CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/04

DIRECTOR OF PUBLIC PROSECUTIONS:
CAPE OF GOOD HOPE Applicant

versus

TREVOR CLAUD ROBINSON Respondent

Heard on : 24 August 2004

Decided on : 2 December 2004

JUDGMENT

YACOOB J:

Introduction

[1] Mr Robinson, the respondent, is a South African citizen who was convicted by a Canadian court in 1996 of sexually assaulting a fourteen year old girl in Canada. He fled to South Africa immediately after conviction and was sentenced in his absence by the same court to three years imprisonment. In due course the Canadian government requested the South African government to extradite Mr Robinson to Canada to serve the sentence. He was eventually brought before a Wynberg magistrate pursuant to the

provisions of the Extradition Act[1] (the Act) for the purpose of determining whether he was liable to be surrendered in terms of section 10 of the Act. The magistrate found that he was. However, the respondent successfully appealed to the Cape of Good Hope High Court (the High Court).[2] In allowing the appeal, the High Court held that Mr Robinson was not liable to be surrendered because if extradited to Canada he would have to serve a sentence of imprisonment that had been imposed in his absence. In these circumstances, so the High Court held, Mr Robinson's right to a fair trial would have been violated. The High Court accordingly made an order discharging the respondent in terms of section 10(3) of the Act. The Cape of Good Hope Director of Public Prosecutions (the DPP) seeks leave to appeal against this judgment. The arguments of the parties will be better appreciated if some aspects of the Act are briefly described at the outset.

Some aspects of the Act

[2] The Act determines the conditions that must be complied with on the domestic plane before any person sought by a foreign State to undergo trial or serve a sentence there can be surrendered to the requesting state for that purpose.[3] Section 3 of the Act distinguishes between three types of extradition to a foreign State:[4] where South

[1] Act 67 of 1962.

[2] *Robinson v The State*, (CPD) Case No A1060/02, 7 April 2004, as yet unreported.

[3] *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) para 14.

[4] Id para 5.

Africa has concluded an extradition agreement with the foreign State,[5] where there is no extradition agreement in place[6] and where the foreign State is a "designated State".[7] The extradition cases so far considered by this Court[8] were both concerned with extradition proceedings where there was no extradition agreement in existence and where the foreign State concerned was not a designated State. One of the issues in this case is whether the extradition agreement[9] between Canada and the Republic of South Africa that came into force more than a year before the enquiry was held was applicable to that enquiry.

[3] The extradition process as well as the nature of the proceedings before the magistrate could differ significantly depending on whether the Act alone is applicable or an extradition agreement is in force. In the absence of any agreement, the President must consent to the surrender of the person sought before the machinery of the Act can be put into operation for the purpose of determining whether or not there should be an extradition. Moreover, the determination by the extradition magistrate as to whether the person is liable to be surrendered is made by reference to the provisions of the Act alone.[10] If however, there is an extradition agreement in force, no

[5] Section 3(1) of the Act.

[6] Section 3(2) of the Act.

[7] Section 3(3) of the Act.

[8] See *Harksen* generally above n 3 and *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

[9] Published in Government Gazette 22284 GN R391, 18 May 2001.

[10] Section 10 read with section 3(2) of the Act. *Harksen* above n 3 para 14; *Geuking* above n 8 at 29.

presidential consent is necessary to trigger the process of extradition.[11] In addition, the decision as to whether a person is to be extradited including the question as to whether documents have been authenticated appropriately must be made by reference to the agreement and the Act.[12]

[4] The Act provides for two types of extradition enquiry: one applies in limited circumstances if extradition is sought by an associated State,[13] and the second applies in all other cases where extradition is requested by a foreign State. In the first case, the extradition is commenced in terms of section 4(3) read with section 6 of the Act and the enquiry conducted is that described in section 12 of the Act.[14] In all other cases, the extradition process begins in terms of a section 4(1) request and the extradition enquiry is governed by section 10 of the Act.[15]

[5] Section 10 of the Act requires the magistrate to determine whether the person is liable to be surrendered to the foreign State concerned and, in the case where the person is accused of the commission of an offence, whether there is sufficient evidence to warrant a prosecution in the foreign State.[16] A magistrate who makes a positive finding in relation to these matters must make an order committing that

[11] Section 3(1) read with section 4(1) of the Act.

[12] Section 10 read with section 3(1) of the Act.

[13] Section 6 of the Act read with the definition of "associated State" in section 1.

[14] Section 9(4)(b)(ii) read with section 4(3) and section 6 of the Act.

[15] Section 9(4)(a) and (b)(i) of the Act.

[16] Section 10(1).

person to prison "to await the Minister's decision with regard to his or her surrender".[17] If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time she must discharge that person.[18] A magistrate issuing a warrant for committal to prison is obliged to forward a copy of the record of the proceedings together with a report deemed by the magistrate to be necessary to the Minister immediately. The magistrate does not in a section 10 enquiry make an order for the surrender of the person sought to be extradited. A person may not be extradited consequent upon the magistrate's decision. She may be committed to prison only.

[6] The Minister of Justice makes the decision whether or not to surrender the person concerned to the foreign State in an extradition commenced in terms of section 4(1), and after a section 10 enquiry. The Minister is empowered to do this by the provisions of section 11 of the Act. Section 11 provides:

> "Minister may order or refuse surrender to foreign State.—The Minister may—
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> (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
>
> (b) order that a person shall not be surrendered—
>
> (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
>
> (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

[17] Section 10(1).

[18] Section 10(3).

(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

[7] In summary therefore, a person whose extradition is requested by a foreign State in terms of section 4(1) must be brought before an extradition magistrate who determines whether the person is liable to be surrendered in terms of section 10 of the Act. The Minister cannot make an order for the extradition of any person unless a magistrate has committed that person to prison after a section 10 enquiry. An order of committal by a magistrate is a prerequisite to the Minister's decision to surrender. The extradition magistrate and the Minister both play a role in the extradition if there is a section 10 enquiry.

[8] As I have already said, the section 12 enquiry cannot be conducted unless the state seeking extradition is an associated State. Canada is not. A brief account of section 12 and the way in which it differs from section 10 of the Act remains necessary however. Section 12 of the Act provides:

"Enquiry where offence committed in associated State.—

(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(b)(ii) the magistrate finds that the person brought before him or her is liable to

be surrendered to the associated State concerned, the magistrate shall, subject to the provisions of subsection (2), issue an order for his or her surrender to any person authorized by such associated State to receive him or her at the same time informing him or her that he or she may within 15 days appeal against such order to the Supreme Court.

