted by Holmes JA: see *R v Moti* [2010] QCA 178 at [48]
[29] (1987) 9 NSWLR 546 at 560D.
[30] (2010) 183 FCR 62 ('*Habib*').
[31] (1988) 19 FCR 347 at 368-372 (Gummow J) ('*Ditfort*')
[32] *Buttes Gas & Oil Co v Hammer* (No 3) [1982] AC 888 at 938 (Lord Wilberforce); *Habib* (2010) 183 FCR 62 at [100] (Jagot J).
[33] *Habib* (2010) 183 FCR 62 at [7] (Black CJ) and [135] (Jagot J); *Kuwait Airways Corp v Iraqi Airways Company* [2002] 2 AC 883 at [18] (Lord Nicholls); [139]-[140] and [145] (Lord Hope); *Oppenheimer v Cattermole* [1976] AC 249
[34] *Habib* (2010) 183 FCR 62 at [29] and [37] (Perram J); *Ditfort* (1988) 19 FCR 347 at 368-372 (Gummow J)

(a) provided for a person to apply to the High Court for review of a deportation order within seven days of that order being served on them;[35] and

(b) prohibited the execution of a deportation order until such an application had been dealt with.[36]

17. The Court injunction the appellant obtained which specifically prohibited his arrest and deportation also provided a clear standard of legality.

18. With respect to the second point, the appellant's human rights were breached, contrary to international law. The appellant's treatment breached the following provisions of the International Covenant on Civil and Political Rights ('ICCPR'):

> *Article 9*
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> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> ...
>
> 4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

19 The cases of *Habib* and *Ditfort* deal with the third point. It follows from those decisions that the conduct of Australian officials in dealing with the Solomon Islands Government in relation to the appellant's rendition gives rise to a justiciable matter under Ch III of the Constitution.[37] In *Ditfort*, Gummow J specifically referred to disguised extradition cases as examples of cases which concern the conduct of international relations and which may give rise to a 'matter' justiciable at the suit of an individual.[38] This case concerns the conduct of the Australian executive in dealing with a foreign country, but also raises the question of the integrity of a Court exercising federal jurisdiction being compromised by a prosecution of an Australian citizen which amounts to an abuse of process.[39]

20 All of the conduct relied upon by the appellant as constituting Australian involvement in the deportation is justiciable. There is no basis to treat differently the issuing of travel documents for the appellant and the Solomon Islands officials who escorted him from Honiara to Brisbane.

Dated this 14th day of June 2011.

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Mr Robert Herd per
Ian Barker QC and PJ Doyle
Counsel for the appellant

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[35] S 5(3) of the Deportation Act [Cap 58] (SI) as amended by the Deportation (Amendment) Act 1999 (SI).
[36] S 7(2) of the Deportation Act [Cap 58] (SI) as amended by the Deportation (Amendment) Act 1999 (SI).
[37] *Habib* at [29] and [37] (Perram J); *Ditfort* at 372 (Gummow J).
[38] (1988) 19 FCR 347 at 370, citing *Schlieske v Minister for Immigration* (1988) 84 ALR 719.
[39] See *Kable v DPP (NSW)* (1996) 189 CLR 51 and *Dupas v R* (2010) 241 CLR 237 at [15].