THE JUDICIAL REVIEWABILITY OF EXTRADITION DECISIONS: ARE THEY EFFECTIVELY IMMUNE FROM CHALLENGE IN THE ABSENCE OF A REQUIREMENT TO GIVE REASONS?

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In my previous article[1] I advanced the proposition that a Commonwealth Minister, when deciding under s 22 of the *Extradition Act 1988* (Cth) (the *Act*) whether to extradite a person to a requesting country, should have regard to international human rights standards and, particularly, the notion of a fair trial as encapsulated in Article 14 of the UN *International Covenant on Civil and Political Rights 1966* (*ICCPR*). I advanced the thesis that the *Act* impliedly incorporates international fair trial standards by giving effect to certain 'extradition exceptions' in bilateral extradition treaties,[2] most notably the exception that extradition can be refused if it would be '*unjust, oppressive, incompatible with humanitarian considerations, or* entail *too severe punishment*' (the 'unjust exception')[3]. This was on the basis that those standards were inherent in the stipulated notions of unjustness, oppression or incompatibility with humanitarian considerations.

Having made the claim for greater and more specific reference to the fair trial standards in the *ICCPR* as relevant to extradition determinations, I now make the counter-claim that any liberalisation of surrender decisions flowing from that realisation will largely be negated by reason of the fact that unless Commonwealth Ministers are required to provide some *explanation* or *justification* for a decision to surrender a person[4] extradition proceedings will be largely insusceptible of judicial review. Even assuming that decisions relating to surrender are open to objection on the basis that surrender would entail contravention of international fair trial standards adopted in the *Act*, the question is: can a challenge to extradition based on the likelihood of such a contravention ever *succeed* in the absence of a confirmatory statement by the relevant Minister? I contend that any enlargement of the scope for taking a more nuanced and articulate consideration of fair trial standards into account will be rendered pointless if extradition decisions are for the most part immune from judicial review by reason of a failure to state reasons.

This article contends that in the absence of a specific, express *statutory duty* to give reasons there is a *constitutional requirement* to provide a *sufficient explanation* of the basis of a decision to enable effective judicial review to take place. What is required in terms of the content of such explanation, in those circumstances, will depend upon the nature of the dispute and the function of the decision-maker in the particular circumstances of the case. The requirement to adequately explain a decision will vary according to the statutory context with the standard impliedly depending on the purpose and object of the legislation.[5]

Inhibitions to effective review

Eight matters significantly qualify the extent to which a court can effectively review extradition decisions of that kind. They are:

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1. The *principle of comity* and respect for foreign judicial process in requesting countries;

2. The 'double layered' nature of the extradition determination under s 22 whereby even if the Attorney is satisfied that it would be unjust to surrender a person because a fair trial in the requesting country is unlikely or impossible, the Attorney may nevertheless conclude that within the scope of *a residual discretion* and *for other reasons* extradition should *not be refused*;

3. The effect of coupling the consideration of the several specific criteria in the 'unjust exception' with the need for the Attorney to take into account the *nature of the extradition offence* and the *interests of the requesting country*;

4. The virtual inviolability of the Minister's exercise of the *general discretion* under s 22 conceived as a 'balancing' process in which minds may differ on the merits and its effect in insulating the decision from review;

5. The effect of the '*no evidence*' principle and the negative objective that extradition proceedings do not entail any judgments about a requested person's guilt;

6. The Attorney General's Department's invocation of *legal professional privilege* relating to the redacted text of legal observations in Departmental submissions to the Minister preventing an applicant accessing and the reviewing court from knowing legal advice upon which an extradition decision was based;

7. Application of the principle of *non-justiciability* and other *discretionary reasons* for not granting relief; and

8. The fact that there is as yet no recognised constitutional, statutory or common law *requirement to provide reasons* or otherwise *explain the basis* of the Attorney's decision, leaving a reviewing court unable to identify how the decision was made, thus effectively immunising it from effective judicial review.

The first difficulty listed above (comity) represents a *general restraint* on the review of extradition cases. Difficulties 2 to 4 constitute *structural obstacles* that stand in the way of a court determining that the Minister has fallen in error on a particular matter. Difficulties 5 to 8 represent *evidentiary or procedural restrictions* impeding review.

1. *Deference to foreign judicial process based on considerations of comity*

It is a truism of extradition law that an Australian court reviewing an extradition decision is obliged under the principle of comity not to impugn the criminal justice system of a requesting country. Respect for comity ostensibly requires that an Australian Minister is obliged to assume that a trial in a foreign country will be properly conducted. This is considered necessary to accommodate the fact that there are often major differences between the criminal trial process in other countries and that in Australia.[6] Respect for the fairness of process in other common law jurisdictions employing adversarial criminal procedures, such as in the UK, New Zealand and Canada is not surprising. Inquisitorial procedures as employed in continental Europe (particularly in Eastern Europe) vary considerably in quality and are accordingly more problematic.

The significance of comity in extradition law was expressed by Gordon J in *Mokbel v Attorney-General (Commonwealth)*:

> The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another.[7]

In *Mokbel* her Honour was commenting in the specific context where a decision of a Greek court *had already been made* but it is apparently presumed that the injunction to respect the decisions of foreign courts extends to include *future* criminal process post-extradition. This represents a considerable constraint on the extent to which Ministers and in turn Australian courts are prepared to pass judgment on prospective investigative proceedings or trials in requesting countries. The question is, nevertheless: does comity constitute an *absolute bar* against questioning foreign proceedings?

By way of qualification it may be noted that in *Cabal v United Mexican States (No 3)*[8] French J made the following observation: '[I]t is important to bear in mind that the *general functioning* of the judicial system of an extradition country is *not a matter* for this court.' (Emphasis added.) In dealing with the matter as one of the *general* functioning of a foreign judicial system his Honour appears to have left open the possibility that in a *particular* and perhaps egregious and objectively verifiable *instance*, an Australian court may reflect on the adequacy and fairness of foreign proceedings.

The conclusion can be drawn that while not entirely preclusive of judicial review comity will substantially inhibit it by ensuring that prospective proceedings in foreign courts are likely to receive fairly low-level scrutiny calculated to avoid embarrassment.[9]

2. *The 'double layered' nature of the Attorney's function under s 22 and the possible exercise of the residual discretion to override a conclusion that surrender would be unjust in the circumstances*

The structure of the discretion exercised by the Minister when considering claims based on the 'unjust exception' is governed by sub-ss 22(3)(e) and (f) of the *Act*. They operate in cases where, because of s 11, the *Act* applies in relation to an extradition request subject to a condition or qualification that has the effect that surrender of the person in relation to the offence *shall* or *may* be refused. The effect of these provisions is that first, if in such a case the Minister is satisfied that circumstances exist that would attract the operation of a condition or qualification *mandating refusal*, the Minister is *bound* not to surrender the requested person. If, on the other hand, the Minister is satisfied that circumstances that would attract the operation of a condition or qualification *permitting but not requiring refusal* exist the Minister may still, in the exercise of his or her *discretion*, refuse surrender. Thus even if the Minister is satisfied in the latter circumstances that it is open for her or him to refuse surrender the Minister may nevertheless conclude that surrender of the person in relation to the offence *should not be refused*.

