IN THE HIGH COURT OF AUSTRALIA **NO P 50 OF 2013**
PERTH REGISTRY

On appeal from
the Full Court of the Federal Court of Australia

BETWEEN: **COMMONWEALTH MINISTER FOR JUSTICE**
Appellant

10 **AND:**

ADRIAN ADAMAS
First Respondent

COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
Second Respondent

20

FIRST RESPONDENT'S SUBMISSIONS

30

40

Filed on behalf of the First Respondent by:

O'Connor Lawyers
Level 7, 524 Hay Street
Perth WA 6000

Date of this document: 7 November 2013

Telephone: 08 92214333
Facsimile: 08 9221 4344
Email: lawyers@oconnor.com.au
Ref: John O'Connor

PART I FORM OF SUBMISSION

1. These submissions are in a form suitable for publication on the internet.

PART II THE ISSUES

2. This matter concerns an exercise of power by the Minister under s.22(2) and s.23 of the *Extradition Act 1988*. Mr Adamas is an "eligible person" by reason of s.22(1)(b). In respect of the power exercised by the Minister under s.22(2), s.22(3)(e) requires the Minister to have regard to "limitations, conditions, qualifications or exceptions" provided for in any regulations referred to in s.11 of the Act. Relevant are the *Extradition (Republic of Indonesia) Regulations 1994*. Regulation 5 provides that the Act applies subject to the Treaty set out in the schedule to the Regulations. Article 9(2)(b) is a limitation, condition, exception or qualification to the Act, within the meaning of s.11 of the Act.

3. As the Appellant correctly observes[1], s.22(3) of the Act requires that Mr Adamas only be surrendered if the Minister[2] is satisfied that Mr Adamas' extradition would not be "unjust, oppressive or incompatible with humanitarian considerations" within the meaning of Article 9(2)(b), or that surrender should nevertheless not be refused.

4. Determination of the issue on appeal and that arising under the Notice of Contention involves the following. First, construction of Article 9(2)(b), and whether, in determining whether extradition would be "unjust, oppressive or incompatible with humanitarian considerations", these matters are to be assessed according to Australian standards or on some other basis. Second, if Australian standards are the basis of assessment, how Australian standards are ascertained.

5. A further issue arises from the refusal of the Minister to provide reasons for his decision - whether, in the absence of reasons, a Court exercising judicial power of review of this decision can infer that the Minister did not take into account relevant considerations or took into account a wrong consideration.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

6. The first respondent has considered whether any notice should be given to comply with s.78B of the *Judiciary Act 1903* (Cth) and concluded that such notice is not required.

[1] Appellant's Submission at [5].
[2] Being the delegate of the Attorney General.

PART IV FACTS

7. As the Appellant observes[3], facts in this matter largely concern the contents of Attachment B, having regard to the advice to the Minister at [5] of page 2 of the Departmental Submission.

8. In Attachment B, the relevant advice is at [158]-[260], in light of [45]-[60], [73]-[75] and [102].

PART V APPLICABLE LEGISLATION

10

9. This is correctly set out in the Appellant's Submission.

PART VI STATEMENT OF ARGUMENT IN ANSWER TO ARGUMENT OF THE APPELLANT

CONSTRUCTION OF ARTICLE 9(2)(b)

10. Section 22(3) of the Act required the Minister to answer whether the circumstances in Article 9(2)(b) existed[4]; namely, whether Australia considered that, in the
20 circumstances of Mr Adamas' case, his extradition "would be unjust, oppressive or incompatible with humanitarian considerations".

11. Article 9(2)(b) commences by requiring that account be taken of the nature of the offence and the interests of Indonesia. This is followed by reference to "the circumstances of the case". These circumstances are to be considered by the Minister and account taken of the nature of the offence and the interests of Indonesia, in arriving at the conclusion of whether extradition of would be unjust, oppressive or incompatible with humanitarian considerations by reference to Australian standards.

30

12. Article 9(2)(b) is, other than in referring to age, health and other personal circumstances of the person sought to be extradited, silent as to what are the "circumstances of the case" relevant to whether extradition would be unjust, oppressive or incompatible with humanitarian considerations. Clearly enough as a matter of construction, circumstances other than age, health and other personal circumstances are relevant.

