

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 9742/07
by Anthony KING
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 26 January 2010 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 27 February 2007,

Having regard to the interim measure indicated under Rule 39 of the Rules of Court;

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Anthony King, is a British national who was born in 1966. He is currently detained at HMP Wandsworth. He was represented before the Court by Mr D. Mladenovic, a lawyer practising in London with Kaim Todner LLP. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott of the Foreign and Commonwealth Office.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows. On 16 December 2003 the Government of Australia issued two warrants of arrest against the applicant seeking the applicant's extradition on four charges of conspiracy to supply ecstasy and conspiracy to possess ecstasy with intent to supply. He was accused of being a member of an international gang engaged in a conspiracy to import large quantities of ecstasy into Australia in 2003. The ecstasy intercepted by the Australian authorities as part of their investigation amounted to over 164,000 tablets weighing 31 kg with a street value of 11.4 million Australian dollars.

3. On 17 December 2003 the applicant was arrested under the extradition request at his home in the United Kingdom. On 15 November 2004 a District Judge sitting at Bow Street Magistrates' Court found that there was a case to answer on all four charges and committed the applicant to await the decision of the Secretary of State.

4. The applicant asked the Secretary of State to refuse to order his return to Australia under section 12 of the Extradition Act 1989. He claimed his involvement in the conspiracy was under duress; if extradited he would be unable to obtain the attendance and examination of witnesses who would give evidence to this effect under the same conditions as witnesses against him, in breach of Article 6 § 3(d) of the Convention. He maintained that he could be prosecuted in the United Kingdom for conspiring to export ecstasy and that if convicted in Australia he would inevitably receive a life sentence with, probably, no right of parole, which would be manifestly excessive. He also argued his extradition would be a disproportionate interference with his family life in the United Kingdom, which consisted of a wife, two children (born in 1998 and 2004) and a mother who was in poor health.

5. On 4 May 2005, while the Secretary of State was considering the applicant's representations, the Attorney-General's Department of the Australian Government provided the following information on the applicant's likely sentence:

> "While it is possible, given the seriousness of the offences, that Mr King may receive a sentence of life imprisonment, the sentencing Court is required to set a non-parole period unless, having regard to the nature and circumstances of the offence

> and to the antecedents of the person, the Court is satisfied that it is not appropriate to fix a non-parole period. It would be highly unusual for the Court not to fix a non-parole period.
>
> The sentence imposed will depend upon the findings of the Court in relation to matters such as the type and amount of narcotics involved, the role of the defendant in the importation and other particular distinguishing factors. The sentence imposed will also depend upon whether there is a plea of guilty or not guilty and whether any assistance has been provided by the defendant.
>
> Comparative sentences imposed in [New South Wales] over the last two years for offences of importation of a commercial quantity of narcotics consisting of MDMA [ecstasy], heroin or cocaine, where the quantity consisted of more than 10 kilograms and a plea of not guilty entered shows head sentences in the range of 15 years to life imprisonment with non-parole period in the range 11 years to 25 years. The maximum penalty of life imprisonment is, of course, usually reserved for the most serious offences."

6. On 16 August 2005 the Secretary of State ordered the applicant's extradition to Australia. In reply to the complaint about the likely imposition of a life sentence in the event of conviction, it was noted that it would be highly unusual for Australian courts not to fix a non-parole period, and, in any event, it would not be unjust or oppressive to return the applicant to Australia purely on the basis of the sentence he could receive if convicted of serious criminal offences. As to the argument that the applicant would be unable to plead duress in Australia, no evidence had been submitted to substantiate the claims of intimidation of the applicant and his family or that these mattes were reported to the police. The Australian authorities had confirmed that should any of the applicant's witnesses be subjected to threats, appropriate action would be taken by the Australian police. They also advised that it was open to the applicant to apply for a suppression order in relation to the names of any witnesses who feared for their safety. If his witnesses were unable or unwilling to attend trial in Australia he could apply to the Australian courts for evidence to be given via video link. It was also possible for evidence not requiring cross-examination to be submitted in the form of a written statement. On this basis, the Secretary of State was satisfied that there was sufficient provision to allow the applicant's witnesses to give evidence to the Australian courts and there would be no breach of his rights under Article 6 § 3 (d). As to the Article 8 complaint the applicant's family circumstances were not so exceptional as to engage this provision. In addition, the United Kingdom was obliged to fulfil its international obligations towards its extradition partner. The applicant's co-accused had already been tried in Australia, and, as such, it would not be unreasonable for the Australian authorities to expect related trials to be conducted in the same jurisdiction.