Regarding the nature of the Minister's task when addressing a claim that surrender would be unjust or oppressive Gleeson CJ and McHugh J in *Foster v Minister for Customs and Justice (Foster)* summarised the situation as follows:

> There is a *double layer of satisfaction* involved in s 22(3)(e) and [the regulation incorporating the 'unjust exception']. The section provides that the eligible person is only to be surrendered if the Attorney-General (or Minister) is satisfied that circumstances engaging a limitation, condition, qualification or exception to surrender contained in the Regulations do not exist. [The regulation] provides for such a limitation. It prohibits surrender if the Attorney-General (or Minister) is satisfied that it would be unjust, oppressive or too severe a punishment. Therefore, in order to surrender a person the Attorney-General (or Minister) must be satisfied that he or she is not satisfied that it would be

> unjust, oppressive or too severe a punishment. Since what is involved is the state of satisfaction, or lack of satisfaction, of the one decision-maker, what is critical is whether the decision-maker is satisfied of a matter referred to in [the regulation]. Applying the Act and Regulations to the present case, the Minister was obliged to ask whether she was satisfied that it would… be unjust or oppressive or too severe a punishment to surrender the eligible person. If the answer to that question were in the negative, then she would be satisfied that the circumstances referred to in s 22(3)(e)(iii) did not exist, and the qualification imposed by s 22(3)(e) upon the extent of her powers under ss 22 and 23 would not operate to inhibit their exercise. (Emphasis added)[10]

In the result, where regulations provide that by reason of the 'unjust exception' surrender is discretionary, the Minister may come to a conclusion that in fact surrender would be unjust, oppressive or incompatible with humanitarian considerations yet still decide for other reasons that may not even be disclosed to exercise the *general discretion* not to refuse extradition. Even a conclusion that the Minister may, in exercising the first discretion, refuse extradition does not mandate that he or she must.[11]

3. *The coupling of the criteria in the 'unjust exception' with the need for the Attorney to take into account the nature of the extradition offence and the interests of the requesting country*

The addition of these two extra criteria has the consequence that the value judgment required in the case of treaties incorporating the unjust exception is different from the alternative decision-making process where the 'unjust' criteria are to be considered *solely* by reference to their separate or cumulative elements.

This consequence was recognised by Barker J in *Adamas FFC* in which he said:

> What might be said … about the operation of s 22(3)(e) and Art 9(2)(b) [of the extradition treaty between Australia and Indonesia] is that the Minister at all material times was possessed of a *broad function* to achieve a certain level of satisfaction. He could, even if he were to consider, by reference to the circumstances of the case, that extradition of the first respondent to Indonesia would be unjust, on the basis of the first respondent's conviction in that country in absentia, nonetheless ultimately not be satisfied that it would be unjust to surrender him to Indonesia taking into account the nature of the offence and the interests of Indonesia.[12]

In his Honour's view, this requires ministerial decision-makers to *balance* and *weigh* these various factors when forming the relevant value judgment about whether extradition would be unjust.[13] In that case the interests of the requesting state may 'outweigh' the oppression to the individual.

4. *The virtual inviolability of the Minister's exercise of the general discretion under s 22 conceived as a 'balancing' process on which minds may on the matter of the merits differ, insulating the decision from review*

A formidable and arguably intractable barrier to review is presented by the problem that the balancing process involved both in exercising the residual discretion in s 22 and the 'weighing' of an unjust surrender against the countervailing factors of the nature of the offence and the interests of the requesting country, is that this divergent cluster of factors constitutes a somewhat elusive and judicially unmanageable test (in the sense of providing no clear guidelines).

The indeterminate nature of the process is reflected in the formulaic way in which the Attorney-General's Department couches recommendations in its submission to the Minister. These are often along the following lines:

> While you may give *some weight* to the (applicant's assertion) … it is *open to you* to conclude that extradition in the circumstances would *not be unjust*, oppressive or incompatible with humanitarian considerations. (or to similar effect): that having regard to the nature of the offence/interests of the [requesting state] it is open to you not to refuse extradition. (Emphasis added)

How can a court determine whether the Minister has 'failed to accord *sufficient* weight' to a particular factor?[14]

Taken to its logical limits, it would mean that in the case of extremely serious crimes involving homicide, terrorism or massive defalcation of money the nature of the offence will, as a matter of proportion, virtually outweigh any other mitigating circumstance. Commit an offence against the US *Patriot Act* and off you go, even if you will be tried before an arguably biased military commission in Guantanamo Bay (assuming it is still open)![15] The seriousness of the offence could virtually become the sole and exclusive consideration. Even more elusively the amorphous character of 'interests of a requesting state' comes close to Australia (and arguably the court) having to make political judgments about foreign regimes.

This is compounded by the initial problem that in an extradition challenge the applicant must be able to establish that the Minister had regard to one of other of these factors. As indicated in the next section, in the absence of a clear evidentiary basis for so concluding, any decision resulting from the balancing process is virtually immune from review.

That may be an acceptable outcome so far as it insulates courts from engaging, impermissibly, in a political assessment on the merits entailed in the balancing process itself[16] but arguably goes too far where that process has been contaminated by substantial errors of law and misunderstandings that go to the heart of the process. The need for a means of identifying aberrations of the latter kind in the absence of reasons remains for consideration below.

5. *The inhibiting effect of the 'no evidence' principle and the negative factor that extradition proceedings do not entail any judgments about a requested person's guilt*

While not in terms precluding production of relevant material evidence, the 'no evidence' rule arguably tends to create a context of expeditious extradition that tips the scale against a court scrutinising evidentiary material too closely lest the court infringes the injunction against not arbitrating on issues of guilt. This has a limiting effect on the kind of documentary material that may be produced on judicial review and aggravates the consequential difficulties of relying on inference from Departmental submissions.[17]

Understandably, courts are reluctant to concede that in matters involving the liberty of the subject the exercise of executive discretion is beyond judicial review. In *Minister for Immigration and Citizenship v SZQRB* (*SZQRB*) Flick J commented that where a Commonwealth law authorises an exercise of statutory discretion the power cannot *generally* be conferred free from all judicial scrutiny.[18] Nevertheless, as his Honour concedes, where courts have *no means by which to ascertain the basis of an authority's decision* it may be impracticable to determine its legality by reference to whether it lies within the general limits of the scope and purpose of an Act. In the absence of a statement of the Minister's reasons there can be *no direct evidence* of the basis on which the Minister did not disallow extradition.

Given that the Minister in her or his discretion may decline to refuse extradition notwithstanding that the extradition would be unjust, oppressive or incompatible with humanitarian considerations, this opens the possibility that the Minister may have had regard to *other possible reasons which may remain undisclosed*. In those circumstances it is

appropriate to ask: to what extent can a court reasonably draw *inferences from the Departmental submission*, the one given source of information, to identify the underlying considerations and reasons on which the extradition decision was based? This requires an appreciation of the function of Departmental submissions as part of the decision-making process.

It is axiomatic that the Minister is under no statutory duty to provide reasons for his or her decisions under the *Act*.[19] In fact, it is not the practice for Ministers to do so. The usual process in extradition cases is for the Minister to signify approval of the Department's recommendation by ticking the relevant recommendation box in the Department's written submission and signing his or her name. The main document before the reviewing court will therefore be the Departmental submission itself setting out the facts, law, applicants' submissions, the Department's comments and legal advice, together with the Department's general recommendations regarding the same. Invariably, in cases that are reported, the Department recommends that the Minister should not refuse extradition.

There is, of course, no legal objection to a Minister relying on advice and recommendations in a departmental submission. As Gibbs CJ said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (*Peko-Wallsend*) '[A] Minister cannot be expected to read for himself all the relevant papers … It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department.'[20]

It may be accepted that the Departmental submission does not constitute a statement of the Minister's reasons. Case law clearly establishes that submissions prepared by the Department are not a record or substitute for the Minister's reasons. In particular, they cannot be taken to indicate the Minister's decision-making *process* of deliberation and choice.[21] This is especially so where material in the submission has been redacted. This does not preclude, however, the drawing of inferences from statements or omissions in the Departmental submission[22] although there are numerous judicial comments indicating that a court should be cautious and slow to draw any adverse inference about the Minister's reasons.