13. The Appellant accepts that the standard of what is "unjust, oppressive or incompatible with humanitarian considerations" is assessed by reference to Australian standards[5]. It
40 cannot sensibly be otherwise.

14. On this understanding, the relevance of a particular circumstance is determined by whether it bears upon injustice, oppression or incompatibility with humanitarian

---

[3] Appellant's Submission at [11].

[4] See *Foster v Minister for Customs and Justice* [2000] HCA 38; (2000) 209 CLR 442 at 447 [7] (Gleeson CJ and McHugh J).

[5] Appellant's Submission at [39].

considerations understood by reference to Australian standards.

15. It is evident from the terms of Article 9(2)(b) that the matter which is to be assessed as being "unjust, oppressive or incompatible with humanitarian considerations" is extradition of X, not the conviction of X[6]. But, if the circumstances of a person's conviction and sentence were unjust and oppressive, generally, so too would be extradition unless there is something in the "nature of the offence" or the "interests of the Requesting State" that would countervail this.

16. As to "nature of the offence", as Olsson J observed in *Perry v Lean*[7] the nature or seriousness of the offence may be a double-edged sword – the more serious the offence the more important it is to ensure that the return of the person is not unjust or oppressive.

Unjust, oppressive or incompatible with humanitarian considerations - assessment by Australian standards

17. The Appellant accepts that in determining whether an extradition would be "unjust, oppressive or incompatible with humanitarian considerations", the Minister determines this by reference to Australian standards of what is "unjust, oppressive or incompatible with humanitarian considerations"[8]. This concession accords with *Foster*, where Gaudron and Hayne JJ observed, in respect of an extradition treaty formulation of "unjust or oppressive or too severe a punishment"[9]:

> "The other question which arises is what is the standard which the words 'unjust or oppressive or too severe a punishment' set? Unjust or oppressive by what measure? Too severe by what measure? The answer must be that the value judgment which the expression requires is to be made according to Australian standards[[10]], not the standards of any other country. It requires consideration of how the offence or offences for the prosecution of which the extradition is sought would be viewed in this country. Is surrender of the eligible person for that offence, or those offences, unjust or oppressive or too severe a punishment?"

18. This *dicta* is consistent with prior authority in the Full Court of the Federal Court and followed in subsequent decisions[11].

---

[6] In the Appellant's Submission at [44]-[45] it is asserted that the majority in the Full Court erred by assessing whether 'conviction' as opposed to 'extradition' would be unjust. With respect, this error is wrongly attributed. Their Honours directed themselves to the correct question; see FFC at [129]-[130], [324]-[328], [331]-[332], [428]. See also Lander J, FFC at [75].

[7] (1985) 39 SASR 515 at 542.

[8] Appellant's Submission at [39].

[9] [2000] HCA 38; (2000) 200 CLR 442 at 458 [43]. See also Kirby J at 466-477 [93], 478 [95].

[10] Citing, La Forest, *Extradition to and from Canada*, 3rd ed (1991), p 241.

[11] In *Bannister v New Zealand* (1999) 86 FCR 417 at 430 [26], the Full Court stated, in respect of the standards to be applied in determining whether surrender to New Zealand would be unjust or oppressive, that: "Clearly enough, the standards to be applied to that issue are those which prevail in the Australian community." See also, *Newman v New Zealand* (2012) 206 FCR 1 at 7-8 [24]-[25]; *New Zealand v Moloney* (2006) 154 FCR 250 at 276 [139]; *Moloney v New Zealand* (2006) 235 ALR 159 at 176 [72], 189-190 [131]-[132]; *Binge v Bennett* (1998) 13 NSWLR 578 at 596-597; *New Zealand v Venkataya* (1995) 57 FCR 151 at 164-165, 171.

How Australian standards are assessed under Article 9(2)(b)

19. As will be explained, at one level this issue does not arise in this matter. It is obvious that a conviction in the circumstances of Mr Adamas are unjust, oppressive or incompatible with humanitarian considerations assessed by Australian standards. It is difficult to imagine any final and binding conviction and sentence more offensive to Australian standards of what is unjust, oppressive or compatible with humanitarian considerations than the circumstances of Mr Adamas' trial, unappealable conviction and sentence.

10 20. Reasoning to this end cannot be better expressed than by McKerracher J at [133].

21. To the extent that Australian standards of whether an extradition would be unjust, oppressive or incompatible with humanitarian considerations are informed by international law and practice, regard can be had to the following.

