**49/08; [2008] VSC 433**

**SUPREME COURT OF VICTORIA**

# *MOKBEL v DPP (VIC) and ORS*

**Kaye J**

**16, 17, 28 October 2008**

**PRACTICE AND PROCEDURE – STAY OF PROSECUTION – ACCUSED EXTRADITED FROM GREECE WHILST APPLICATION TO EUROPEAN COURT OF HUMAN RIGHTS PENDING – CONDUCT OF PROSECUTING AUTHORITIES LAWFUL – WHETHER CONTINUATION OF PROSECUTION AN ABUSE OF PROCESS – NATURE OF COMMITTAL PROCEEDINGS – WHETHER PROSECUTION AT COMMITTAL PROCEEDING MAY BE STAYED FOR ABUSE OF PROCESS.**

**1. Abuse of process is the doctrine which describes the inherent power of a court to prevent abuse of its judicial processes. Axiomatically, central to that doctrine is the concept of the court protecting its own judicial processes. The doctrine of abuse of process does not extend to providing relief in non-judicial or ministerial functions of a court or of an inferior court or tribunal.**

**2. Committal proceedings before a magistrate are not judicial by nature but are conducted in the exercise of an executive or ministerial function. The role of the magistrate in holding a committal is essentially inquisitorial and administrative. Accordingly, a magistrate's order committing for trial or refusing to commit is not amenable to the doctrine of abuse of process.**

***Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, and**

***Potter v Tural; Campbell v Bah* [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318, applied.**

**3. In determining whether there has been an abuse of process, a balance must be undertaken between the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences. A court invested with jurisdiction to try a serious criminal offence should not lightly refuse to exercise that jurisdiction. For, to do so, other than on the grounds of an overriding public interest to the contrary, would be an affront to justice and would undermine public confidence in the administration of justice.**

**4. In the present case there was no suggestion of unlawful conduct by or on behalf of the Australian authorities in securing the accused's extradition to Australia. On the contrary, the Australian authorities complied with the relevant provisions of the *Extradition Act*, the regulations under the Act and the treaty between Australia and the Hellenic republic. Given the seriousness of the charges for which the accused was extradited, it could not be rationally maintained that the prosecution of the accused for the offences for which he was extradited constituted an abuse of process.**

**KAYE J:**

1. The plaintiff, by originating motion, claims declarations against the first named defendant, the Director of Public Prosecutions (Victoria), and the second defendant, the Director of Public Prosecutions (Commonwealth), that it is an abuse of process to continue to prosecute charges which they have laid against him. The plaintiff further seeks injunctions to restrain the first and second defendants from prosecuting the charges, and an order in the nature of prohibition preventing the third named defendant, the Melbourne Magistrates' Court, from dealing with those charges. The claims by the plaintiff are based on the proposition that he should not have been extradited from Greece to Australia to face those charges, until an application by him to the European Court of Human Rights, relating to his proposed extradition to Australia, had been heard and determined.

**Background facts**

2. The background facts to the case are uncontroversial. In August 2001, the plaintiff was arrested by Victorian police and charged with one count of trafficking in a drug of dependence in a quantity not less than a commercial quantity, and two further counts of trafficking in a drug of dependence, contrary to s71(1)(a) and s71(1)(b) of the *Drugs Poisons and Controlled Substances*

*Act* 1991. On 15 February 2005, after a committal proceeding in the Melbourne Magistrates' Court, the plaintiff was committed for trial in the Supreme Court of Victoria on each of those three charges. He was released on bail.

3. On 25 October 2005, the plaintiff was arrested by the Australian Federal Police and charged with two counts of urging the commission of an offence against s233E(1) of the *Customs Act* 1901 by another person, namely, importing a commercial quantity of 3, 4 methylenedioxymethamphetamine (MDMA). Subsequently, in November 2005, he was granted bail on those charges. At a mention hearing before the Melbourne Magistrates' Court in January 2006, the committal proceeding in respect of those charges was adjourned to 10 July 2006.