The problem remains, however, just what inferences, if any, can reasonably be drawn from the contents of the *Departmental* submission concerning the basis of the Minister's decision?[23] In some instances an applicant for review may be able to demonstrate that particular guidance provided in a briefing note was relevant but constituted wrong and misleading advice, or a relevant matter was not addressed. In such cases, a court may find that the exercise of the Minister's power miscarried by reason of jurisdictional error.[24]
One possible ground for challenging the Minister's exercise of discretion would be to argue that a failure to state and identify reasons for a decision implies that no good reasons exist. That approach is not open, however, in circumstances such as those prevailing under the *Act* where it may be *presumed* that the Minister had good reasons although whether they exist is not, however, readily accessible on the face of the record.[25]

Also, compounding this, a court should accept that where, for example, a Departmental submission is extensive and detailed, adverse inferences should not be lightly made concerning whether the Minister fairly turned his mind to the material before him.[26] The assumption is that the Minister has read the same in its entirety together with any submissions made by the applicant.[27] That assumption does not mean that the Minister's opinion in the end depends on anything in the submissions. Ministers may be persuaded by external factors such as the desire to maintain a favourable relationship with another country or for extraneous reasons of domestic politics. These may not in themselves be 'improper purposes'. Whether they are or not, without ministerial acknowledgement the basis of the decision will not be evident, even if their existence is improbable.

Different considerations may apply, on the other hand, where the court is able to deduce from the material put before the Minister that, on *a specific matter,* the Minister was erroneously or inadequately advised on a matter of law. A constructive conclusion may then permissibly be drawn from the objective likelihood that the Minister was misled into error.

Thus in *Adamas FFC*, Barker J, for the majority, found that absence of reasons did not necessarily preclude review regarding whether the Minister was *adequately and correctly advised* about the requirement that potential injustice should be assessed by reference to Australian standards.[28] In his view, having regard to the principles of good public administration it is not only open to a judge to draw an inference about whether the Minister took into account an irrelevant consideration if misled by legal advice in the Departmental submission, it may also be reasonable in all of circumstances to conclude that the Minister *had done so*. Thus, if an applicant can demonstrate that particular guidance provided in the Departmental submission 'was relevant and apparently significant to the recommendation made, but wrong, or a relevant matter was not addressed, then plainly there would be a case for considering that the exercise of the Minister's power miscarried by reason of jurisdictional error.'[29]

The majority of the Full Federal Court held that a deficiency in the advice to the Minister amounted to jurisdictional error, particularly since it failed to advert to how, as a matter of fairness, it would be viewed in an Australian context if a person unaware of charges against him or her was convicted *in absentia*.[30] On that specific matter the High Court on appeal overturned the decision of the Full Federal Court because the Full Court itself had applied an incorrect test of unfairness, in not accepting that in a bilateral treaty unfairness was not to be construed and judged *solely* by Australian standards.[31] It is significant, however, that the broader proposition advanced by the Full Court, that a patent error in advice could amount to jurisdictional error, was not rejected by the High Court.

This opens the possibility that even allowing for the fact that there may be no *direct evidence* about what regard the Minister actually had to a Departmental submission, an egregious failure to properly inform the Minister about the legal significance of a matter central to the *Act's* operation is capable of founding a basis for review. While the Minister's reasoning may not be *generally* accessible to a court of review, a patent error in departmental advice can apparently provide a ground for review.[32] Hence the 'no-evidence' rule does not necessarily work to prevent judicial review. It just makes the matter more difficult in practice.

6. *The resort to legal professional privilege preventing an applicant for review and the reviewing court from knowing the content of legal advice upon which an extradition decision was based*

The fact that the reviewing court has limited scope to infer the Minister's process of reasoning from the Departmental submission is aggravated by the practice whereby the Department usually provides a copy of its submission to a person seeking to challenge in *redacted* form. Legal advice given to the Minister is therefore excluded from scrutiny by both the challenger and a reviewing court. In *Zentai v O'Connor* (*No 2*)[33] McKerracher J held that references to conclusions made in legal advice given by Australian prosecuting authorities that the Department had provided to the Minister sufficiently indicated the nature of that advice to amount to a *waiver* of legal professional privilege. The full text of the various advices was then provided to the applicant in unredacted form.[34] In *Adamas v O'Connor*,[35] on the other hand, the primary judge noted the comprehensive redactions in the Departmental submission and distinguished *Zentai* as turning on its own facts. He held that there was no basis for finding that legal professional privilege had been waived.

In future cases it may be assumed that great care will be taken in redacting the submission to ensure that privilege is not waived. The resort to legal professional privilege will probably continue to be a substantial obstacle to applications for review screening the court from knowing and judging the soundness of any legal advice upon which an extradition decision is based.

7. *Principle of non-justiciability and exercise of discretion not to grant relief*

While it is not a doctrinal bar, considerations of justiciability[36] often work to preclude certain politically contentious administrative decisions from review. In other common law jurisdictions, such as England and Canada, issues of justiciability and deference are often mingled, both operating to create zones of executive non-accountability.[37] They have been criticised as doctrines of abstention[38] constituting an abdication of the judicial responsibility to protect human rights.[39] Avoidance of issues as non-justiciable is compounded by the fact that even if prepared to enter upon consideration of a matter[40] a court can, in the exercise of discretion, decline to grant any relief.[41]

In *Peko-Wallsend* Mason J identified several factors that significantly reduce the scope of judicial review of certain kinds of decisions. One is the level of decision-maker that Parliament selects to exercise the discretionary power. The fact that the power is vested in a Minister, who is accountable to Parliament, and is exerciseable on broad considerations of public policy and national interest are factors that disincline courts to subject such decisions to close scrutiny. While not totally preclusive it makes such decisions less susceptible to review.[42]

So far in Australia the High Court has set its face against allowing *deference* to institutional expertise to emerge as a factor for not intervening to review some decisions.[43] *Justiciability* and its correlative *standing to sue* on the other hand can still pose problems where issues such as national security, global political crises or international relations are concerned.[44] Extradition proceedings can entail elements of each of the latter. Allied with claims of comity these factors can represent significant barriers to judicial intervention in surrender decisions.

8. *The consequence of there being no statutory or common law requirement to provide reasons or otherwise explain the basis of the Attorney's decision, leaving courts unable to identify how the decision was made thereby effectively immunising the decision from effective judicial review*

The above difficulties entail procedural and evidentiary limitations that confront any applicant who seeks review of an extradition decision. They substantially diminish the capacity of a court to exercise judicial review effectively. Where the matter is one where the Minister might have exercised his or her *general discretion* it is particularly difficult to mount a challenge solely by reference to the objects and purposes of the *Act* authorising the exercise of power.[45] Even where resort to inference is possible it is largely inconclusive in the absence of a requirement for the Minister to *particularise the basis* for his or her decision. For the most part the reasoning process will remain inaccessible in the domain of the unknown or speculation.[46]