22. Article 14(3)(d) of the *International Covenant on Civil and Political Rights*[12] provides (relevantly) that a person has the right to be tried in his or her presence. Article 14(3)(e) of the *Covenant* provides (relevantly) that an accused person has a right to examine witnesses and call witnesses on the same terms as those called by the
20 prosecution. Article 67 of the *Rome Statute of the International Criminal Court* provides that — subject to Article 63(2) — an accused is entitled, among other things, to be present at the trial, to conduct the defence through legal assistance, to examine the witnesses against him and to obtain attendance and examination of witnesses on his behalf on the same conditions as witnesses against him. Article 63(2) provides one limited exception: where the accused is present before the court and continues to disrupt the trial. Even so, if the accused is removed from the court, provision is to be made for the accused to observe the trial and instruct counsel from outside the courtroom[13].

30

23. Decisions concerning Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedom* are to the same effect[14].

---

[12] Australia and Indonesia are parties to the *International Covenant on Civil and Political Rights.* Indonesia acceded to the *International Covenant on Civil and Political Rights* on 23 February 2006.

[13] The *Rome Statute of the International Criminal Court* is incorporated in Schedule 1 of the *International Criminal Court Act 2002* (Cth).

[14] See *Colozza v Italy*, Application No. 9024/80 ECHR (12 February 1985) at [29]; *Poitrimol v France,* Application No. 14032/88 ECHR (23 November 1993) at [31]; *Somogyi v Italy* (Application No. 67972/01, 18 May 2004) at [66]; *Sejdovic v Italy* (Application No. 56581/00, 1 March 2006) at [82]. In *The Government of the Republic of Albania v Bleta* [2005] 3 All ER 351; [2005] 1 WLR 3576 the Republic of Albania sought the extradition of the respondent who had been convicted *in absentia* for murder. The court held that the respondent's appeal rights in Albania did not constitute a right to retrial because the relevant Albanian law provided that "a repetition of judicial proceedings" will only be held "if the court thinks it is reasonable" (at 361-362 [24]-[26]; 3585-3586). In *Chen v The Government of Romania* [2006] EWHC 1752 (Admin) it was observed (at [8]) in respect of the "entitlement" to a re-trial that: "'Entitled' as a matter of ordinary language must mean 'has the right under the law'. It is the law of the requesting state which either confers or does not confer that right. It is a right which must be conferred, not merely the possibility of asking the court to exercise a discretion. Free of authority, I would hold it is neither necessary nor right to examine what a requesting state

THE CIRCUMSTANCES OF MR ADAMAS' CASE AS THEY WERE BEFORE THE MINISTER

24. What comprises the relevant circumstances of the case in Article 9(2)(b) is determined by whether a circumstance bears upon injustice, oppression or incompatibility with humanitarian considerations understood by reference to Australian standards.

25. These were identified in the material before the Minister, principally, Attachment B. The following are relevant to Australian standards of whether extradition of Mr Adamas would be "unjust, oppressive or incompatible with humanitarian considerations".

26. Attachment B at [58]; prior to any proceeding being commenced or attempt made to serve any papers on Mr Adamas, he had advised the Indonesian consulate in Perth of his address in Australia.

27. Attachment B at [45]-[47]; Mr Adamas was not personally served with any criminal process. He was in Australia when substituted service first occurred. Service was effected on the "village head" of Mr Adamas' last known address. The purpose of this service was so that the "village head" could hand what was provided to him to Mr Adamas, if he returned to his last known address. Notice of proceedings was placed in newspapers, obviously in Indonesia (see also [49], [51]).

28. Attachment B at [48]; the village head advised (presumably the Court) that Mr Adamas had not been contacted by him and had not returned to the village.

29. Attachment B at [52]; the prosecution requested that Mr Adamas and a co-accused be tried in their absence.

30. Attachment B at [54]-[56]; the trial proceeded without any evidence that Mr Adamas had been served with anything or was aware of the trial or the date of the hearing. The only positive evidence referred to in Attachment B was of the village head who advised that Mr Adamas had not been contacted by him and had not returned to the village.

31. At [17] of Attachment E1 (that was before the Minister); Mr Adamas (through his solicitors) stated that he had not been advised of either the trial or appeal.

