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FEDERAL COURT OF AUSTRALIA

PAPAZOGLOU v REPUBLIC of PHILIPPINES

Wilcox, Tamberlin and Sackville JJ

17 April 1997 — 144 ALR 42; (1997) 92 A Crim R 418; (1998) 74 FCR 108

PRACTICE AND PROCEDURE – EXTRADITION PROCEEDINGS – WHETHER MAGISTRATE EXERCISING AN ADMINISTRATIVE FUNCTION – WHETHER MAGISTRATE HAS POWER TO STAY PROCEEDINGS AS AN ABUSE OF PROCESS: *EXTRADITION ACT* 1988 (CTH) S19.

HELD: 1. A magistrate conducting proceedings under s19 of the *Extradition Act* 1988 (Cth) exercises an administrative function rather than a judicial function.

2. Whether the magistrate has an implied power to terminate the proceedings as an abuse of power must depend on the legislative intention as revealed by the language and structure of the *Extradition Act*. Having regard to the statutory obligations contained in s19, couched as they are in mandatory terms, there is no room for the implication of a discretionary power to terminate the proceedings in a manner other than that provided in the section itself.

THE COURT: "... **[56]** It is clear that the functions performed by a magistrate pursuant to s19 of the *Extradition Act* are administrative functions performed by them as *personae designatae*. This view was expressed in *Wiest v DPP* [1988] FCA 450; (1988) 23 FCR 472; (1988) 86 ALR 464; 38 A Crim R 358; 17 ALD 149, by Burchett J at FCR 486, and by Gummow J (with whom Sheppard J agreed), at FCR 522. (As to the distinction between the judicial powers of the Commonwealth conferred on a court and executive or administrative functions conferred on *personae designatae*, who may happen to be members of a court, see *Hilton v Wells* [1985] HCA 16; (1985) 157 CLR 57; (1985) 58 ALR 245; (1985) 59 ALJR 396; 15 A Crim R 394; *Grollo v Palmer* [1995] HCA 26; (1995) 184 CLR 348 at 360-2; 131 ALR 225; 69 ALJR 724; 82 A Crim R 547; [1996] 2 CHRLD 298.) The comments in *Wiest v DPP* were directed to the functions exercised by magistrates under s17 of the *Extradition (Foreign States) Act* 1966 (Cth): see also *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282; (1989) 91 ALR 341; 45 A Crim R 327; *Schlieske v Federal Republic of Germany (No 2)* (1987) 76 ALR 417; 26 A Crim R 341. However, that section does not differ in material respects from s19 of the *Extradition Act*. In any event, the joint judgment of the High Court in *DPP v Kainhofer* [1995] HCA 35; (1995) 185 CLR 528 expressly stated (at CLR 538) that the powers conferred by the *Extradition Act*, other than those conferred on a court by s21, are administrative in character. See also *Todhunter v USA* [1995] FCA 1198; (1995) 57 FCR 70 at 80; 129 ALR 331.

... **[60]** [T]he question whether the magistrate has an implied power to stay or otherwise terminate the proceedings as an abuse of process must depend on the construction of the legislation. Despite the considerations to which we have referred, the *Extradition Act* contains provisions which suggest that there is no room for an implication that a magistrate performing the functions specified by s19 has power to stay the proceedings on the ground that they constitute an abuse of process. ... **[62]** The effect of a decision by a magistrate exercising functions conferred by s19 of the *Extradition Act* is very similar. although not identical, to the effect of a decision by a magistrate conducting proceedings under s41 of the *Justices Act (NSW)*. The decision of the magistrate under s19, that a person is eligible for surrender, does not determine whether the person will be surrendered to the requesting country; that is a matter for the Attorney-General. In that respect, s19 proceedings are like committal proceedings, since a decision to commit for trial does not mean that the accused will in fact stand trial; that decision rests with the prosecuting authorities.

However, a determination by a magistrate that a person is eligible for surrender is a necessary preliminary to a person being surrendered for extradition. By contrast, a person can be required to stand trial for an indictable offence even though a magistrate has decided that the evidence is insufficient to put the person on trial since the prosecuting authorities may file an *ex*

officio indictment. The differences between the two processes are somewhat narrowed by the fact that, as *Wiest v DPP* decides, a determination that a person is not eligible for surrender does not finally decide that issue and a fresh application can be brought. Nonetheless, some differences remain.

It is not enough, however, to distinguish *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183 from the present case to point out that these differences exist. Whether the magistrate has an implied power to terminate the proceedings for an abuse of process must depend on the legislative intention, as revealed by the language and structure of the *Extradition Act*. To adopt what was said by Dawson J in *Grassby v R*, there is no room in the face of the statutory obligations contained in s19, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided in the section itself ..."