7. The applicant then made further representations, arguing that there would be a further breach of Article 6 since he would not obtain legal aid in Australia. He renewed his representations on Article 8 and also claimed that

the Australian provisions governing the transfer of prisoners were discriminatory and were applied inconsistently and arbitrarily.

8. These further representations were rejected by the Secretary of State on 30 June 2006. As to the legal aid complaint the Australian authorities had confirmed that persons charged with serious criminal offences would normally be granted legal aid if their means were insufficient to engage private legal representatives. If the applicant were to be refused legal aid, he could make an application for a stay of the trial: the relevant Australian case-law (*Dietrich v. the Queen* (1992 177 CLR 292)) provided that where an accused charged with a serious offence, who through no fault on his or her part was unable to obtain legal representation, applied to the trial judge for an adjournment or stay then, in the absence of exceptional circumstances, the trial should be adjourned, postponed, or stayed, until legal representation was available. If an application that the trial be delayed was refused, and by reason of the lack of representation of the accused, the resulting trial was not a fair one, any conviction of the accused would have to be quashed by an appellate court for the reason that there had been a miscarriage of justice in that the accused had been convicted without a fair trial. Further, the Secretary of State noted that the applicant's co-accused had been granted legal aid for their trials in Sydney.

9. As to the applicant's contention concerning the Australian provisions for the transfer of sentenced prisoners, Australia was a party to the multilateral Council of Europe Convention on the Transfer of Sentenced Persons, which was incorporated into Australian domestic law. The applicant, if convicted, would be eligible to apply for transfer. The Secretary of State was satisfied that any application for transfer he might wish to make would receive appropriate and fair consideration. On Article 8, the Secretary of State again found the applicant's circumstances were not so exceptional as to prevent extradition.

10. On 19 February 2007 the High Court refused permission for judicial review. It refused to interfere with the Secretary of State's finding that Australia was the appropriate venue for the trial, especially when the alleged co-conspirators had been tried there. On the fairness of the trial in Australia, Lord Justice Latham (with whom Mr Justice Lloyd Jones agreed) accepted that the legal aid authorities in Australia would not fund the travel of defence witnesses but this was remedied by the fact that there was no bar on witnesses giving evidence by video link. He added:

> "However more importantly, the evidence before this court simply does not raise a scintilla of a suggestion that the Australian judicial authorities will permit a trial to proceed if to do so would be unjust to the applicant. The case of Dietrich has been cited by the Australian authorities to the Secretary of State, who has considered it. As one would expect of Australian jurisprudence, it essentially says that if there is unfairness to a defendant arising out of difficulties from legal aid funding, the court will be astute to exercise such powers as it has to ensure that the trial is ultimately a fair trial or is stayed. I can therefore see no justification for concluding that there will

be any breach of Article 6 in the Secretary of State's decision to return the appellant to Australia."

B. Further information provided by the Australian Government

11. Four further letters from the Attorney-General's Department of the Australian Government addressed the applicant's likely sentence and general sentencing practice for drugs offences. The first, dated 18 November 2005, summarised the trial and sentencing of two co-accused of the applicant, Peter James Henry and Hugh Williams James Gravett. The Australian Government considered Henry to be one of the most senior members of the conspiracy in Australia. He received a "head sentence" of 18 years' imprisonment and a non-parole period of 11 years. Gravett received a head sentence of 13 years' imprisonment, with a non-parole period of 8 years and 8 months. The letter noted that it was the prosecution's case that the applicant's level of criminality was higher than that of Henry but any sentence would have to be proportionate to that imposed upon the co-accused. Subsequent developments in the cases of Henry and Gravett were set out in the third and fourth letters (see paragraph 13 below).

The first letter went on to state that there were only two people in Australia who had been sentenced to life imprisonment without a non-parole period; a third was re-sentenced to life imprisonment without a non-parole period after he breached a life sentence with a non-parole period on his release. The two who were sentenced to life imprisonment without a non-parole period at first instance were the principals in an organisation which had imported 389 kg of heroin. In other cases of the importation of narcotics where life imprisonment has been imposed, but a non-parole had been set, the highest non-parole period has been 30 years' imprisonment, ranging down to 15 years.