The problems that face someone challenging extradition can be gleaned from considering the Minister's grounds of appeal in *Adamas FFC.*[47] In elaboration the Minister submitted that in the absence of direct evidence about his reasons for not disallowing extradition no inference could be drawn concerning whether he had adopted the contents of the Departmental document as his own reasoning. For one thing, he *may have had other possible reasons* for deciding to extradite. Accordingly, no conclusion could be inferred that extradition would not be unjust, oppressive or incompatible with humanitarian

considerations. He might, for reasons extraneous to the Departmental submission, have been prepared to extradite the person anyway. Acceptance of propositions of that kind almost totally negates any possibility of judicial review.[48] In fact, the Commonwealth submitted that there were sound reasons for the executive to exercise specific and general discretions that were *not open* to a court to review.[49] In the result, if these submissions are accepted courts will be left in the situation of either impotence or impermissibly engaging in an uninformed exercise of forensic 'Pin the Tail on the Donkey'.[50]

This dilemma is not so much a case of what is not known cannot be explained, rather of what is not explained cannot be known.[51] Without a secure basis in published reasons an applicant and a reviewing court are left to face the Kafkaesque problem that 'The right understanding of any matter and misunderstanding the same matter do not wholly exclude each other.'[52]

The difficulties of challenging a Minister's decision under s 22 because an applicant is ignorant of the specific basis for decision is also compounded by the inability, generally, to go behind the Attorney's prior decision under s 16 of the *Act* to give notice to a magistrate that an individual is an 'extraditable person'. That notice triggers the process whereby the magistrate makes the further determination as to whether the individual is an 'eligible person', which is a precondition to the Minister exercising power under s 22. To assist the Minister in deciding whether to issue a Notice under s 16 the Department usually furnishes the Minister with a submission (sometimes redacted) on the matter, mirroring the later procedure of advising the Minister for the purposes of s 22. Even with the advantage of the Department's briefing note there is little scope for an extraditable person to challenge any matter at that stage. This is significant since a failure to contest at the s 16 stage whether a person legally has the status of an 'extraditable person' may be fatal to further review of that issue.[53]

Necessarily, this intractability of access to the Minister's basis for decision gives scope to the executive to shield a significant field of administrative decisions from effective review and does nothing to enhance transparency and the accountability of government.

The question can alternatively be posed as an element of the Rule of Law: Is the lack of *an obligation* upon the Minister *to explain and justify his or her decision* in an intelligible way consistent with the requirements of Chapter III of the Constitution? The question is framed in terms of explanation and justification to avoid it being too readily and simplistically identified with the cognate but distinct question: is there a common law *duty to provide reasons* for administrative decision.[54]

Arguments for implying a principle of justification

In the first place, it is necessary to appreciate that neither the *Act* nor any other statute such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*)[55] expressly requires the Minister to provide a statement of reasons.[56] Moreover, there is no general common law duty to do so.[57] It is also debatable, that an obligation can be derived by way of *necessary implication* from s 22 of the *Act* compelling the Minister to provide a statement of relevant findings and reasons in light of the drastic consequences of an adverse decision.[58] The same difficulty of establishing a necessary implication is faced in arguing that it is *incidental to the purpose* implicit in s 39B of the *Judiciary Act 1903* to effect judicial review.

The above arguments converge to support the claim that unless the Minister records findings and reasons a reviewing court will generally not be able to judge whether his or her actions are lawful. Notionally, at least according to *Avon Downs*[59]*,* it may be possible to scrutinise the decision, having regard to the materials before the Minister and infer error, excess of

authority, identifying a wrong issue or asking a wrong question, ignoring relevant material or relying on irrelevant material.[60] However, as demonstrated by some of the cases analysed above there are substantial limitations on that logical process. Another obstacle is that the obligation to provide reasons is not inherently an aspect of the requirement to provide natural justice or procedural fairness.[61]

Is there a constitutional requirement to disclose reasons?

Is there then a *constitutional basis* for asserting that, if not as extensive as a duty to state reasons, some *justification and explanation* of an extradition decision is required in order to ensure that the High Court's jurisdiction under Chapter III, particularly 75(v) of the Constitution is not rendered nugatory? The basic premise is that s 22 of the *Act* requires the Attorney General to determine a number of specific matters. Unless he or she records findings with respect to the same a reviewing court will not be able to judge whether his or her actions are lawful or not. The Court's jurisdiction under s 75(v) would be rendered capricious as depending on executive choice regarding disclosure.

In *Plaintiff M61/2010E v The Commonwealth* (*The Offshore Processing Case*)[62] the High Court referred to the purpose of Chapter III in constraining arbitrary executive power. It said:

> It is an essential characteristic of the judicature established by Ch III that it declares and determines the limits of power conferred by statute upon decision-makers. The various legislative powers for which the *Constitution* provides are expressed as being 'subject to' the *Constitution* and thus to the operation of Ch III, in particular to the exercise of jurisdiction conferred by s 75. The reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the Rule of Law under the *Constitution*.[63]

Section 75(v), together with its counterpart in s 75(iii) (which vests original jurisdiction in the High Court in matters where the Commonwealth or someone acting on its behalf is being sued) is central to both the maintenance of the Rule of Law under the Constitution and the maintenance of the constitutional separation of powers. It ensures that those who exercise public powers are bound by the law authorising their actions.[64] As explained by James Stellios, s 75(v) was included to hold Commonwealth offices to account.[65] The importance of the role of s 75(v) in maintaining governmental accountability and preventing the executive from going outside the bounds of its lawful powers was emphasised by Flick J in *SZQRB*.[66] Regarding the significance of s 75(v) in the scheme of review he said:[67]

> It is one thing for the Commonwealth legislature to pass a law to restrict or even exclude – or attempt to restrict or exclude – the scope of judicial review of administrative decision-making. So long as any such restriction or exclusion of judicial review is consistent with the Commonwealth *Constitution* – and, in particular, s 75(v) – such laws are within the legislative competence of the Commonwealth Parliament. It is thereafter the duty of the courts to apply the law to the matters that come before it.
>
> It is an entirely a different thing for a Minister of the Crown to attempt to administer legislative powers entrusted to him *in a manner which further attempts to exclude from judicial scrutiny* the decisions he has made. (Emphasis added)

In order to determine both the limits on power and the facts which bring the decision within power the High Court must be able to ascertain the basis of the Commonwealth executive decisions. Otherwise the stream is free to rise above its source.[68] To be deprived of access to the Minister's reasons arguably renders judicial review *ineffective*[69] and would leave many questions of validity incontestable if the exercise of Commonwealth executive or statutory power is unexaminable.[70] At the least a refusal to give reasons, if not constitutionally mandated, should attract a heightened intensity of review.

Essentially, the implication of a constitutional requirement, albeit limited, of disclosure of reasons can be justified as *one of necessity* premised on the notion that the system of judicial review for which s 75(v) provides extends to every authority or capacity which is proper to render it 'effective'.[71]

Justification arguably does not require a lengthy explanation nor would it be necessary to refer to every finding of fact or every piece of evidence. However, a bald conclusion leaving it to guesswork about what were the actual reasons moving the decision-making would not be adequate.[72] It may be accepted that the requirement to provide justification is not universal in terms of its content; it will necessarily apply according to variable standards. The standard should be set, not at the optimal level of detail but rather at the minimum acceptable standard.[73]

The argument for a constitutional obligation of justification is rooted not only in the Rule of Law as encapsulated in s 75(v) of the Constitution but also in the principle of *responsible government* which forms part of the basic fabric of Chapters I and II of the Constitution.[74] Not only does non-disclosure of a Minister's reasons thwart the exercise of judicial review, it prevents the Parliament from adequately scrutinising decisions of the executive arm of government.[75] This is irrespective of whether the Minister's failure to explain her or his decision is a result of a deliberate refusal or simply the product of an executive default.[76] In both cases non-compliance arguably constitutes an arbitrary defeasance of the constitutional scheme to ensure accountability of the executive.