(2) The magistrate may order that the person brought before him or her shall not be surrendered—

(a) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

(b) where such person is serving, or is about to serve a sentence to a term of imprisonment, until such sentence has been completed; or

(c) at all, or before the expiration of a period fixed by him or her, or make such order as to him or her seems just if he or she is of the opinion that—

(i) by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(ii) the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion.

(3) If the magistrate finds that the evidence does not warrant the issue of an order under subsection (1) or that the required evidence is not forthcoming within a reasonable time and the delay is not caused by the person brought before him or her, he or she shall discharge that person."

[9] Extradition magistrates presiding over both section 10 and section 12 enquiries must enquire whether or not the person brought before the court is liable to be surrendered to the requesting state. But there the similarity ends. The Minister has no role in a section 12 extradition. Indeed all the powers conferred upon the Minister by

section 11 are conferred upon the magistrate by section 12, but the extradition magistrate can exercise these powers only on a finding that the person sought is liable to be surrendered. The magistrate is empowered by section 12 to make an order for the surrender of the person sought to any person authorised by the associated State to receive him or her[19] in the same way as section 11 authorises the Minister to order a person committed to prison under section 10 to be surrendered to any person authorised by the foreign State.[20] Section 11(b) sets out in detail the circumstances in which the Minister may not order the extradition of a person who has been committed in terms of section 10. Section 12(2) limits the power of the magistrate and prohibits the extradition magistrate from making an extradition order in almost exactly the same terms as section 11(b) does in respect of the exercise of ministerial power.

Proceedings in the High Court

[10] The respondent took three points before the High Court. He submitted that:

(a) he would be the victim of an unfair trial contrary to section 35 of the Constitution if extradited to serve a sentence of imprisonment imposed upon him in his absence and that the magistrate ought to have discharged him on that account;

(b) the documents relied upon at the enquiry had not been properly authenticated; and

(c) it had not been shown that he had been convicted of an extraditable offence.

[19] Section 12(1) of the Act.

[20] Section 11(a).

[11] The DPP in effect contended in support of the magistrate's decision that the magistrate in a section 10 enquiry had no power to decide whether or not the person sought should be extradited. She had no power to order the extradition of the person sought but had the power only to commit the person to prison pending the Minister's decision in terms of section 11 of the Act. It was not within the purview of the magistrate conducting a section 10 enquiry to determine whether it would be unjust or unreasonable to extradite the person. That power it was argued is reserved for the Minister where a section 10 enquiry is held[21] and is expressly conferred on the magistrate presiding over a section 12 enquiry.[22]

[12] The High Court rejected this argument. It began by ascertaining the meaning of the phrase "liable to be surrendered" in section 10(1) of the Act by reference to a dictionary definition of the word "liable" which was rendered as "bound or obliged in law or equity". On this basis, the High Court adjudged that section 10(1) required the magistrate to decide whether or not the person sought was bound or obliged in law or equity to be surrendered. The High Court then directed its attention to the violation of the respondent's constitutional right to a fair trial and concluded that it would be wrong and a serious violation of this right were the respondent to be extradited to serve a sentence of imprisonment imposed in his absence. In the light of this finding and in the context of the earlier conclusion that the extradition magistrate had to

[21] Section 11(b)(iii).

[22] Section 12(2)(c)(i).

decide whether the respondent was "obliged" to be surrendered, the court took the view that section 39(2) of the Constitution[23] required a court to interpret section 10(1) so as to confer upon the extradition magistrate the power to consider whether the respondent's constitutional rights would be infringed were he to be extradited. It accordingly held that the magistrate ought not in the circumstances to have made a section 10(1) order. The High Court also held that section 10(1) had to be construed to be a "filter" that would preclude any ministerial decision in terms of section 11 if the circumstances were such that the constitutional rights of the person sought would be violated upon extradition.

[13] In coming to this conclusion, the High Court placed some emphasis on the distinction between judicial and administrative decisions and on a perception that it would be unsafe to entrust decisions to the executive where a person's constitutional rights were implicated. It held on this basis that the extradition magistrate ought to have discharged the respondent in terms of section 10(3). The High Court allowed the appeal, set aside the order of the extradition magistrate and discharged the respondent. In the circumstances, it was unnecessary for the High Court to consider the authentication issue or whether the respondent had been convicted of an extraditable offence.

[23] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[14] The DPP seeks to challenge the correctness of this decision in the application before this Court. The respondent supports the decision of the High Court and contends as it did in the High Court that the documents before the magistrate had not been properly authenticated in compliance with the extradition agreement. The respondent also raises a preliminary jurisdictional issue and argues that the DPP is precluded by law from appealing to this Court against the High Court decision. I address this first.

Does the DPP have the right to approach this Court?

[15] The DPP comes to this Court in terms of rule 19(2) which provides:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

The respondent contends that the DPP is neither "aggrieved by the decision" of the High Court nor is that office a "litigant" within the meaning of rule 19(2). It is necessary, before going to these issues, to consider if this is an appeal on a constitutional matter.

[16] The decision of the High Court in issue here is that the respondent be discharged in terms of section 10(3) of the Act. In effect, the decision of the High Court was that the magistrate ought not to have declared that the respondent was liable

to be surrendered within the meaning of section 10(1) of the Act because the respondent would, contrary to the provisions of our Constitution be forced, upon extradition, to serve a sentence of imprisonment imposed in his absence. The High Court held that sections 9 and 10 of the Act, read in terms of the Constitution precluded the magistrate from ordering that the respondent was liable to be surrendered when the consequence of that order would be that the respondent could serve a sentence imposed in his absence. The decision of the High Court raises the issue of how the section 10(1) powers of the extradition magistrate should be delineated. Is the magistrate empowered to consider whether the constitutional rights of the person sought to be extradited would be compromised by the fact of the extradition? If so, is she empowered to make an order discharging an extraditee in terms of section 10(3) of the Act if it is found that constitutional rights of the person sought would be violated upon extradition? Or are these powers and duties conferred solely upon the Minister by section 11 of the Act?