12. The second letter, dated 1 May 2007 and provided in the context of the proceedings before this Court, reiterated that it was unlikely that the applicant would receive a life sentence with no non-parole period. Since his co-accused had already been sentenced, should the applicant be convicted a major concern for a sentencing judge would be that of parity of sentence with those of the co-accused. The letter noted that, in addition to Henry and Gravett, three other co-accused - Hands, Swansson and Alkarim - received head sentences of between 5 and 9 years' imprisonment with non-parole periods of between 3 and 6 years. A fourth co-accused, Alchikh, the only one to plead guilty, received a discount of one third for that plea and for his assistance to the relevant law enforcement agencies. The discount reduced his head sentence from 18 years' imprisonment to 12 years. His non-parole period was set at 7 years and 3 months. The United Kingdom Government in their observations (see below) indicated that another co-accused,

Susan Saxby, had pleaded guilty and was sentenced to life imprisonment with a recommendation that she serve a minimum of thirteen years before being eligible for parole. The letter from the Australian Government stated that the applicant's sentence would necessarily be higher than his co-accused to reflect his role as the principal organiser. However, any sentence imposed would not be so much higher as to be out of proportion with the sentences imposed on the co-accused. Should the applicant be convicted, the Crown would not submit to the court that a sentence of life imprisonment without parole was an appropriate sentencing option.

The letter also recorded that a person convicted and sentenced to a term of imprisonment could appeal as of right to the Court of Criminal Appeal and, thereafter, seek special leave to appeal to the High Court of Australia. A federal offender was also able to petition the Governor-General to exercise the Royal Prerogative of Mercy to remit or commute part of his sentence of imprisonment. It continues:

> "It is likely that the Prerogative would only be exercised if there were circumstances that did not exist, or were unknown to the court, at the time the matter was dealt with, which warranted some mitigation of the sentence. A federal offender could also apply for early release on licence under section 19AP of the Crimes Act 1914. The Attorney-General or his Delegate may grant early release on licence where exceptional circumstances exist that warrant early release, for example assistance to law enforcement agencies or health problems that cannot be adequately managed within the prison system."

13. The third and four letters, dated 4 and 17 August 2009, were also provided in the context of the proceedings before this Court. The letters stated that Gravett, Henry and Swansson had appealed to the Court of Criminal Appeal on the basis that their convictions were without jurisdictional foundation because of the form of the indictments. Their appeals were allowed. At the end of the retrial of Gravett and Henry in spring 2008, the jury was discharged because it was unable to reach a verdict. On 27 January 2009, Gravett pleaded guilty to a charge of attempting to possess a prohibited import. On 20 February 2009, he was sentenced to ten years' imprisonment with a non-parole period of six years to date from 17 December 2003. Henry's third trial commenced on 27 January 2009 and, on 19 February 2009, he pleaded guilty to one charge of aiding, abetting, counselling or procuring an attempt to possess prohibited imports. The Crown accepted that plea of guilty in full satisfaction of all charges brought against him. On 14 August 2009 he was sentenced to 11 years' imprisonment commencing on 17 December 2003 and expiring on 16 December 2014. The non-parole period was seven years commencing on 17 December 2003 and expiring on 16 December 2010. Swansson was also retried and, on 13 May 2009, found guilty of aiding, abetting, counselling or procuring an attempt to possess prohibited imports.

He was sentenced to nine years' imprisonment with a non-parole period of five years and five months to date from 8 July 2008.

C. Relevant domestic law

14. At the relevant time, extradition arrangements between the United Kingdom and Australia were governed by the Extradition Act 1989. By section 12(1) of the Act, the Secretary of State has a general discretion to order a person's surrender, including when it would, having regard to all the circumstances, be unjust or oppressive to return the person. The Secretary of State's decision was open to challenge by way of judicial review, *inter alia*, on the basis that it was incompatible with a Convention right. This is by virtue of section 6(1) of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

COMPLAINTS

15. The applicant complained that his extradition would violate Articles 3, 6 and 8 of the Convention. Under Article 3, he alleged that, if extradited and convicted, there was a real risk that he would be sentenced to life imprisonment without parole (that is, in Australia, a life sentence where no non-parole period was set). Under Article 6 he alleged that he would suffer a flagrant denial of justice since he would be unable to obtain legal aid and, furthermore, he would be unable to secure the attendance of witnesses for his defence. Finally, under Article 8, he complained that his extradition would constitute a disproportionate interference with his right to respect for his family life.