32. Attachment B at [54]-[56]; Mr Adamas was convicted and sentenced in his absence. He was sentenced to lifetime imprisonment.

33. Attachment B at [57]; no appeal was lodged by Mr Adamas within the time period for

---

does in practice. Its law will either provide clearly for the relevant entitlement or it will not." The issue of whether a person convicted in absentia could be extradited to Albania was recently raised in the United Kingdom Supreme Court in *Kapri v Lord Advocate* [2013] UKSC 48 but it was conceded by counsel at [24] on the basis that it had now been accepted by the English courts that Albania would grant a retrial to those convicted in absentia following the decisions of *R (Mucelli) v Secretary of State for the Home Department* [2012] EWHC 95 (Admin) at [55] and *Zeqaj v Albania* [2013] EWHC 261 (Admin) at [16].

appeal.

34. Attachment B at [75]; the co-accused (Mr Sutrisno), who was also tried *in absentia,* lodged an appeal. He was resident in Singapore at the time of the appeal.

35. Attachment B at [102]; the Indonesian prosecuting authorities joined Mr Adamas as a party to the appeal by the co-accused (Mr Sutrisno). The appeal bound both Mr Adamas and Mr Sutrisno even though Mr Adamas did not bring the appeal[15]. As a result, Mr Adamas no longer has a right of appeal and his conviction and sentence are final and binding[16].

10 36. Attachment B at [225]-[239]; Mr Adamas, if extradited, may request a PK review. It is far from an appeal.

37. Attachment B at [242]; in Indonesia, a sentence of lifetime imprisonment is imprisonment until death.

38. So, the relevant circumstances of Mr Adamas' case were these; if extradited to Indonesia Mr Adamas will spend the rest of his life in gaol for offences for which he was tried in his absence; where there is no proof, and Mr Adamas denies, that he was
20 aware of the charges laid against him, of his trial or conviction prior to the request for extradition. This in the circumstance where Mr Adamas lived openly in Perth and had advised the Indonesian consulate of his address. All this also in the circumstance that, in respect of this conviction and sentence, he cannot now appeal.

THE GROUNDS OF REVIEW IN THIS MATTER

39. The relevant consideration, to which the Minister failed to have regard was that identified by McKerracher J; "the manifest injustice by Australian standards"[17] of
30 extradition where, if extradited, Mr Adamas will spend the rest of his life in gaol for offences for which he was tried in his absence; where there is no proof, and Mr Adamas denies, that he was aware of the charges laid against him, of his trial or conviction prior to the request for extradition; where Mr Adamas lived openly in Perth and had advised the Indonesian consulate of his address; and where Mr Adamas cannot now appeal.

---

[15] Footnote 4 of the Appellant's Submission refers to Lander J at FFC [16] to the effect that it was not clear whether Mr Adamas' right to appeal was extinguished by the appeal of the co-accused or by the expiry of the time limit for filing an appeal. This does not accurately reflect the advice to the Minister set out at [102] of Attachment B concerning Article 141 of the Indonesian Criminal Code. The Indonesia Ministry of Law and Human Right's letter dated 11 May 2010 (Attachment E3) at 6 confirms that Mr Adamas was joined to the appeal (although the letter suggests that the joinder is automatic, Article 141 provides that it is for the public prosecutor to effect the joinder).

[16] The Indonesian Ministry of Law and Human Right's letter dated 11 May 2010 (Attachment E3) at 6 states that the decision of the High Court, which dismissed the appeal against conviction by the Central Jakarta District Court, is "final and binding".

[17] FFC at [135].

40. McKerracher J alternatively expressed the jurisdictional error as taking into account a wrong consideration, namely "mere rarity"[18] in the sense that:

> "...the high point of the information before the Minister in relation to what may be unjust by Australian standards was the advice (at [197] of Attachment B) that 'convictions in a person's absence are "rare" in Australia and generally only occur for summary offences or where the defendant has deliberately absented himself [or herself] from proceedings after having appeared initially."

41. Barker J held that Attachment B[19]:

> "...failed adequately to consider (save in respect of the sentence imposed) what the position by Australian standards was in respect of a number of matters against which standards the Indonesian law or practice concerning in absentia convictions and appeals could be compared to the Australian standards in order to ask the right question about whether extradition would be unjust."