[17] In my view, the application for leave to appeal does raise a constitutional matter. Our Constitution confers the right to a fair trial upon the respondent. Whether the extradition magistrate or the Minister has the power to consider if and the extent to which the respondent's constitutional rights would be violated if he is extradited is a matter concerned with the enforcement of the fair trial right conferred upon the respondent in the Constitution. So too is the question whether an extradition magistrate should discharge a person sought and preclude the executive from making

a decision to extradite if there is some danger that the fair trial rights of that person would be violated upon extradition.[24]

[18] Another issue before us is whether the magistrate ought to have applied the extradition agreement and conducted the enquiry by its lights. The nature of the magistrate's decision whether the person sought is liable to be surrendered in terms of section 10(1) would be impacted upon by the terms of the extradition agreement in issue in a particular case if it were to be held that the extradition agreement was applicable. In that event, the extradition agreement would be part of the statutory context in which the powers of the magistrate ought to be determined. In the circumstances, the question whether the extradition agreement was applicable to the enquiry before the magistrate is, at the very least an issue connected with a decision on a constitutional matter, within the meaning of this phrase in section 167(3)(b) of the Constitution.

[19] The respondent contends that the magistrate ought, in any event, to have ordered his discharge pursuant to section 10(3) of the Act because the documentary evidence was not properly authenticated. Both parties agreed, however, that the issue of whether the documents were properly authenticated does not raise a constitutional matter. I cannot agree. The authentication debate will arise only if it is held that the High Court was wrong in concluding that the extradition magistrate should have

[24] It is not necessary to consider whether the right to a fair trial in our Constitution has any extra-territorial application. See *Kaunda and Others v President of the RSA and Others (2)* 2004 (10) BCLR 1009 (CC) para 32.

discharged the respondent. In that event, the magistrate's order that the respondent is liable to be surrendered will stand. If the magistrate had been wrong in the finding that the documents placed before her had been properly authenticated, the respondent would stand the risk of being extradited on an unfair and improper basis.

[20] The extradition of a South African citizen raises a constitutional matter because the citizen will be formally removed from this country to stand trial or serve a period of imprisonment which would have an impact on the constitutional rights of the person sought to be extradited. All people who are unlawfully extradited to serve a sentence of imprisonment abroad would have their rights infringed contrary to the provisions of the Constitution.[25] If the magistrate was wrong in accepting the documentary proof and if the respondent ought to have been discharged for want of appropriate authentication, the subsequent extradition of the respondent if it occurs, will not be consistent with our Constitution. In the circumstances, whether there was proper authentication in the extradition enquiry before the magistrate is a constitutional matter or, at the very least, a matter connected with a constitutional matter.

Section 167 of the Constitution

[21] Rule 19 must be interpreted in the context of section 167(3) and section 167(6) of the Constitution. Section 167(3) declares that this Court is the highest court in all constitutional matters including any issue concerning the interpretation, protection and

[25] *Geuking* above n 8 para 1.

enforcement of the Constitution.[26] Section 167(6)(b) says that national legislation or the rules of the Constitutional Court must allow a person to appeal directly to this Court from any other court with the leave of this Court, whenever it is in the interests of justice.[27]

[22] Counsel argued that this section does not confer a right of appeal directly to this Court. All it does is to oblige the legislature and those responsible for making the rules of this Court to make provision for an appeal directly to this Court. It must be accepted however that the purpose of the provision is to ensure that there is a right of appeal directly to this Court in the circumstances envisaged, that is when it is in the interests of justice to do so. Section 167(6)(b) does not concern itself with appeals to this Court in the ordinary course and in the context of the hierarchy of courts described in section 166 of the Constitution. It is not concerned with appeals to this Court from the Supreme Court of Appeal (SCA). It is concerned really with direct appeals to this Court from any other court. In other words, it is concerned with a situation in which the SCA (and perhaps other courts) is bypassed.

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[26] Section 167(3) provides:

> "The Constitutional Court—
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[27] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

[23] The respondent emphasises that the Act does not expressly confer a right of appeal on the state against the decision of an extradition magistrate or a high court discharging the person sought to be extradited. Counsel submits that section 167(6) requires provision to be made for an appeal directly to this Court only where there is a right of appeal to another court in terms of a statute. It does not require provision to be made for an appeal directly to this Court if there is no right of appeal in the first place. The submission continues that the state has no right of appeal against the decision of the High Court and section 167(6) therefore does not require the legislature to provide for a state appeal to this Court.

[24] There is no warrant for reading this limitation into section 167(6). It is impossible to conceive why, if the purpose had been to limit the extent to which an appeal is guaranteed only to those who already have a right of appeal, the limitation was not expressly written into the provision. More importantly, the suggested interpretation has the consequence that an appeal on a constitutional issue to this Court should be provided for by the legislature only if there was a right of appeal to another court on some other basis. The absence of a right of appeal to another court would, according to the submission, relieve the legislature of the obligation to provide for an appeal directly to this Court even if the interests of justice demanded this. The suggested interpretation means that the Constitution would allow a judgment of another court on a constitutional matter to remain unchallenged even if the interests of justice cry out for its reconsideration. This means in effect that another court (the High Court in this case) will be the highest court in constitutional matters.

[25] The argument is untenable. Section 167(6) obliges the rules of the Court or the legislature to provide for an appeal to this Court with leave whenever it is in the interests of justice to do so without any qualification. The Constitution enables this Court to exercise control over the cases it will entertain and by doing so, to be the supreme guardian of the Constitution. It does this by enabling this Court to decide whether it will hear an appeal on a particular constitutional matter regardless of whether or not there is a right of appeal to any other court. The construction contended for undermines the purpose and scheme of the section 167(6) access provisions as well as the constitutional precept that this Court is the court of final instance in all constitutional matters. The suggestion that the right to appeal in terms of some other legislation is a prerequisite for an appeal to this Court on a constitutional matter when in the interests of justice to do so has no substance.

[26] The respondent also submitted that section 167(6) requires provision to be made only for persons to appeal and that there is no obligation to provide for appeals by organs of state. The respondent contrasts section 167(6) with section 172(2)(d)[28]

[28] Section 172(2) of the Constitution provides:

> "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

of the Constitution which confers the right upon a person and an organ of state to appeal against or to apply to vary or confirm an order that is subject to confirmation in terms of section 172(2)(a) read with section 172(2)(c) of the Constitution. The submission is that section 167(6) would, like section 172(2)(d), have referred to both organs of state and persons had the purpose of the section been to include both. The word "person" in section 167(6) should be given the same meaning as can be ascribed to it in section 172(2)(d). It should bear a narrow meaning and exclude organs of state.