THE LAW

A. Article 3 of the Convention

16. Article 3 of the Convention provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

1. The parties' submissions

17. The Government submitted that the applicant had failed to exhaust domestic remedies since he had raised the argument concerning the

possibility of being sentenced to life imprisonment without parole in his representations to the Secretary of State but had not, when seeking judicial review of the Secretary of State's decision to order his extradition, renewed that argument before the High Court. On the merits of his complaint, the Government relied on the information provided by the Australian Government. The applicant's co-accused had all been given non-parole periods in their sentences; any sentence imposed on the applicant would have to be proportionate to the sentences imposed on the co-accused; and the prosecution would not submit that the applicant should receive a life sentence without parole. It was highly unusual for Australian courts not to fix a non-parole period; only two people had been sentenced to life imprisonment with no non-parole period being set and this was for importing 389 kg of heroin with a street value of 620 million Australian dollars. Sentencing practice in Australia indicated that the applicant faced a sentence which would involve serving between 11 and 25 years' imprisonment. Even if a life-sentence with no non-parole period were to be imposed, having regard to all the circumstances of the case and the Court's judgment in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-..., this would not violate Article 3 of the Convention. Such a sentence would not be irreducible nor would there be no prospect of release. They relied on the 1 May 2007 letter from the Australian Attorney-General's Department, which outlined the ability to petition the Governor-General under the Royal Prerogative and apply for early release under section 19AP of the Crimes Act 1914.

18. The applicant considered that he had exhausted domestic remedies; before the Secretary of State and the High Court he had argued that the sentence he faced was disproportionate, oppressive and unjust; hence he had put the complaint in substance before the domestic authorities. On the merits of the complaint, before this Court he argued that the sentence he faced was of sufficient severity to fall within the ambit of Article 3, taking into account his age and the effect prison would have in reducing his life expectancy. The risk of a sentence of life imprisonment without parole was a real one; the charges he faced were serious ones and the Australian authorities regarded his level of criminality as higher than that of his co-accused. It was instructive that, even after a guilty plea during his third trial, Henry had received a sentence of 11 years' imprisonment. This made it highly likely that, for the applicant, a sentence of life imprisonment would be regarded as proportionate by the sentencing court, even though the Australian Government did not regard a sentence of life imprisonment with no non-parole period as an appropriate sentencing option. The assurances given by the Australian Government, since they could not bind the sentencing court, were insufficient. He contrasted the information provided by the Australian Government with the express undertakings given by the District Attorney responsible for prosecuting the applicant in *Nivette*

v. France (dec.), no. 44190/98, ECHR 2001-VII. In the present case, there could be no guarantees that such a sentence would not be imposed as the severity of the sentence would depend on the precise nature of the applicant's involvement (if any) which was found by the trial court to have existed.

The applicant also argued that the prospect of a life sentence would be wholly disproportionate to the charges he faced. It was also relevant that, since the evidence against him had been obtained by intercepts in the United Kingdom, he could be prosecuted there. Therefore, there would be no impunity if his extradition could not proceed.

2. The Court's assessment

19. The Court notes the Government's preliminary objection and also recalls its finding in *NA. v. the United Kingdom*, no. 25904/07, § 90, 17 July 2008 that in expulsion cases (and, *mutatis mutandis*, extradition cases) judicial review is in principle an effective remedy which applicants should be required to exhaust before applying to this Court. However, the Court considers it unnecessary to rule on whether the present applicant has failed to exhaust domestic remedies in respect of this complaint since, in any event, it considers this complaint to be manifestly ill-founded. The Court recalls its finding in *Kafkaris*, cited above, § 97, that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3. However, the Court agrees with the United Kingdom Government that a sentence of life imprisonment without parole is unlikely to be imposed in this case and thus there is no real risk of the applicant serving such a sentence if convicted in Australia. The Australian authorities have provided detailed information on general sentencing practice in Australia and, more importantly, the sentences given to the applicant's co-accused. Although they have been careful to state that they regard the applicant's level of criminality to be higher than that of his co-accused, they have also made it clear that the applicant's sentence, if convicted, would need to remain in proportion to the sentences imposed on his co-accused. The Court finds no reason to doubt that the sentencing court would proceed on this basis. Moreover, the Court notes that only two people have been sentenced at first instance to terms of life imprisonment with no non-parole periods being set. The contrast between the level of criminality in that case and the present one is readily apparent; it concerned an attempt to import heroin worth 620 million Australian dollars, over fifty times the value of the ecstasy the present applicant is accused of conspiring to import. Indeed the Australian authorities have distinguished that case from the present one by indicating that, if the applicant is convicted, the prosecution will not submit to the court that a sentence of life imprisonment without parole is an appropriate sentencing option. In light of these considerations, the Court considers there is no real risk that the applicant, if convicted, would be sentenced to life