42. This led Barker J to conclude[20]:

> "...that the Minister constructively failed to take into account relevant considerations by assuming the s 22 submission correctly informed him as to his decision-making task when it did not ask whether the in absentia conviction of the first respondent in Indonesia in the circumstances described would be considered unjust by Australian standards".

43. These grounds require consideration of the Minister's reasons.

THE MINISTER'S REASONS

44. The Act does not require that the Minister, in making a decision under ss.22 and 23, give reasons[21]. Nothing precludes the Minister from giving reasons. In some matters involving review of decisions made under s.22, the Minister will state reasons usually by confirming that they are in the form of the Departmental Submission[22].

45. As Kirby J observed in *Foster*[23]:

> "... the effect of the Act is to require that the Minister be satisfied that the circumstances described in reg 7 do not exist. If the Minister concludes that they do not, there is a legal prohibition on removal. It is a prohibition based upon a state of satisfaction. But this is not a subjective satisfaction. In the absence of additional

---

[18] FFC at [136].
[19] FFC at [408].
[20] FFC at [428].
[21] *Minister for Home Affairs v Zentai* (2011) 195 FCR 515 at 589-590 [213]-[215]; *O'Donoghue v O'Connor (No 2)* (2011) 283 ALR 682 at 686-687 [29]-[32]. See also *Minister for Home Affairs v Zentai* [2012] HCA 28; (2012) 246 CLR 213 at 234 [56] (Gummow, Crennan, Kiefel and Bell JJ), 248-249 [91]-[98] (Heydon J).
[22] *de Bruyn v Minister for Justice & Customs* (2004) 143 FCR 162 at 177 [71]: "The Minister gave no reasons for his decision to approve the Recommendation. However, the Recommendation was accompanied by a briefing paper ('the Briefing Paper') and the proceeding has been conducted on the basis that the Briefing Paper contains the Minister's reasons for his decision."
[23] [2000] HCA 38; (2000) 200 CLR 442 at 479 [100].

reasons or other evidence, it is one inferred objectively from the materials placed before the Minister relevant to the decision eventually made."

46. The judge at first instance (with respect) correctly observed[24]:

> "It is reasonable to infer, absent written reasons, that the Minister had regard to the Departmental comment and in particular at Attachment B as to what he ought relevantly consider in determining whether or not the applicant's extradition would be unjust, oppressive or incompatible with humanitarian considerations: *Foster v Minister for Customs & Justice* [1999] FCA 687; (1999) 164 ALR 357; *O'Donoghue v The Honourable Brendan O'Connor (No 2)* [2011] FCA 985; (2012) 283 ALR 682 at [135]- [136]. It was expressly recommended that he read the submissions and at the front of the submissions he circled the word 'Approved' in respect to that recommendation."

47. The Appellant has never appealed this finding.

48. Correct also (with respect) and applicable is the passage from the judgment of Drummond J in *Foster v Minister for Customs and Justice*[25]:

> "The Minister has not given any reasons for her decision of 30 March 1999. She is not obliged to do so. But as Watkins LJ pointed out in *R v Secretary of State for the Home Department; Ex parte Sinclair* [1992] Imm AR 293 at 301, while the failure to give reasons where there is no obligation to do that does not of itself attract judicial review of a Minister's surrender decision, the absence of reasons does not necessarily leave the decision immune from such a challenge. A failure to give reasons when the evidence shows the advice given to the Minister did not advert to a relevant consideration leaves uncontradicted the inference that that consideration was overlooked when the decision was made."

The Departmental Submission in respect of Article 9(2)(b)

49. This is in Attachment B at [158]-[260]. Of particular note are the following.

50. Paragraph [185]; where there is no explanation of the relevance of Indonesian law or international law; and the final bullet point that is at best incomplete and more likely misleading.

51. Paragraph [189]; which contains no explanation of relevance.

52. Paragraph [194]; where there is no explanation of the relevance of this "case law" to the decision that the Minister was required to make.

53. Paragraph [197]; which is plainly wrong. Trials in absentia do not happen in Australian law where an accused has not been served.

54. Paragraph [202]; the fact that the trial may have been conducted "according to law in Indonesia" is irrelevant to Article 9(2)(b). Why the observation appears under a

[24] *Adamas No 2* at [66]. See also Barker J in FFC at [249].
[25] (1999) 164 ALR 357 at 374 [66].

heading "Australian case law on the right to a fair trial" is confusing.