Argument by analogy

The effect of failing or declining to furnish reasons can be approached by way of analogy. The inability of applicants for review to access the jurisdiction of the Federal Court due to executive default was raised in a series of refugee cases concerned with non-compliance with the time limit then specified in s 478 of the *Migration Act 1958*.[77] Under that provision an applicant who sought review of a Refugee Review Tribunal decision had to lodge the application with the Federal Court within 28 days of being notified of the decision. The section then provided that the Federal Court must not make any order allowing an applicant to lodge an application outside the 28 day period. Asylum-seeking applicants in detention centres, even if they completed their applications some days before the period expired were totally reliant on departmental officers to fax applications to the Federal Court in time. Not infrequently their applications were not received by the Court Registry until a day or two after the relevant date, preventing the lodging of the application within the specified time limit. No suggestion was made that this was deliberate. It appears to have occurred largely because of systemic factors such as when the outward mail-box was cleared.

The direction to the Federal Court not to extend time limits was challenged as derogating from the essential character of the Federal Court as a Chapter III court since it was incompatible with the standards of fairness appropriate for such a court. Effectively it would allow the executive government, *by inaction*, to *dispense* with an applicant's right to have a decision of the Tribunal reviewed. The Full Federal Court rejected these submissions on several occasions holding s 478 constitutionally valid. It held that s 478 simply *defined the jurisdiction* of the Federal Court and did not constitute an impermissible direction to the Court. The stipulated time limit was held to operate as a definition of the jurisdiction of the Federal Court,[78] not a withdrawal of or impediment to the exercise of jurisdiction within those defined limits.[79]

In one case, *WAFE v Minister for Immigration*[80], special leave to appeal to the High Court was granted.[81] Before the High Court considered the constitutional objection concerning the administrative potential of officers to frustrate access to the Court's jurisdiction the

Commonwealth granted asylum to the appellants. The appeal accordingly lapsed and the constitutional issue was left undetermined.

It might be drawing a long bow to argue that the kind of executive default or negligence entailed in preventing asylum-seekers in a case such as *WAFE* from having their matters reviewed is analogous with Ministers maintaining silence about their extradition decisions but the inhibitive effect of inaction or silence is similar in each case.[82] Both represent instances of substantial limiting access to the constitutional remedies provided under s 75(v).

High Court's holding in *Bodrudazza* that unreasonable time limits on s 75(v) suits is unconstitutional

After those earlier refugee cases the High Court in *Bodrudazza*[83] subsequently held that a provision in the *Migration Act* which purported to impose a 35 day limit on seeking a constitutional writ against an officer of the Commonwealth under s 75(v) of the Constitution was invalid. In the Court's view the time limit subverted the constitutional purpose of the remedy provided by s 75(v) particularly where the failure to comply is not due to any fault on the part of the applicant. *Bodrudazza* was concerned with the *constitutional* jurisdiction under s 75(v) whereas *WAFE* was dealing with a *statutory* jurisdiction that could be abolished at any time. In the end, if a constitutional requirement to provide reasons were confined to s 75(v) matters and not those arising under s 39B of the *Judiciary Act* it might prompt applicants to challenge extradition decisions directly in the High Court.

In SZAJB v Minister for Immigration (*SZAJB*)[84] the Full Federal Court distinguished *Bodrudazza* on the basis that the time limitation in the case of the Federal Court only had the legislative effect that an application beyond the designated time limit fell *outside the statutory jurisdiction* of that Court whereas the limitation in the case of the High Court under s 75(v) considered in *Bodrudazza* was an actual interference with the *constitutional* grant of power to issue 'constitutional writs'. The consequence of the first kind of limitation meant that a person is unable to approach the Federal Court for judicial review but it leaves open access to the High Court's constitutional jurisdiction. Whatever the situation with limiting the statutory jurisdiction of the Federal Court it does not apparently affect the ambit of the High Court's original jurisdiction. The issue of whether the executive arm of government can determine whether or not a matter is heard in either court still awaits final consideration by the High Court.

In *Minister for Home Affairs v Zentai* (*Zentai HC*)[85] the respondent contended that there was a constitutional requirement for the Minister as an 'officer of the Commonwealth' to provide some explanation regarding the basis for his decision. In the event, the High Court apart from Heydon J did not find it necessary to address the issue, dismissing the appeal on its merits. The issue remains currently undetermined at that level.[86]

Heydon J dissented on the major ground of appeal concerning the existence of the offence of war-crime. He therefore had to address the 'reasons' contention. He held that it is not possible to derive from s 75(v) an implication that all decision-making powers subject to s 75(v) review carried with them a duty to provide reasons. In rejecting the respondent's submissions, he made the observation that extradition decisions *were not necessarily unexaminable* for failure to provide reasons. This was because the decision-maker could, in his opinion, be compelled by subpoena to produce documents revealing the reasons for a given decision, or to reveal those reasons in response to interrogatories or under examination in the witness box.[87] In future extradition challenges, therefore, we may well see Commonwealth Ministers floundering under cross-examination for days on end attempting to explain why they decided not to refuse extradition.[88]

Conclusion

This article has sought to establish that because of the segmented structure of the *Act*, a lack of evidence establishing the Minister's basis of decision, the procedural difficulties of having materials produced to the court in unredacted form, and especially because of the fact that the Minister is not required to justify a decision, it is extremely difficult if not impossible to isolate the basis of the Minister's extradition decision regarding the fairness of an overseas trial. The result substantially inhibits or precludes an applicant's ability to subject the decision to judicial review. Only in an exceptional case, such as contemplated in the *Adamas case* will it be possible to infer the existence of jurisdictional error from a misstatement of law in the Departmental submission regarding the correct interpretation and application of the 'unjust exception'.[89] The determination of whether a trial in the requesting state conforms to the appropriate standard of 'justness', according to a correct understanding of notions such as 'just', will only be evident if the Minister acknowledges he or she has accepted the departmental view on the matter. In the event of non-disclosure a court will otherwise be bereft of plausible grounds to uphold a challenge on that ground.

In the end, the problem may not be whether international human rights standards governing a fair trial are incorporated into the *Act* but whether they are capable of realisation in judicial proceedings as constitutional protections against executive incursion. A constitutionally rooted requirement for Ministers to explain the basis of their decisions is vital to that realisation.

Recognition of an implied constitutional obligation to state reasons for an extradition decision will not necessarily provide a panacea guaranteeing a successful challenge. A Minister can, although having concluded that extradition would be unjust by international fairness standards, still exercise the residual discretion under s 22, including determining that the nature of the alleged crime is so heinous that the request should not be refused. The same is true if the Minister puts different 'weight' on diplomatic factors to that which an ordinary citizen would apply. In such events, however, the constitutionally mandated requirement to reveal the basis of the decision would at least provide greater accountability, including possible parliamentary scrutiny and debate. The Rule of Law in terms of restraining arbitrary executive action would thereby be vindicated.

Endnote

1 Peter Johnston, 'The Incorporation of Human Rights Fair Trial Standards into Australian Extradition Law' (2014) 76 *AIAL Forum* 20.

2 By virtue of s 11 of the *Act* and regulations under it giving effect to the provisions of extradition treaties.

3 I referred to this as the 'unjust exception'. I contended that it takes direct effect as if a provision of the *Act* and consequently forms part of Australian domestic law governing extradition.

4 For reasons that follow, I make the distinction between a requirement of *justification* and the more broadly conceived notion of 'a *duty to give reasons'*.

5 *Wingfoot Australia Partners Pty Ltd v Kocak* (*Wingfoot HC*) (2013) 303 ALR 64, 76 at [43]; [2013] HCA 43 at [43], adopted in *Leighton v Hon John Day* (*Leighton*) [2014] WASC 164 at [56].