imprisonment with no non-parole period being set. This conclusion makes it unnecessary to consider whether, consistent with the Grand Chamber's judgment in *Kafkaris*, § 98, cited above, the ability to petition the Governor-General or seek early release under section 19AP are sufficient to make a life sentence *de jure* or *de facto* reducible. It also makes it unnecessary to consider the relevance of the applicant's submission that he could be tried in the United Kingdom. Finally, in the Court's view, no significance can be attached to the absence of any diplomatic assurance from the Australian Government that a sentence of life imprisonment with no non-parole period will not be sought and no fault can be attached to the United Kingdom Government for failing to seek such an assurance; both Governments were entitled to take the view that, since such a sentence was highly unlikely, no such assurance was necessary. It follows that this part of the application must be rejected as manifestly ill-founded.

B. Article 6 of the Convention

20. Article 6 of the Convention provides, as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

1. The applicant's submissions

21. The applicant argued that legal aid in Australia was much more limited than in the United Kingdom. The nature of the charges and the complexity of the case against him meant that the legal costs of the trial were likely to exceed 40,000 Australian dollars. Funding of that level was far from certain. At trial he also intended to rely upon the defence of duress and, in order adequately to present that defence, it would be essential that a number of witnesses travel from Europe to Australia to attend the trial since the Australian authorities were only prepared to allow video link evidence for non-contentious testimony. The Australian legal-aid budget would not meet the cost of travel. This would infringe the right to equality of arms, the

right to legal assistance and the right to obtain the attendance and examination of witnesses as guaranteed by Articles 6 §§ 1 and 3. Although recognising that these rights were not absolute, their infringement would amount to a flagrant breach of that Article. In his final observations under Article 6, the applicant also referred to the fact that vast quantities of intercept evidence had been obtained by the Australian authorities in the United Kingdom. Similar intercept evidence had been used in the related trial of a drug dealer in Jersey. This drug dealer had been responsible for placing the applicant under duress. The applicant would ordinarily have sought disclosure of this intercept evidence to prove his defence of duress and so invited this Court to postpone its consideration of the case until the intercept evidence could be obtained and placed before it.

2. The Court's assessment

22. The Court begins by observing that in *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 90 and 91, ECHR 2005-I, the Grand Chamber confirmed the principle first laid down in *Soering v. the United Kingdom*, 7 July 1989, § 113, Series A no. 161, that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of a fair trial in the requesting country. The Grand Chamber in *Mamatkulov* also found that, as in the present case, when extradition is deferred following an indication by the Court under Rule 39 the risk of a flagrant denial of justice must also be assessed in light of the information available to the Court at the time when it considers the case.

23. Proceeding on that basis, and in common with the High Court, the Court considers that the present applicant has failed to demonstrate that his trial in Australia would give rise to a breach of Article 6, still less that it would amount to a flagrant denial of justice of the kind contemplated by the Court in *Soering* and *Mamatkulov*. Article 6 § 3 (c) requires free legal assistance "when the interests of justice so require"; the seriousness of the offence and the possible sentence faced are two factors that must be considered in determining whether that test is met (*Benham v. the United Kingdom*, 10 June 1996, *Reports of Judgments and Decisions* 1996-III; *Quaranta v. Switzerland*, 24 May 1991, Series A no. 205). However, as the High Court found, if there were unfairness to the applicant arising out of difficulties from legal-aid funding in Australia, the case of *Dietrich v. the Queen* would allow the trial court to exercise its powers to ensure the trial was fair or to stay the trial in the event of unfairness resulting out of difficulties from legal aid funding. In his submissions to this Court, the applicant has not established any grounds for believing that either the High Court was wrong in this conclusion or that the *Dietrich* case would not apply to his case. It may well be the case that legal aid in Australia is less generous than the legal aid that would be available to the applicant if he

were tried in England and Wales and funding arrangements in Australia may be stricter. However, as the United Kingdom Government have observed, the applicant's co-accused received legal aid for their trials. The applicant has failed to demonstrate that the Australian authorities would not give due consideration to any application for legal aid he might choose to make.