55. Paragraph [221]; is misleading in that it does not state that Mr Adamas does not have a right of appeal. Further, it does not state that the PK review (explained at [225]-[230]) is, by Australian standards, nothing like an appeal from a criminal conviction.

56. Paragraph [245] (last sentence); which does not state that there is no positive evidence that Mr Adamas was aware of the appeal and was only a party to it because he had been joined by the prosecution.

57. Paragraph [243]-[246]; these paragraphs are important as a contrast to earlier analysis. In particular the conclusion at [246]. It does not state, in respect of the single relevant circumstance, that the Minister must consider whether the sentence would be unjust or oppressive or incompatible with humanitarian considerations according the Australian standards.

58. The conclusion at [255]-[256] is stark for what it does not state.

EXTRADITION – UNJUST, OPPRESSIVE OR INCOMPATIBLE WITH HUMANITARIAN CONSIDERATIONS ASSESSED BY AUSTRALIAN STANDARDS?

59. It is patent that a trial in the circumstances of that of Mr Adamas would be unjust, oppressive or incompatible with humanitarian considerations assessed by Australian standards. No criminal trial for a serious offence would occur in Australia in the absence of the accused, even if disruptive. No person could be tried for a serious offence on the basis of substituted service. No person could be tried in the absence of proof of service. No convicted person in Australia would lose a right to appeal because a co-accused appealed and the prosecution joined the convicted person to the appeal. No convicted person in Australia could be sentenced to a strict life sentence after a trial in their absence. None of these considerations were brought to the Minister's attention by Attachment B.

60. It is difficult to imagine any final and binding conviction and sentence more offensive to Australian standards of what is unjust, oppressive or compatible with humanitarian considerations than the circumstances of Mr Adamas' trial, conviction, sentence and lack of appeal.

61. The circumstances of Mr Adamas' final conviction and sentence are so profoundly offensive to Australian standards of what is unjust, oppressive or incompatible with humanitarian considerations that, in terms of Article 9(2)(b), no interest of Indonesia or consideration of the nature of the offence could countervail them.

62. The nature of the offence and the interests of Indonesia are addressed in Attachment B at [165]-[167].

63. It is not contended in this appeal that Indonesia's efforts to eradicate corruption (which are not identified in Attachment B) require the extradition of Mr Adamas.

THE APPELLANT'S CONTENTIONS

64. These are best addressed by reference to the six errors imputed to the majority below in the Appellant's Submission.

The first alleged error

65. This is dealt with at [44]-[45] of the Appellant's Submission. This is a matter of construction of Article 9(2)(b) considered above. The Appellant's Submission does not refer to the passages of the judgments below where this error can be seen. Their Honours in the majority plainly directed themselves to the correct question; see FFC [129]-[130], [324]-[328], [331]-[332], [428][26].

The second alleged error

66. This is dealt with commencing at [46] of the Appellant's Submission. This analysis attributes to Barker J (and McKerracher J) a process of reasoning that is simply absent. This is demonstrated by reference to Barker J's judgment at [326], [428]. The contention is one of construction of Article 9(2)(b) and is dealt with above.

67. There is nothing in the judgment of Gleeson CJ and McHugh J in *Foster,* to which the Appellant's Submission refers, which discloses error in the majority reasoning. It has not been asserted here that the Minister was asked to investigate facts that were not circumstances of Mr Adamas' case within the meaning of Article 9(2)(b). The considerations of this case, to which the Minister failed to have regard, were relevant to his decision.

68. As McKerracher J's reasoning at [133] illustrates, the matters that were "circumstances of the case" relevant to the decision whether the extradition of Mr Adamas would be unjust, oppressive or incompatible with humanitarian considerations by reference to Australian standards were clear and obvious.

The third alleged error

69. This is dealt with commencing at [55] of the Appellant's Submission. Again, this attributes to Barker J (and McKerracher J) an error that neither makes. Their Honours did not embark upon a process of critically and minutely comparing Australian and Indonesian law or practice, and upon finding variance concluding that Indonesian law or practice was unjust or oppressive by Australian standards or incompatible with Australian conceptions of what is humanitarian[27]. To do so would have been erroneous, but this error is not made.