6 Similar considerations of deference arise from the need to interpret international treaties 'in good faith'. In *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59; (2013) 88 ALJR 364, at [32]-[37], the High Court observed that in light of the requirement to read extradition treaties in good faith, in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties,* such treaties should be interpreted broadly in a way that is sensitive to international diplomatic relations. See also *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [10] following *Adamas HC*.

7 (2007) 162 FCR 278, 292-293 at [59]-[60].

8 (2000) 186 ALR 188, 229 at [104].

9 In *O'Connor v Adamas* (*Adamas FFC*) (2013) 210 FCR 364, 445 at [427] Barker J observed, however, that the doctrine of international reciprocity cannot be relied upon to undermine the requirement to address concerns about possible injustice resulting from an *in absentia* conviction by reference to Australian standards under Australian law. This point was not contradicted on appeal to the High Court; *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) n 6 above.

10 (2000) 200 CLR 442 at [7]. The Court was dealing with extradition to the UK where under the regulations a finding that extradition would be unjust *required* the Attorney to refuse.
11 Regarding the capacity of the *residual discretion* to outflank or 'trump' the existence of other facets of a decision under the *Act* that might otherwise constitute jurisdictional error, see McKerracher J in *Zentai v O'Connor (No 3*) *(Zentai (No 3)* [2010] FCA 691; (2010) 187 FCR 495 at [253]-[259], approved by Jessup J in *O'Connor v Zentai* (*Zentai FFC)* (2011) 195 FCR 515 at [190]. I was counsel for Mr Zentai in all his various cases.
12 Above n 9, at [331] per Barker J. On this point his Honour is not inconsistent with anything said in (*Adamas HC*), n 6 above.
13 *Adamas FFC*, n 9 above, at [325]-[328].
14 In *Minister for Immigration v Eshetu* (1999) 197 CLR 611 the High Court held that it was the function of the decision-maker, not a reviewing court, to decide what *weight* should be attributed to various evidentiary factors, otherwise courts would intrude into merits review.
15 The matter is not quite so simple. In the case of US extradition requests, for constitutional reasons ironically, the Commonwealth's decision is subject to a *prima facie* case test.
16 Courts have long recognised the inappropriateness of judicial resolution of complaints about governmental conduct where such complaints are political in nature and require curial judgments about the reasonableness of governmental action. Decisions about the latter involve competing public interests. The absence of any criterion by which a court can assess where the balance lies between the weight to be given to one interest rather than to another precludes review; see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 at [6] per Gleeson CJ citing Lord Diplock in *Dorset Yacht Co v Home Office* [1970] AC 1004, 1067.
17 Arguably, the trend towards streamlining the extradition process has been at the expense of individual rights. *Report 40*: *Extradition: A Review of Australian Law and Policy*, Australian Parliament, Joint Committee on Treaties, 2001, para 3.24 citing the submission of Professor Aughterson.
18 (2010) 210 FCR 505, 576; [2013] FCAFC 33 at [383].
19 *Adamas FFC* n 9 above at [234] per Barker J.
20 (1986) 162 CLR 24, 30.
21 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (Ex parte Palme*) (2003) 216 CLR 212, 224 at [40]; *Brock v Minister for Home Affairs* [2010] FCA 1301 at [68]-[75]; *Adamas FFC*, above n 9 at [235]-[248] per Barker J. Although the task of a court is to review the decision and not the decision-maker's reasons the grounds of review can only be effectively formulated if the reasons are known.
22 *Rivera v Minister for Justice* (2007) 160 FCR 115 and *Foster v Minister for Customs and Justice* (*Foster*) (2000) 200 CLR 442. In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432, Latham CJ said that where the exercise of statutory power is conditional upon the existence of a particular opinion, the Court may inquire whether the opinion has really been formed. This could be established by inference from materials before the decision maker to see if he or she has excluded from consideration some factor which should affect the determination; see also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (*Avon Downs*) (1949) 78 CLR 353, 360 (Dixon J), discussed in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
23 *Zentai FFC* (2011) n 11 above at [182].
24 *Adamas FFC* n 9 above at [250] (Barker J). The statement of *a wrong legal test* on the face of a Departmental submission should be distinguished from *factual errors* contained in it. The latter cannot be taken to have affected the Minister's decision in the absence of some clear reference to them. Merely taking account of factually erroneous statements in a departmental brief does not normally mean that the Minister has fallen into jurisdictional error; *Oates v Attorney-General (Cth)* (2001) 181 ALR 559 at [133] (Lindgren J); *Zentai (No 3)* n 11 above at [362] (McKerracher J).
25 The difficulty of going behind the 'inscrutable face' of the decision-maker even with the capacity to draw inferences, as indicated in *Avon Downs* n 22 above was recognised by Gummow and Kiefel JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [34].
26 See for example *Zentai FFC* n 11 above at [182] per Jessup J.
27 A freedom of information inquiry seeking disclosure of the Minister's diary and time commitments could be illuminating as to the amount of time spent on reading these submissions.
28 Above n 9 at [249-[252].
29 Ibid at [249]-[252] (Barker J). In *Adamas v O'Connor (No 3)* [2012] FCA 365 Gilmour J at first instance found that he could properly draw the inference that the Minister did not judge the question of injustice, oppression or incompatibility according to Australian standards. The Full Court majority in effect endorsed the primary judge's view. This assumes that where erroneous legal advice in a Department brief causes a Minister to take into account a prejudicial consideration adverse to the applicant, that could in some instances be ground for jurisdictional error: *Re Patterson* (2001) 207 CLR 39. The High Court in *Adamas HC* n 6 above overruled Gilmour J and the Full Court but only on the correct understanding of the unjust exception, not on the issue of what inferences could be drawn.
30 *Adamas FFC*, above n 9, at [407], [413], [415], [423]-[428].
31 *Adamas HC*, n 6 above.
32 This can be compared with *Zentai (No 3)* n 11 above where McKerracher J at [234]-[259] concluded that the Departmental submission revealed a misleading description of the Minister's function in determining

whether, under Article 3(2)(b) of the Extradition Treaty between Australia and Hungary, the Australian Federal Police had decided to 'refrain' from prosecuting Mr Zentai for the alleged offence. He held that notwithstanding what he described as an accumulation of errors (including that advice), while it was *possible* that he might have been misled on this point and taken it into account, he may still have decided that there was *another* adequate *discretionary basis* for refusing surrender. The Full Court in *Zentai FFC* n 11 above dismissed an appeal on this point.

33 [2010] FCA 252.

34 Even then, in the case of Mr Zentai when possible erroneous legal advice was disclosed it could not be found to support a finding of jurisdictional error as it could not be shown to have affected the Minister's decision.

35 (2011) 282 ALR 302; [2011] FCA 948.

36 For a discussion of the different senses of justiciability see Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: *Then* and *Now*?' Sydney Law School: 4th Winterton Lecture, 14th February 2013, 5 and entry on 'Justiciability' by Lindell in T Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 391; also *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368-369 and 367-373 per Gummow J; *Thomas v Mowbray* (2007) 233 CLR 307, 353-355 at [104]-[109] per Gummow and Crennan JJ.

37 Jeffery King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 411-412, 421. See also generally Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell, Toronto, 1999) 233; Matthew Lewans*,* 'Deference and Reasonableness since *Dunsmuir*' (2012) 38 *Queen's Law Journal* 59.

38 Richard Garnett, 'Foreign States and Australian Courts' (2005) 29 *Melbourne University Law Review* 704.

39 See TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] *Cambridge Law Journal* 671.

40 'Matter' is here used in its commonly-used sense. Justiciability on the other hand may turn on whether judicial proceedings engage a *real controversy*, and hence a 'matter' under Chapter III of the Constitution.