[27] I do not agree. The section must be interpreted in its context. It is contained within chapter 8 of the Constitution called "Courts and Administration of Justice". The chapter is concerned with judicial authority, the structure of the court system, the jurisdiction of courts, the appointment, discharge and conditions of service of judges as well as with the office of the National Director of Public Prosecutions. Section 167 is concerned with this Court: its composition, quorum, jurisdiction and other matters. Subsection (6) sets out the minimal levels of access that must be provided for. In effect, the section guarantees minimal access. It mandates that there must, at the very least be access to this Court by way of appeal directly to it if this is in the interests of justice. No other provision in the Constitution is concerned with access in a general sense.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[28] The purpose of the measure is therefore to ensure that provision is made for minimal levels of access to be determined and exercised in terms of a broad, flexible and value-laden principle: the interests of justice. The focus of the provision is not on the determination of the kind of entity that ought to have access but on the circumstances in which access ought to be made available by the legislature.

[29] Section 172(2) has a different and more specific focus that is to be understood in its context. Paragraphs (a) and (c) of section 172(2) provide that orders of constitutional invalidity must be referred to this Court for confirmation and must be confirmed before they can be effective. The focus of subsection (d) is to give those aggrieved by the order a right of appeal to this Court, to make possible applications for variation or confirmation of orders of constitutional invalidity and to identify precisely those entities who will be able to exercise these rights. In the normal course, it would have been expected that a non-state entity would apply for confirmation of orders of constitutional invalidity and that the state would be opposed to confirmation. In these circumstances, the use of the word "person" alone might have given rise to difficulty. Paragraph (d) of section 172(2) makes it clear, in these circumstances, that both an organ of state and any person can exercise any of the rights conferred by the paragraph. It does not follow from this that the word "person" in section 167(6) has the same meaning and excludes organs of state. The meaning of the word "person" must be determined in its context.

[30] The way in which the undertaking that judges must make in terms of item 6 of schedule 2 of the Constitution is phrased is a useful illustration. A judge or acting judge undertakes to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". It could never be suggested that the word "person" must be narrowly interpreted to exclude the state. This would have the absurd result that a court may be fearful of, favour or prejudice the state if it is a party to proceedings before it.

[31] Section 167(6) guarantees an appeal to this Court subject to its leave and provided that the interests of justice render an appeal appropriate. The respondent's submission implies that our Constitution guarantees an appeal with leave of this Court when in the interests of justice to all parties that are not organs of state. There was no obligation to allow organs of state a right to appeal subject to the leave of this Court even where this is in the interests of justice. It is inconceivable that the Constitution would differentiate between organs of state and others in this irrational way. The word "person" in section 167(6) must therefore be given a broad meaning. The rules of this Court must make provision for organs of state to come to this Court directly on appeal when it is in the interests of justice subject to the leave of this Court.

Is the DPP a litigant for the purpose of rule 19?

[32] The respondent's submission that the DPP is not a litigant for the purpose of rule 19 is grounded on three bases. First, the respondent relies on judicial pronouncements to the effect that extradition proceedings are sui generis and cannot

be equated with criminal proceedings.[29] The second proposition is that the state is permitted by the Extradition Act[30] merely to appear at extradition proceedings. Thirdly the respondent places reliance on a decision by a High Court full bench that the state was not a party to extradition proceedings.[31] The submission is that if the DPP is not a party to extradition proceedings, that office cannot be a litigant and that there is in effect no lis between the DPP and the respondent.

[33] There can be no doubt that extradition proceedings are sui generis and that there are fundamental differences between extradition proceedings and criminal proceedings. It can therefore not be gainsaid that the DPP is not a party to extradition proceedings in the same way in which it participates in criminal proceedings. The role of the state representative in criminal proceedings is different to that in extradition proceedings. This, however, is a far cry from the proposition that the state is not a party to extradition proceedings at all.

[34] The *Minister of Justice* case does however say explicitly:

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[29] *Geuking* above n 8 para 26. See also *S v McCarthy* 1995 (3) SA 731 (A) at 741G-J and 749E-G; *Harksen v Attorney-General, Cape and Others* 1999 (1) SA 718 (C) para 83; *Harksen v Director of Public Prosecutions, Cape, and Another* 1999 (4) SA 1201 (C) paras 38-40.

[30] Section 17 of the Act.

[31] *Minister of Justice and Another v Additional Magistrate, Cape Town* 2001 (2) SACR 49 (C) at 63d. (The *Minister of Justice* case.)

> "The fact that under s 17 of the Extradition Act, a Director of Public Prosecutions or any person delegated by him or her, or a public prosecutor, may appear at an enquiry, does not make the State a party to the proceedings."[32]

This statement was made in the process of deciding whether an extradition magistrate was correct in concluding in extradition proceedings that the state's case had been closed in those proceedings in accordance with the Criminal Procedure Act.[33] The court concludes on this issue:

> "The finding of the first respondent that he regarded the State case (the first respondent obviously means the South African state) as closed in terms of the Criminal Code (the reference is obviously to the Criminal Procedure Act), is accordingly founded upon a misconception of the nature of the proceedings before him. The State was not a party to the proceedings before him, and there was no 'case' which could be 'closed' in terms of the 'Criminal Code'."[34]

[35] It is apparent in particular from the second quotation in the preceding paragraph that the issue to be considered in that case did not require that court to determine whether the state was at all a party to extradition proceedings. It was necessary in the *Minister of Justice* case to determine whether there were sufficient differences between extradition proceedings and criminal proceedings to render the idea that the state had "closed its case" before the magistrate to be patently wrong. The conclusion that the statement could not be regarded as correct on the basis of the material differences between extradition proceedings and criminal proceedings cannot be

[32] Id at 62f.

[33] Act 51 of 1977.

[34] Id at 63c-d.

faulted. It was however not necessary for the court to decide that the state was not a party to extradition proceedings at all. It is perhaps fair to conclude that the statement that the state is not a party to extradition proceedings means, in its context, that the state is not a party to extradition proceedings in the same way as it is a party to criminal proceedings. The state does not close its case in extradition proceedings. However, I consider it desirable to examine whether the proposition that the state is not a party to extradition proceedings at all can be supported.