24. Similarly, the Court accepts, as the High Court did, that some difficulties would arise in securing the proper examination of defence witnesses. Article 6 § 3 (d), though, does not guarantee the accused an unlimited right to secure the appearance of witnesses in court: it is for the domestic courts to decide whether it is appropriate to call a witness (*Ubach Mortes v. Andorra* (dec.), no. 46253/99, ECHR 2000-V (extracts). Moreover, the Australian authorities have also indicated their willingness to consider the use of video linking to enable those witnesses to give evidence and, if the evidence does not require cross-examination, to admit the evidence in the form of written statements. In the Court's view, these steps must be regarded as going some way to mitigating any difficulties the applicant would have in mounting his defence. Thereafter, it must be for the trial court in Australia to determine what prejudice, if any, would be caused to the applicant and the appropriate remedy. In any event, it cannot be said that the United Kingdom Government would be in violation of Article 6 §§ 1 and 3 if they extradited the applicant to face trial in Australia.

25. Finally, the Court cannot accept that it should postpone its consideration of the applicant's case so as to allow it to consider the intercept evidence to which he refers. To the extent that this evidence is in the possession of the Australian authorities, the disclosure of that evidence could be sought by his Australian defence team and, to the extent that intercept evidence was led in the Jersey trial, appropriate transcripts could no doubt be obtained directly from the Jersey authorities. Whatever course is pursued, this evidence may well be relevant to his defence of duress but it is irrelevant to the question of the fairness of his trial in Australia.

26. It follows that this part of the application must also be rejected as manifestly ill-founded.

C. Article 8 of the Convention

27. Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The applicant's submissions

28. The applicant considered it would impossible for his family to move to Australia if he were extradited. Given the ease with which he could be prosecuted in the United Kingdom, with no disruption to his private and family life, the extradition would be disproportionate to the need to prevent disorder or crime. He provided two statements to the Court. The first was from his mother in which she detailed the regular visits the family paid to the applicant in prison and stated that, because she suffered from scoliosis of the spine, osteoporosis, arthritis and celiac disease and was due to have a total knee replacement, she could not travel to Australia. If the applicant were extradited, she would never see him again. The second statement was from the applicant's wife in which she stated that she would be unable to cope with the raising of their children if the applicant were extradited. The children had regularly visited their father in prison and bonded well with him. The eldest child would find it particularly hard to deal with her father's extradition given her age.

2. The Court's assessment

29. The Court notes that the applicant does not argue that the extradition would not be in accordance with the law and thus the only matter which falls to be considered is the proportionality of the extradition to the legitimate aims set out in the second paragraph of Article 8. At the outset, the Court observes that the Convention does not provide a right to be prosecuted in a particular jurisdiction but considerations as to whether prosecution exists as an alternative to extradition may have a bearing on whether the extradition would be in violation of the one of the rights guaranteed by the Convention (see, for example, *Soering*, cited above, § 111). Nonetheless, in the present case, the United Kingdom authorities have given convincing reasons as to why they regard it as appropriate for any prosecution to take place in Australia, not least that the applicant's co-accused have all been tried there. Therefore, in deciding to allow the extradition to proceed, the United Kingdom authorities were entitled to conclude that this pursued the legitimate aim of preventing disorder or crime provided for in Article 8 § 2 (*Aronica v. Germany* (dec.), no. 72032/01, 18 April 2002). In considering whether the applicant's proposed surrender to Australia struck a fair balance between any interference with the applicant's right to respect for his family life in the United Kingdom and that legitimate aim, they were also entitled to have regard to their international obligations to Australia. Mindful of the importance of extradition arrangements between States in the fight against crime (and in particular crime with an international or cross-border dimension), the Court considers that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting

State will outweigh the legitimate aim pursued by his or her extradition (see *Launder v. the United Kingdom*, no. 27279/95, Commission decision of 8 December 1997). In the applicant's case, the Court notes that he relies on the fact that he has a wife, two young children and a mother in the United Kingdom, whose ill-health would not allow her to travel to Australia. This, in the Court's view, is not an exceptional circumstance which would militate in favour of the applicant's non-extradition. Although the long distance between the United Kingdom and Australia would mean the family would enjoy only limited contact if the applicant were extradited, convicted and sentenced to a term of imprisonment there, the Court cannot overlook the very serious charges he faces (see *A.R. v. Austria*, no. 25342/94, Commission decision of 4 September 1995). Given those charges, and the interest the United Kingdom has in honouring its obligations to Australia, the Court is satisfied that the applicant's extradition cannot be said to be disproportionate to the legitimate aim served. It follows that this part of the application must be also rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

D. The interim measure indicated under Rule 39

30. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President