41 Regarding the discretionary factors that influence granting relief by way of declaratory orders and certiorari see *Re McBain* (2002) 209 CLR 372 at [1]-[5] (Gleeson CJ); [92]-[114]; [242-249] (McHugh J) and [268]-[290] (Hayne J) in the context of whether there is a 'matter' within the meaning of ss 75 and 76 of the Constitution; *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at [47]-[52] (Gaudron J); [95] (Gummow J) and [217] (Callinan J); *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263-264 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101-109 at [42]-[59] (Gaudron and Gummow JJ).

42 S*ee Peko-Wallsend*, n 20 above, at 39-40 (Mason J). As to the nature of some powers being inherently insusceptible of review see Wilson and Toohey JJ in *South Australia v O'Shea* (1987) 163 CLR 378 at 402, adopted by Doyle CJ in *Watson v South Australia* (2010) 278 ALR 168,182-193; [2010] SASCFC 69 at [83]-[125]; also Peek J at [128]-[144]; *Moti v The Queen* (2011) 245 CLR 456, 474-475 at [46]-[52]; [2011] HCA 50 at [46]-[52]; *Wilsmore v Court* [1983] WAR 190; *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth* (2003) 126 FCR 354 at [64]-[68] (Black CJ and Hill J) citing *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 and *Re Limbo* (1989) 64 ALJR 24. Regarding broad policy considerations see *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 529, 565 and *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50]. These authorities recognise that there are some areas into which a court should hesitate to intrude: *West Australian Field and Game Association Inc v Pearce* (1992) 8 WAR 64, 87; and see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, 257-258 at [108] & [111]; [2013] HCA 18 at [108], [111] (Gageler J). In *Leighton*, n 5 above, Allanson J at [62] cautions about extrapolating from the administrative law principles developed in the context of refugee review decisions to other situations where Ministers exercise power by reference to broad policy considerations. Broad policy determinations are arguably the case with extradition decisions.

43 Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1 citing *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-155 at [39]-[47] (Gleeson CJ, Gummow, Kirby and Hayne JJ). In the latter the High Court declined to follow the American doctrine of judicial deference in *Chevron USA Inc v Natural Resources Defense Council Inc* [1984] USSC 140; 467 US 837 (1984). See Anthony Cassimatis, 'Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England' (2010) 34 *Melbourne University Law Review* 1.

44 See Simon Evans, 'Standing to Raise Constitutional Issues' (2010) 22 *Bond Law Review* 3; Peter Johnston, 'Pape's Case: What does it say about Standing as an Attribute of Access to Justice?' (2010) 22 *Bond Law Review* 16; Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22 *Bond Law Review* 12; *Thomas v Mowbray*; (2007) 233 CLR 307, 325 at [8] (Gleeson CJ); 353-355 at [104]-[110] (Gummow and Crennan JJ). But in *Habib v The Commonwealth* (2009) 175 FCR 411 the Full Federal Court did not accept that embarrassment of a foreign state in matters of foreign relations and terrorism precluded review.

45 See *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 757-758 per Dixon J; *SZQRB* n 18 above at [384] per Flick J. In the case of *Zentai*, after refusing to provide reasons for his decision Home Affairs Minister Brendan O'Connor announced his decision in a press release dated 12 November 2009. After stating that it was not one of determining Mr Zentai's guilt or innocence he observed that it was about

deciding whether or not Mr Zentai should be surrendered to Hungary in accordance with Australia's extradition legislation and its international obligations, adding that Australia '*takes war crimes seriously*' and the methodical application of the Extradition Act 'ensures that *Australia is not a haven for alleged criminals*' (emphasis added). It might well be the case that while his statement could not be taken to represent his reasons officially, it discloses the overriding consideration that could have motivated his decision; namely, concern about criticisms made about Australia never having extradited an alleged war criminal and its effect in damaging Australia's international reputation. Arguably, this could well constitute a legitimate, if questionable, basis for the exercise of his residual discretion under s 22 of the *Act*.

46 See E P Aughterson, 'The Extradition Process: an Unreviewable Executive Discretion?' (2005) 24 *Australian Yearbook of International Law* 13.

47 Note 9 above.

48 In *SZQRB* n 18 above, at [373]-[387] Flick J held that when faced with a virtually inscrutable decision a court may conclude that it can properly be regarded either as '*arbitrary*' or a decision which is not made in accordance with a proper consideration of the objects and purposes of (in that instance) the *Migration Act 1958* (Cth). He stated at [382] that: 'It must be recognised that an exercise of statutory discretion or power conferred by a Commonwealth legislative provision cannot generally be conferred free from all judicial scrutiny.' It appears from his Honour's qualification '*generally*' that he conceives that *some* decisions may in fact be unreviewable.

49 See *Adamas FFC* above n 9 at [276] (Barker J).

50 In *SZMDS*, n 25 above, Gummow ACJ and Kiefel J refer to the *practical importance* of providing reasons and the difficulties inherent in relying on inferences of the kind that were discussed in *Avon Downs* n 22 above.

51 Borrowing generously from Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*: 'Whereof one cannot speak, thereof one must be silent.'

52 Franz Kafka, *The Trial* (1920).

53 The Commonwealth's position on the relationship between ss 16 and 22 is that once a magistrate has determined that a person is 'eligible' for extradition the individual is no longer an 'extraditable person'. Accordingly, the latter is not a jurisdictional fact conditioning the Minister's power under s 22. The Full Federal Court in *Zentai FFC* n 11 above accepted that proposition (Besanko J at [41]-[44] and Jessup J at [122]-[144]) but it remains open until settled authoritatively by the High Court. Regarding the statutory change of status upon a magistrate's determination see also *Snedden v Minister for Justice of the Commonwealth* [2013] FCA 1202 at [25] (Davies J) and *Marku v Republic of Albania* [2012] FCA 804; (2012) 293 ALR 301, and *Marku v Republic of Albania* [2013] FCAFC 51; (2013) 212 FCR 50.

54 This requirement of *justification* has become more evident in Canadian and some English authorities. It is the basis of suggestions by the late Michael Taggart and Professor Dyzenhuis that Australian courts should adopt a similar principle; see 'Reasoned Decisions in Legal Theory' David Dyzenhaus and Mike Taggart, in D Edlin, (ed) *Common Law Theory* (Cambridge University Press, 2007) 134-167 and see David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal of Human Rights* 11. The Supreme Court of Canada has recognised the importance of reasons depending, contextually, upon the adjudicative setting. This is justified on the basis that reasons allow the parties and the public to see that justice is done and maintains confidence in the judicial process while facilitating judicial review; *Baker v Canada (Minister of Citizenship and Immigration) (Baker)* [1999] 2 SCR 817; *R v Sheppard* [2002] SCC 26 and *R v R.E.M.* [2008] SCC 51. For a discussion of the significance of *Baker* see Lorne Sossin, 'The Rule of Policy: The Impact of Judicial Review on Administrative Discretion' in David Dyzenhaus, *The Unity of Public Law* (Hart Publishing, 2004) 87; also Mary Liston, '"Alert, Alive and Sensitive": the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law' ibid, 113; also Lorne Sossin, 'Administrative Law in an Interconnected World' (2013) 74 *AIAL Forum* 24.

55 Decisions under the *Extradition Act 1988* are excluded from the *ADJR Act* (see Schedule 1). Regarding the negative inference to be drawn when a matter is exempted from judicial review under the *ADJR Act* see *C Incorporated v Australian Crime Commission* (2010) 113 ALD 226 at [96], the Full Federal Court was not addressing an argument based on a *constitutional* requirement to provide reasons.