[36] In support of the proposition that the state is not a party to extradition proceedings, the *Minister of Justice* case relied on the statement by Howie JA in a minority judgment of the Supreme Court of Appeal in *McCarthy*.[35] That case was concerned with whether the discharge of a person sought to be extradited on account of the fact that "the required evidence is not forthcoming within a reasonable time" in terms of what is now section 10(3) of the Act[36] is a discharge on the merits. The minority held that it was and in the course of its reasoning made the statement relied upon in the *Minister of Justice* case in the following passage:

> "Finally, there are legislative policy considerations to be taken into account. Extradition proceedings are, in substance, in the nature of criminal proceedings: *Bagattini* at 267H. The arrest, detention and committal provisions of the Act carry obvious implications adverse to the right to liberty, to the presumption of innocence which is basic to the criminal law and to any such right which the accused may have to be in this country and to remain here. The context is not one in which this country is seeking to enforce its own criminal law; it is only advancing the hand of assistance

[35] *McCarthy* above n 29 at 732.

[36] It was then section 10(2).

> to a foreign country to enforce the criminal law of that State. The proceedings are initiated, and the case for extradition is presented, by a South African prosecutor, but as pointed out in the *Sotiriadis* case supra at 703f, in reality it is the foreign State making the extradition request that fills the role of prosecutor. It is that State that must obtain the required evidence and have it adduced. The domestic prosecutor, representing the South African State, is merely the conduit."[37]

[37] However, the majority judgment[38] concluded that the discharge in terms of that part of the now section 10(3) quoted above could not be a discharge on the merits and distanced itself from that part of the minority judgment relied upon by the *Minister of Justice* case saying:

> "I also do not consider that policy considerations warrant the conclusion that the Legislature intended a discharge under the second part of s 10(2) to be final. In general the reason why State A agrees in an extradition treaty to assist State B to enforce the criminal law of the latter in regard to crimes committed within its jurisdiction is precisely because State B accepts a reciprocal obligation. In construing legislation of State A applying to extradition treaties too much emphasis should therefore not be placed on the fact that in proceedings under such legislation State A is not enforcing its own criminal law but is assisting State B to enforce the latter's penal law."[39]

[38] I agree with these remarks. It is inaccurate to say that the DPP is no more than a conduit for the foreign State. Except in extradition proceedings initiated by warrants of arrest issued in an associated State[40] extradition proceedings before a magistrate are

[37] *McCarthy* above n 29 at 741G-J.

[38] Id at 747*ff*.

[39] Id at 748B-D.

[40] Sections 4(3), 6, 9(4)(b)(ii) and 12 of the Act.

held because there has been a request from a foreign State for the extradition of a person. What is more, South Africa is willing to do everything possible to facilitate that extradition in the context of foreign relations either in compliance with an extradition agreement[41] or after "the President has in writing consented to" the surrender of that person.[42] The state must decide whether the evidence available justifies the initiation of proceedings before a magistrate. The DPP will normally make a decision whether to institute or continue extradition proceedings. The DPP in the proceedings before the magistrate and before the High Court contended on behalf of the state that the respondent ought to be extradited. The respondent contended strenuously that he should not. The contention of the DPP was really part of the attempt by the state to extradite the respondent because the state had obviously formed the view, in the conduct of its foreign relations, that the respondent should be extradited. As was said in the *McCarthy* majority judgment:

> "In a criminal matter the *lis* between the State and the accused is whether or not he is guilty of the crime with which he is charged . . . As regards a person accused of an offence included in an extradition agreement and allegedly committed within the jurisdiction of a foreign State which is a party to such an agreement, the cardinal question in proceedings under ss 9 and 10 of the Act is whether there would be sufficient reason for putting him on trial for the offence, had it been committed in the Republic."[43]

[41] Section 3(1).

[42] Section 3(2).

[43] *McCarthy* above n 29 at 749E-G.

[39] There is an issue between the state and the person sought in extradition proceedings. The state contends for extradition and the person sought is opposed to it. The extradition magistrate must determine the issue. On appeal, in a broad sense, the same issue must be determined. The proposition that the DPP is not a litigant for purposes of rule 19 would therefore be inconsistent with the provisions of section 167(6) of the Constitution which, as I have held, requires the rules of this Court to enable an organ of state to appeal to this Court when it is in the interests of justice to do so but subject to leave. The submission that the state is not a party or a litigant in extradition proceedings is misplaced and cannot prevail.

Is the applicant an aggrieved party?

[40] The submission that the DPP was not aggrieved by the decision of the High Court is also unsustainable. The meaning of the term "aggrieved" must be ascertained in the light of sections 167(3) and (6) of the Constitution. The state argued before the High Court in furthering the cause of the extradition of the respondent to which the state had obviously committed itself that there was no constitutional bar to the extradition of the respondent. The High Court held that there was. The state would wish to extradite the respondent if there were no constitutional bar. It has a direct and substantial interest in the adjudication of the issue and is therefore aggrieved. The state is not merely "disappointed with the outcome of the proceedings" before the High Court, as the respondent would have it, but has suffered a grievance cognisable in law. A conclusion that the DPP is not an aggrieved litigant in this case would run counter to the provisions of section 167(6) of the Constitution, because it would result

in this Court not being accessible to an organ of state even if this is in the interests of justice. The state is therefore an aggrieved litigant.

Interests of justice

[41] The appeal can be entertained only if it is in the interests of justice to do so. This case raises important constitutional questions concerning the interpretation of section 10 of the Act. A final decision by this Court on the question raised is desirable so that there will be certainty concerning the ambit of the powers of a magistrate in an extradition enquiry. All concerned ought to know as soon as possible whether in a section 10(1) enquiry an extradition magistrate must take into account the possible infringement of constitutional rights of a person sought to be extradited. It is certainly in the interests of justice for these issues to be considered. We are not concerned at this stage with the considerations that ought to be mentioned in the report of the extradition magistrate to the Minister contemplated by section 10(4) of the Act. It is appropriate to determine whether it is in the interests of justice for this Court to decide the authentication issue after the discussion concerning the powers of a magistrate conducting a section 10 enquiry.