70. It should be noted[28] that although there are variations between Australian States and Territories in criminal law and practice, in every Australian State and Territory, the

---

[26] See also Lander J, FFC at [75].

[27] See FFC at [402], [427].

[28] In response to Appellant's Submission fn 15.

circumstances of this case[29] would be considered unjust, oppressive incompatible with humanitarian considerations. The Appellant does not suggest otherwise.

The fourth alleged error

71. This is dealt with commencing at [59] of the Appellant's Submission.

72. It is accepted that, were Indonesia the Requested State in Article 9(2)(b), it would determine whether an extradition requested by Australia was unjust, oppressive or incompatible with humanitarian considerations, having regard to Indonesian standards.

10 73. As noted above, the issue is not whether there are differences between Australian and Indonesian criminal law and practice. Obviously there are and both countries knew so when the treaty was entered into[30]. It was accepted by both Australia and Indonesia in entering into the Treaty that there may be circumstances of particular cases where, for both countries, a request for extradition would be refused if extradition would be unjust, oppressive incompatible with humanitarian considerations. This is the point of the treaty provision.

74. In advancing this argument the Appellant repeats the error of Lander J[31]. Lander J
20 erroneously departed from the majority in viewing the question under Article 9(2)(b) as simply being whether, "... eligible persons, who have been convicted in their absence in a Requesting State, should not be extradited because that would be unjust according to Australian standards"[32]. This was not the sole "circumstances of the case" for the purpose of Article 9(2)(b), as the other judgments in the Full Court demonstrate. In any event, Lander J was, with respect, clearly wrong to conclude that the question of whether trial *in absentia, simpliciter,* is unjust according to Australian standards is answered by the presence of s.10(1) of the *Extradition Act,* which contemplates extradition of persons tried in absentia[33]. This reasoning is erroneous for
30 the reasons explained by Barker J[34]; express contemplation of extradition of persons convicted *in absentia* does not carry with it the conclusion that extradition of a person convicted *in absentia* could never be unjust, oppressive or incompatible with humanitarian considerations.

The fifth alleged error

75. This is dealt with commencing at [65] of the Appellant's Submission.

---

[29] That a convicted person would spend the rest of his life in gaol for offences for which he was tried in his absence; where there is no proof, and the person denies, that he was aware of the charges laid against him, of his trial or conviction and where conviction and sentence cannot be appealed.

[30] See FFC at [427].

[31] Appellant's Submission at [64].

[32] FFC at [75].

[33] See FFC at [76]-[78].

[34] See FFC at [366]: "It is plain then that both the Act and the Treaty contemplate that a person may be extradited having been convicted in absentia in Indonesia. But this does not mean that the fact of an in absentia conviction requires the Requested State to surrender the requested person without more. The other terms of the Act and the Treaty which may provide a bar to extradition continue to apply".

76. Clearly enough, the decision under Article 9(2)(b) was one for the Minister, but in making it, the Minister was required to have regard to relevant considerations and not have regard to considerations that are not relevant.

77. A Court in reviewing this particular decision is, however, in a peculiarly advantageous position. A Court can readily determine whether an administrative decision maker, who fails to take into account consideration X, could then lawfully conclude, in the absence of X, that extradition was unjust, oppressive or incompatible with humanitarian considerations, having regard to Australian standards of what is unjust, oppressive or incompatible with humanitarian considerations.

10

78. At no time in this proceeding has Mr Adamas sought that the Court engage in merits review. The Appellant's Submission at [65]-[71], that Barker J's consideration at [333]-[338] of *Bannister* and *Binge v Bennett,* discloses that his Honour (and McKerracher J) "have failed to distinguish between judicial review and the Court forming its own judgment on the ultimate question" overlooks Barker J's previous paragraph ([332]), which commences:

> "*The question of Australian standards:* There remains the question raised by *Bannister* and *Foster*, as to whether the Attorney-General (or delegate) must, in
20 relation to Art 9(2)(b), regard relevant circumstances of the case said to suggested extradition of the requested person could be unjust by reference to Australian standards, or whether the Attorney-General or delegate may or should regard international law or other, even personal standards of what is just, not necessarily informed by Australian standards." [Emphasis added.]

79. Justice Barker did not suffer any misconception about the role of the Federal Court.

The sixth alleged error

30 80. This is dealt with commencing at [72] of the Appellant's Submission.