56 In *Commissioner of Police v Eaton* (2013) 294 ALR 608,611-612; [2013] HCA 2, Heydon J at [13]-[14] noted that the intended statutory effect of the Commissioner not being required under a state law to give reasons was that the Commissioner's decision could not be impugned on account of any particular reason. Crennan, Kiefel and Bell JJ at [74] observed that the Commissioner's power to dismiss a probationary police officer without giving reasons implied an unfettered power that was not subject to review on the merits. The Court was dealing with a State officer, not an 'officer of the Commonwealth' within the meaning of s 75(v) of the Constitution.

57 According to *Public Service Board of New South Wales v Osmond* (*Osmond*) (1986) 159 CLR 656 there is *generally* no common law requirement to give reasons. For a critique of *Osmond* see M Taggart, 'Administrative Law: Reasons for Decision' (2003) *New Zealand Law Review* 118. *Osmond* does not exclude the possibility in an appropriate case of an *implied statutory requirement* to that effect; see *International Finance Trust Company Limited v New South Wales Crime Commission* [2008] NSWCA 291 at [41], [47], [50] and [56] per Allsop P; *SZQRB* n 18 above, 210 FCR 505, 575-576 at [382]. It certainly does not deny a *constitutional basis* applying to Commonwealth officers including Ministers. While accepting that there is no general duty to provide reasons Flick J in *SZQRB*, n 18 above, at [382]

conjectured that *the law has moved on in the decades since Osmond* so that a duty to provide reasons should be implied where an administrative decision affects the liberty of an individual, citing *R v Secretary of State for Transport, Ex parte Richmond-Upon-Thames London Borough Council (No 4),* [1996] 1 WLR 1460 at 1475 per Brooke LJ. If so, *Osmond* may have been 'constitutionalised' and undergone a metamorphosis of the kind postulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 232 and Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131.

58 *O'Donoghue v O'Connor* (No 2) (2011) 283 ALR 682, 700-701; [2011] FCA 985 at [128]-[138].

59 Note 22 above.

60 As indicated by Dixon J in *Avon Downs* (1949) 78 CLR 353 at 360:

> His decision… is not unexaminable. … Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception.

Regarding the extent to which inferences about unlawfulness can permissibly be made from materials before a decision-maker see *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 120. It is questionable whether the guidance provided by *Avon Downs* and *Melbourne Stevedoring* is susceptible of ready and sufficiently determinative application.

61 *Ex parte Palme*, n 21 above, 216 CLR 212, 221 at [30] (Gleeson CJ, Gummow and Heydon JJ). The problem with relying on compliance with the rules of natural justice is that in the event of non-compliance the court at best might grant mandamus to require the Minister to reconsider the decision without testing whether the Minister's decision was based on a correct understanding of law.

62 (2010) 243 CLR 319.

63 Ibid, at [87]-[91].

64 Stricter scrutiny of executive conduct under Part II of the Constitution would be consistent with recent decisions of the High Court such as *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 and *Williams v The Commonwealth (Williams*) (2012) 248 CLR 156; see Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313; Gabrielle Appleby and Stephen McDonald, 'The Ramifications of Pape v Federal Commissioner of Taxation for the Spending Power and Legislative Powers of the Commonwealth' (2011) 37 *Monash University Law Review* 162*;* Duncan Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law' (2009) 28 *University of Tasmania Law Review* 145.

65 'Exploring the Purposes of Section 75(v) of the Constitution' (2011) 34 *University of New South Wales Law Journal* 70, 71, 90-91; see also Leighton McDonald, 'The Entrenched Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

66 Note 18 above at [349]-[362].

67 Ibid, at [359]-[360].

68 To use the metaphor adopted by Leslie Zines, *The High Court in the Constitution*, Ch 11, 300 drawing on the doctrine in the *Communist Party Case* (1951) 83 CLR 1.

69 The argument is therefore one based on a principle of *effectiveness*.

70 The contention that the Minister is *constitutionally or statutorily required* to provide *an adequate and intelligible explanation of his decision* also relies on an extrapolation from recent High Court cases such as *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 467, 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) and *Bodrudazza v Minister for Immigration* (*Bodrudazza*) (2007) 228 CLR 651. It draws upon notions of the *efficacy* and *effectiveness* of the judicial review process. It also has received some force from the High Court's decision in *Wainohu v New South Wales* (2011) 243 CLR 181. See also *Plaintiff M61/2002 v The Commonwealth* n 63 above and *MZX0T v Minister for Immigration* (2008) 233 CLR 601, 614 (Gleeson CJ Gummow and Hayne JJ).

71 See *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278, (Dixon CJ, McTiernan, Fullagar and Kitto JJ) cited by McHugh J in *Re Wakim* (1999) 198 CLR 511, at [70], and Gummow and Hayne JJ at [118] and *Abebe v The Commonwealth* (1999) 197 CLR 510 at [47] (Gleeson CJ and McHugh J).

72 *Kocak v Wingfoot Australia Partners* (*Kocak*) (2012) 35 VR 324, 337; [2012] VSCA 259 at [48]-[50] citing *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, see 271 [53]–[56] (French CJ, Gummow, Crennan and Bell JJ), and 301 [170] (Kiefel J). Although *Kocak* was reversed on appeal in *Wingfoot HC*, n 5 above, the two decisions are not inconsistent with these observations. See also *Ex parte Palme* n 21 above, at 224 [40] (Gleeson, Gummow and Heydon JJ) and 245 [113]–[115] (Kirby J).

73 See *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [47]-[48] (Basten JA, Beazley JA agreeing).

74 See *Williams*, n 64 above.

75 Of course in the case of Parliament the Minister or officials may be subject to questioning; it can be queried how effective that might be in a case involving a complex extradition matter.

76 The term 'default' is used in a neutral sense without any necessary implication of culpability on the part of the Attorney or the relevant Department.

77 *Oguzhan v Minister for Immigration*; (2000) 99 FCR 285, 291 per Carr J; *Hocine v Minister for Immigration* (2000) 99 FCR 269, 282 (French J); *Abidin v Minister for Immigration* [2002] FCAFC 54; and *WAFE of 2002 v Minister for Immigration* (2002) 70 ALD 57; [2002] FCAFC 254.
78 That is, 'defined' within the terms of s 77 of the Constitution.
79 *Abidin v Minister for Immigration & Multicultural Affairs* n 77 above; *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269 at 282 (French J); *Oguzhan v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 285 at 291 (Carr J).
80 (2002) 70 ALD 57; [2002] FCAFC 254.
81 *WAFE v Minister for Immigration* [2003] HCATrans 432 (24 October 2003).
82 It could be argued, on the contrary, that non-compliance with s 478 prevented review *absolutely* whereas a failure to give reasons in extradition cases, though somewhat crippling, is not so extreme.
83 Note 70 above.
84 (2008) 168 FCR 410, following *SZICV v Minister for Immigration* (2007) 158 FCR 260.
85 (2012) 246 CLR 213. I was counsel for the respondent.
86 The issue had been raised and decided against the respondent in the earlier rounds of the *Zentai* litigation.
87 Note 85 above at [94]-[95].
88 Whether this would go so far as allowing a court to make an adverse finding against the Commonwealth on the basis of the rule in *Browne v Dunn* (1893) 6 R 67 if the Minister is not called to give evidence is a different matter.
89 This assumes that the court, unlike the Federal Court in the *Adamas* application, correctly interprets the proper test of 'unjust' according to the intended meaning in the particular bilateral extradition treaty.