Application to lead further evidence

[42] Shortly before the date of the hearing, the respondent sought to file certain further affidavits aimed at establishing that he had not waived the right to a fair trial. This, as I understand it, was in response to the contention in the written argument of the DPP that the respondent had waived his right. This was of course followed by an

application by the DPP to file material concerning these matters and an effort by the respondent to file further affidavits in reply concerning the question of waiver. This evidence cannot be admitted. It raises an irresoluble conflict in relation to waiver. The explanation advanced for the late tender of the evidence is that it was necessary for the respondent to deal with the waiver point. This is not a satisfactory explanation. In any event, as will be seen from the findings in this judgment, the evidence is not material.[44]

The merits

[43] The first issue we have to decide is whether the extradition magistrate, in determining whether the person whose extradition is sought is liable to be surrendered within the meaning of section 10(1), is empowered to take into account the fact that the person would if indeed extradited, become the victim of an unfair trial. The term "liable to be surrendered" takes us back to section 3. Subsection (1) of this section is concerned with a person who is "liable to be surrendered" in accordance with the terms of an extradition agreement while subsection (2) is concerned with a person being liable to be surrendered in the absence of an extradition agreement. The ambit of the power of the extradition magistrate to determine whether the person sought is liable to be surrendered will depend on the terms of the extradition agreement if the terms of an existing extradition agreement are applicable to the proceedings. Conversely an extradition agreement would be irrelevant to the determination of this question if it were not applicable to the extradition proceedings in issue. I have

[44] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* CCT 56/03, 26 November 2004, as yet unreported, para 43.

already said that there is a dispute as to whether the extradition agreement between South Africa and Canada was applicable to the extradition proceedings before the magistrate. We must decide this before considering what section 10 of the Act requires.

Was the extradition agreement applicable?

[44] The magistrate came to the conclusion that the extradition agreement was not applicable to the proceedings before her. The basis of this conclusion is not clear. It does seem however that she did place some emphasis on the fact that the magistrates' court was a creature of statute and on the fact that the extradition agreement had not existed at the time the documents were authenticated. There is also a statement by the magistrate in the record of the extradition proceedings to the effect that it was for the Minister of Justice and not for her to consider the terms of the extradition agreement. The High Court concluded that the extradition agreement was applicable to the proceedings before the magistrate. The respondent supported the High Court judgment while the DPP submitted that it did not matter for the purposes of this case whether the extradition agreement was applicable or not.

[45] Some of the pertinent facts must be recited first. The extradition agreement between South Africa and Canada was signed by the parties on 12 November 1999. The seal fixed to the documents relied upon by the state is dated 15 November 2000. The extradition was requested on 27 November 2000. The agreement was approved by the South African parliament on 3 April 2001 and approved by Canada on 4 May

2001.[45] Canada informed South Africa of this on the same day and the agreement was published in South Africa on 18 May 2001.[46] The respondent was arrested in South Africa on 18 January 2002. The enquiry before the magistrate in fact commenced on 25 June 2002. It follows that the extradition agreement came into operation after the request for the extradition but before the arrest of the respondent and before the date of the commencement of the enquiry. It was already in force when the enquiry was held before the extradition magistrate.

[46] The High Court was inclined to the view, on the authority of the judgment of the Appellate Division in *Eliasov*,[47] that the Act applied to the extradition proceedings before the magistrate. The essence of the reasoning of the Appellate Division is reflected in the following passage:

> "It is . . . quite clear that the enquiry, which the magistrate was by sec. 9 (1) enjoined to hold in relation to the appellant, commenced on 9th July, 1965, and not upon the date of the appellant's arrest on 10th April, 1965, or the date of the issue of the warrant for his further detention under sec. 7 of the Act. The appellant was detained in custody until 12th April, and thereafter he was allowed out on bail, and on 9th July, 1965, the enquiry commenced. By that time the extradition agreement contained in Proc. R151 of 1965 had become operative within the Republic, and the magistrate was accordingly obliged, in terms of sec. 9(4) of the Act, to apply the provisions of sec. 12 in relation to the enquiry."[48]

[45] Article 22(1) of the agreement provides:

> "This Treaty shall enter into force on the date on which the Contracting Parties have notified each other in writing that their respective legal requirements have been met. The effective date of entry into force will be the date of last notification."

[46] Above n 9.

[47] *S v Eliasov* 1967 (4) SA 583 (A).

[48] Id at 593H-594A.

There is no suggestion that the treaty applicable in this case is more disadvantageous to the respondent than the terms of the Act. It follows that we need not consider whether a court will have the discretion not to apply the agreement if it had been more disadvantageous than the Act. I accordingly conclude that the extradition agreement in this case was applicable to the extradition enquiry before the magistrate and that the enquiry ought to have been decided on that footing.

The section 10(1) power of the extradition magistrate

[47] The circumstance that the magistrate ought to have decided whether the respondent was liable to be surrendered in the light of the terms of the extradition agreement requires us to construe the phrase "liable to be surrendered" in section 10(1) of the Act with reference to section 3(1) and the extradition agreement itself. Section 3(1) of the Act provides:

> "Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence."

[48] Attention must be drawn to three aspects of section 3(1) at the outset.

(a) First, section 3(1) provides for the possible extradition of a person accused or convicted of an offence. This is not a case in which the respondent is accused of the commission of an offence. He has already been convicted in Canada.

(b) Section 3(1) expressly provides that a person is liable to be surrendered "subject to"[49] the terms of the Act and in accordance with the terms of the extradition agreement. The extradition treaty and the Act are not inconsistent with each other in relation to any matter relevant to the decision of this case. We need not therefore decide whether the treaty or the Act will prevail if there were to be an inconsistency.

(c) The third matter relates to extraditable offences. Section 3(1) allows extradition of a person convicted of an offence included in an extradition agreement. However section 2(1) of the Act makes it clear that only an "extraditable offence or offences" may be specified in any extradition agreement.

[49] In summary, the respondent will be liable to be surrendered and an order of committal by the magistrate will be justified if:

(a) he has been convicted of an extraditable offence that is mentioned in the extradition agreement; and

(b) there is nothing in the Act or in the extradition agreement read subject to the Act that warrants a finding that the respondent is not liable for extradition.

The magistrate is therefore required to determine these two matters only. Issue (a) does not entail a consideration of whether the respondent will be subject to an unfair trial if extradited. It remains necessary to consider whether issue (b) requires the magistrate to consider this aspect. In other words is there anything in the Act or the

[49] *S v Marwane* 1982 (3) SA 717 (A) at 747H-748A.

extradition agreement which requires the magistrate to ensure that the respondent will not be subject to an unfair trial before concluding that the respondent is liable to be surrendered?