81. This matter is addressed above. If the Minister had reasons for making the decision that are not represented in Attachment B he was at liberty to say so.

PART VII STATEMENT OF ARGUMENT IN SUPPORT OF NOTICE OF CONTENTION

THE MINISTER'S DECISION WAS UNREASONABLE

40

The unreasonable conclusions

82. In determining that Mr Adamas was to be surrendered to Indonesia, the Minister must have decided either that; in the circumstances Mr Adamas' case, the Minister was satisfied extradition would not be "unjust, oppressive or incompatible with humanitarian considerations", or the circumstances of Mr Adamas' case were "unjust, oppressive or incompatible with humanitarian considerations" but that his surrender should nevertheless not be refused.

83. Because the Minister did not give reasons it is unknown which of these conclusion was reached. But it was one or the other. Both are unreasonable and disclose jurisdictional error.

First unreasonable conclusion: not unjust, oppressive or incompatible with humanitarian considerations

84. This Court has most recently considered reasonableness as a basis for judicial review in *Minister for Immigration and Citizenship v Li*[35] The joint judgment of Hayne, Kiefel and Bell JJ observed[36]:

> "The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it — nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified."

85. This ground of review is particularly apt in cases where no reasons for decision have been given.

86. No Minister, who understood the requirement to apply Australian standards and who was then advised of all of the relevant considerations concerning Mr Adamas' case, could reasonably have reached the conclusion that Mr Adamas' extradition was not unjust, oppressive or contrary to humanitarian considerations even taking into account Indonesia's interests and the seriousness of the case.

87. As noted above, the circumstances of Mr Adamas' final conviction and sentence are so unjust, oppressive or incompatible with humanitarian considerations that no interest of Indonesia or consideration of the nature of the offence could countervail them.

88. As a result, if the Minister did conclude that extradition in the circumstances of Mr Adamas' case was not unjust, oppressive or incompatible with humanitarian considerations, then the Minister fell into jurisdictional error because that decision was unreasonable.

Second unreasonable conclusion: surrender should nevertheless not be refused

89. Article 9(2)(b) is a discretionary ground rather than a mandatory ground for refusal of surrender.

90. This is the reason why s.22(3)(e)(ii) and (iv) of the Act are engaged. Section 22(3)(iv) of the Act confers a discretion upon the Minister.

---

[35] (2013) 87 ALJR 618; (2013) 297 ALR 225; [2013] HCA 18.
[36] (2013) 87 ALJR 618 at 638 [68]; (2013) 297 ALR 225 at 248.

91. As French CJ observed in *Li*[37]:

> "Every statutory discretion, however broad, is constrained by law...Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred."

92. Similarly, Hayne, Kiefel and Bell JJ referred[38] to the judgment Dixon CJ in *Klein v Domus Pty Ltd*[39] which was to the effect that "where discretions are ill-defined (as commonly they are) it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object." Their Honours continued:

> "The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused."

93. The objects of the Act are set out in s.3. They include "to facilitate the making of requests for extradition by Australia to other countries" and "to enable Australia to carry out its obligation under extradition treaties."

94. Article 1(1) of the Treaty provides:

> "Each Contracting State agrees to extradite to the other, in accordance with the provisions of this Treaty, any persons who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence."

95. When the circumstances of injustice and oppression are as extreme as they are in Mr Adamas' case, a decision that Mr Adamas should be surrendered despite that injustice and oppression would be unreasonable.

96. As a result, if the Minister did conclude that extradition in the circumstances of Mr Adamas' case was unjust, oppressive or incompatible with humanitarian considerations but that Mr Adamas should nevertheless be surrendered, then the Minister fell into jurisdictional error.

---

[37] (2013) 87 ALJR 618 at 629 [23]; (2013) 297 ALR 225 at 236.

[38] (2013) 87 ALJR 618 at 638 [67]; (2013) 297 ALR 225 at 247. See also Gageler J at ALJR 642 [90]; ALR 253.

[39] (1963) 109 CLR 467 at 473.

Part VII Estimate of time required for oral argument

97. It is estimated that 2 hours will be required for oral argument.

Grant Donaldson SC
Telephone: 08 9264 1806
Email: Grant.Donaldson@francisburt.com.au

Adam Sharpe
Telephone: 08 9220 0419
Email: ASharpe@francisburt.com.au