[50] The High Court sought to derive this power from the phrase "liable to be surrendered" in section 10(1). It construed the section so as to oblige the magistrate not to grant an order for committal if a person sought to be extradited would be subjected to imprisonment imposed during her absence upon extradition. I cannot find the power there. The High Court erred in several respects in the process of the reasoning that led to this conclusion. Before traversing this reasoning however we must remind ourselves that a decision by an extradition magistrate in terms of section 10(1) of the Act that the person sought is liable to be surrendered does not result in the extradition of that person. We must not forget that the decision to extradite is made by the Minister in terms of section 11 of the Act.

[51] First, the High Court incorrectly interpreted the phrase to mean "bound or obliged in law or equity to be surrendered." A dictionary definition may be a convenient starting point but they are often not very helpful in determining the meaning of a phrase in the setting in which we find it. The context is all important. It is self-evident that the magistrate conducting a section 10 enquiry, as distinct from the magistrate conducting an enquiry mandated by section 12 of the Act makes no order to surrender. Section 11 of the Act does not oblige the Minister to order extradition.

She may order extradition if she chooses[50] and is expressly permitted not to order extradition in certain defined circumstances. A finding that the person is liable to be surrendered in terms of section 10(1) obliges nobody to do anything; the decision places no obligation whatsoever whether directly or indirectly upon the Minister or any other organ of state for that matter.

[52] Secondly, the High Court ignored the fact that it is the Minister who is empowered to consider whether it will be unjust or unreasonable, having regard to all the circumstances of the case to surrender the person concerned.[51] This would suggest that the magistrate is not authorised to make that decision under section 10(1). The suggestion that the magistrate has no power to make a decision of that kind under section 10(1) is strengthened by the fact that the magistrate conducting the section 12 enquiry is expressly empowered not to make an order of surrender if this is not in the interests of justice or if it would be unjust or unreasonable in all the circumstances of the case.[52] The scheme of the Act makes it quite clear that the question whether a person sought to be extradited will become the victim of an unfair trial as a result of the extradition must be weighed in the equation at the time when consideration is being given to whether there should be a surrender. It is premature to take this factor into account any earlier.

[50] Section 11(a).

[51] Section 11(b)(iii).

[52] Section 12(2)(c)(i).

[53] Thirdly, the court erred in concluding that the provisions of section 39(2) of our Constitution[53] required a court to construe the phrase so that the power contended for by the respondent is provided for by it. There is nothing constitutionally objectionable in a statutory scheme that requires the magistrate to determine whether the person sought to be extradited has been convicted of an extraditable offence and thereafter to grant the Minister a discretion including a discretion to determine whether it is in the interests of justice to extradite any person. Nor is it appropriate to determine whether a law is objectionable on the basis of an underlying apprehension that members of the executive entrusted with making certain decisions will not do it properly. It was this apprehension which motivated the statement that members of the executive have been known to have been fallible.

[54] Fourthly, the High Court misconceived the extent of its power to construe a legislative provision consistently with the Constitution. A court's power to do so is not unqualified; a court cannot give a meaning to the provision which it regards as consistent with the Constitution without more. The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision.[54] The words "liable to be surrendered", in their context, are incapable of bearing the meaning contended for.

[53] Section 39(2) provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[54] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 59 and the authorities referred to in n 87 thereof; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) para 18; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 85; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) paras 22-26; *De Beer NO v North-Central Local Council and South-Central Local*

[55] Fifthly, the High Court failed to take account of the fact that the decision of the Minister is subject to judicial control. It is not appropriate to determine in this case the principles that would govern a challenge to a decision by the Minister to extradite. That had better be done when the occasion arises. There is no need to say more than that the Act expressly contemplates that "any provincial or local division of the Supreme Court [could] upon application made after reasonable notice to the Minister, [order the] discharge from custody [of the person sought to be extradited] on the ground that there is not sufficient cause for his further detention".[55]

[56] Finally, the High Court relied on two passages from *Mohamed*[56] without specifying their relevance. The first passage relied upon was:

> "[58] These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the State to 'protect, promote and fulfil the rights in the Bill of Rights'. For the South African government to co-operate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone

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Council and Others (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) para 24; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* CCT 57/03; *Bissett and Others v Buffalo City Municipality and Others* CCT 61/03; *Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing in the Province of Gauteng and Others* CCT 1/04 *(Kwazulu-Natal Law Society and Msunduzi Municipality Intervening)*, 6 October 2004, as yet unreported, para 27.

[55] Section 14(e)(ii).

[56] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

> in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment." (Footnotes omitted.)

The second passage was:

> "[71] Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights." (Footnotes omitted.)

[57] In *Mohamed* South African state operatives had facilitated the removal of the applicant to the United States of America to stand trial there for certain serious offences without exacting an assurance from the government of that country that the death penalty would not be imposed upon Mohamed and that the penalty would, if imposed, not be carried out. This Court held that the South African state had, by doing this, acted in a way that was inconsistent with our Constitution. Consequently, this Court made a declaratory order to this effect. The first quoted passage is aimed at a justification of the conclusion that the conduct of the South African government was inconsistent with the Constitution. The second passage was part of the motivation of the declaratory order that was subsequently made.

[58] *Mohamed's* case was not concerned with the correct interpretation of the phrase "liable to be surrendered" in section 10(1) of the Act. An issue in that case was whether Mohamed had been deported or extradited. This Court concluded that it did not matter.[57] In the context of this case, the ratio of *Mohamed* means no more than that the Minister ought not to extradite a person sought without seeking an assurance, if relevant, that the death penalty would not be imposed or if imposed, would not be carried out. It is perhaps relevant that the extradition agreement[58] enables a requested state to refuse extradition "where the offence carries the death penalty under the law of the Requesting State, unless that State undertakes that the death penalty will not be sought, or if a sentence of death is imposed it will not be carried out."

[59] The declaratory order in *Mohamed's* case was made after a finding of unconstitutionality not in the apprehension that someone might act unconstitutionally later. There was no statement there that an extradition magistrate is obliged to order a discharge where the extradition, if it ensued, would put the fair trial rights of the person sought in jeopardy. Nor is *Mohamed's* case authority for the proposition that an extradition magistrate must discharge the person sought if the death sentence might be imposed. The proper approach of a magistrate, if all other requirements are met, would be to grant an order for the committal of the person sought. It is for the Minister in terms of section 11 of the Act to determine that issue. *Mohamed's* case does not support the High Court conclusion.

[57] Id para 42.

[58] Sub-article 3 of Article 4.

[60] The High Court was accordingly incorrect in holding that the power contended for resides in section 10(1). The next question to be answered is whether the extradition agreement interpreted in the light of the Act gives the extradition magistrate the power to discharge in the circumstances of the respondent in the present case. The respondent has not pointed to anything. Nor have I been able to find any provision which could be said to confer that power. It follows that the High Court wrongly concluded that the extradition magistrate should have discharged the respondent on the basis that he would, if extradited, have to serve a sentence of imprisonment imposed upon him in his absence. The authentication issue must therefore be discussed next.

Authentication

[61] We must first answer the question whether it is in the interests of justice for this Court to consider the authentication issue. Counsel submitted that we should, if we find that the High Court was wrong about the section 10 power of an extradition magistrate, refer the authentication question to the High Court for determination. It will not be in the interests of justice to do this because it will lead to undue delay and a piecemeal consideration of the issues in this case. It is in the interests of justice for this Court to decide whether the documents were properly authenticated.

[62] Authentication is governed by Article 8 of the extradition agreement which is headed "Authentication of Supporting Documents" and which provides:

> "Where the law of the Requested State requires authentication, documents shall be authenticated by a statement by the Minister responsible for Justice or a person designated by her or him under the seal of that Minister identifying the person who has signed the document, including that person's position or title."

[63] The provisions of Article 8 are to be complied with only where the law of the requested state requires authentication. The Act does require authentication[59] and, in fact authorises authentication "in the manner provided for in the extradition agreement concerned".[60] The respondent's submission that article 8 of the treaty is applicable to authentication in this case is correct. It is not necessary for us to decide whether, authentication in the manner provided for in section 9(3) of the Act could suffice if the provisions of article 8 had not been complied with.

[64] We must now determine what Article 8 in fact requires. First, the documents relied upon must be authenticated either by the statement of the Minister responsible for Justice or by a statement of a person designated by that Minister. Secondly, if the person is designated by the Minister, the designation must be made under the seal of that Minister. This does not mean that the Minister must make a statement to the effect that she has designated the person concerned. The requirement that the Minister make a statement is limited only to the situation where she authenticates the document in other words where the documents are not authenticated by a designated person. It must be clear from all the circumstances however, that the Minister's seal was affixed for the purpose of designating a person and for no other purpose and that the

[59] Section 9(3).

[60] Section 9(3)(a)(ii).

placement of the seal has the effect of designating a particular person without ambiguity. Thirdly, where a Minister has designated that person, there must be a statement by the person designated identifying the person who has signed the document requiring authentication including the position and title of the signatory. Section 8 of the extradition agreement does not require a statement by the person who has been designated by the Minister to the effect that she has been so designated. The documents submitted must be examined on this basis.[61]

[65] The documents in issue were evidently not authenticated by a statement of the Minister. They were in fact authenticated by a person designated by the Minister under her seal of office. The seal of the Minister of Justice has been placed on the second page of a document. That page has been signed by Barbara Kothe who describes herself as "Counsel, International Assistance Group, Department of Justice of Canada". The statement of Kothe is printed on a letterhead of the Department of Justice of Canada. Indeed the letterhead bears what is apparently a representation of the Canadian flag. To the right of the seal is the imprint of a rubber-stamp which indicates that the Deputy Minister of Foreign Affairs of Canada confirms the signature of Barbara Kothe of the Department of Justice. Of course it is also relevant that a foreign service officer at the South African embassy confirms the signature of the Deputy Minister of Foreign Affairs.

[61] The original documents as authenticated were not in the possession of this Court on the date of the hearing of the matter. Some days after the hearing, the registrar was requested to secure these documents with the assistance of the applicant. This was done and we are grateful for the assistance received.

[66] We need to determine what the impact of the seal is. Does the seal of the Minister of Justice confirm the signature of the Deputy Minister of Foreign Affairs or that of the official Barbara Kothe who is part of the Department of Justice? An analysis of the document suggests the latter. In the first place, the imprint of the Foreign Affairs rubber-stamp is next to the seal of the Minister of Justice and not under it. On the other hand a deliberate effort has been made to ensure that the signature of Barbara Kothe is under the seal in the sense that the seal is concerned with that signature and nothing else. The second page of the document has been folded where the signature appears and the seal has been fixed in such a way that the signature of Barbara Kothe could not have been placed on the document after the seal had been fixed. Considerable trouble was taken to ensure that the seal was relevant to that signature.

[67] Although there is no statement in relation to designation, I am satisfied that the seal was intended to and does in fact designate Barbara Kothe as the person making the statement. It is inconceivable that the seal of the Minister of Justice was placed upon the document for any purpose other than to designate Barbara Kothe. We know that as at the date upon which the seal was fixed upon the document, the extradition agreement had been concluded but was not yet in force. It cannot be argued in these circumstances that the serious act of fixing the seal on the document was performed for no reason. A statement by the Minister to the effect that he had designated Barbara Kothe would have simplified the determination of the authentication issue. The absence of such a statement does not however lead to the conclusion that

authentication is bad. To require a statement in the circumstances of this case would be to raise mere form above substance. I am satisfied that Barbara Kothe has been designated under the seal of the Minister of Justice as required by Article 8.

[68] The statement of Barbara Kothe does identify the persons who signed the documents attached to it and gives the position and title of the persons concerned. The documents were thus properly authenticated in terms of Article 8 of the extradition agreement.

[69] It was not in dispute before this Court that the offence of which the respondent has been convicted in Canada is an extraditable offence in terms of the Act and is covered by the terms of the extradition agreement. In the circumstances the appeal must succeed.

[70] There is no reason to make any order as to costs.

Summary

[71] This judgment holds that an extradition magistrate conducting an enquiry in terms of section 10(1) of the Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of section 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control. This judgment also holds that the documents before the extradition

magistrate were all properly authenticated as required by the extradition agreement. The consequences of this judgment are that the extradition magistrate's order for the committal of the respondent to prison stands and that it is for the Minister to decide whether the respondent should be extradited in all the relevant circumstances including the fact that he will, if extradited, have to serve a term of imprisonment that was imposed upon him in his absence.

The order

[72] The following order is made:

(1) The application for leave to appeal is granted.

(2) The appeal succeeds.

(3) The order of the Cape High Court is set aside and is replaced by the following order:

The appeal is dismissed.

Langa ACJ, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the applicant:	P Hodes SC and A Katz instructed by the State Attorney, Cape Town.
For the respondent:	JC Heunis SC, E van der Horst and MF Osborne instructed by Walkers Inc.