4. In the meantime, in February and March 2006, the plaintiff was tried in the Supreme Court on one count of importation into Australia of a prohibited import, namely cocaine, in November 2000, contrary to s233B(1)(d) of the *Customs Act* 1901. After the conclusion of evidence, and during the Crown Prosecutor's address, the accused absconded while still on bail. The trial judge decided to continue the trial. After hearing the completion of the Prosecutor's address, the jury convicted the plaintiff. The trial judge sentenced the plaintiff to a term of imprisonment of 12 years, and fixed a minimum non-parole period of 9 years' imprisonment.[1]

5. On 29 March 2006, the first defendant filed in the Supreme Court a presentment in respect of the three charges of trafficking in a drug of dependence, on which the plaintiff had been committed for trial on 15 February 2005. Gillard J ordered that the trial on that presentment be adjourned to a date to be fixed, and that a warrant be issued for the apprehension of the plaintiff.

6. On 10 July 2006, the Melbourne Magistrates' Court adjourned the committal proceedings against the plaintiff, in respect of the two Commonwealth charges outstanding against him, sine die. On 4 August 2006, the Magistrates' Court made an order for the issue of a warrant of arrest of the plaintiff in respect of those charges.

7. Between 27 February 2007 and 20 June 2007, Victoria Police filed in the Magistrates' Court a further 15 charges against the plaintiff. Those charges included two charges of murder and five charges of trafficking in a large commercial quantity of a drug of dependence. The plaintiff was arrested in Greece on 5 June 2007. On 21 June 2007, the Commonwealth Attorney-General made an application to the Hellenic Republic seeking the extradition of the plaintiff to Australia to answer criminal charges, including the 18 State charges against the plaintiff, and the three Commonwealth charges.

8. The extradition hearing was conducted before the Council of Appeals Court of Athens on 17 and 24 July 2007. On 26 July 2007 that Court ordered that the plaintiff be extradited to Australia. The plaintiff appealed from that order to the Supreme Court of Greece. On 18 March 2008, the Supreme Court of Greece ordered that the plaintiff be extradited to Australia on all the charges against him, except for two charges of perverting the course of justice. On 7 May 2008 the Minister for Justice of Greece approved the plaintiff's extradition to Australia. On 16 May 2008, the plaintiff was surrendered by Greece into the custody of the Australian Federal Police to be escorted to Australia, and the plaintiff arrived in Melbourne on 17 May 2008.

**The plaintiff's application to the European Court of Human Rights**

9. The plaintiff's claims for relief in this proceeding are based on an application which he made to the European Court of Human Rights on 9 April 2008. In that application, the plaintiff alleged that his extradition by the Greek government to Australia would constitute a violation of article 2 (the right to life), article 3 (the right not to be subjected to torture or to inhumane or degrading treatment or punishment), and article 13 (the right to an effective remedy) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

10. That application was lodged on behalf of the plaintiff by his Greek lawyer, Mr Vasilios Chardaris, of Athens. In response, the Secretary to the European Court of Human Rights wrote a letter to Mr Chardaris dated 21 April 2008, acknowledging receipt of the application, and stating that the Court would examine the plaintiff's case as soon as possible, and that Mr Chardaris would be informed of the Court's ruling. On 9 May 2008, Mr Chardaris wrote a letter to the Australian Embassy in Athens, advising of the application made on behalf of his client to the European

Court, and purporting to attach a copy of that application and of the Court's response to it. On the same date, Mr Chardaris wrote a letter to the Attorney-General's Department, also advising of the application by the plaintiff to the European Court, and purporting to attach a copy of the application and the Court's response. In both letters Mr Chardaris stated:

> "Please note that the application is still proceeding. In that sense Mr Mokbel has not yet exhausted all legal means defending his case in Greece. Therefore the extradition should not take place before the ECHR has decided on the substantive application; otherwise it is possible that a decision of the Court recognising the violation of my client's human rights will be of no effect."

11. On 12 May 2008 Dr Mirko Bagaric, the then Australian solicitor for the plaintiff, wrote a letter to the Secretary, Commonwealth Attorney-General's Department. In that letter Dr Bagaric advised that the plaintiff had made an "appeal" to the European Court of Human Rights against the decision by the Greek government to approve his extradition. Dr Bagaric asserted:

> "It would be unlawful and an abuse of process for the Australian government to facilitate or in any way acquiesce in the transfer of Mr Mokbel to Australia prior to his appeal being finalised by the European Court of Human Rights – once Mr Mokbel is back in Australia any judgment in his favour would be futile."

12. On the same day, Mr Cornall, the Secretary to the Commonwealth Government Attorney-General's Department, wrote to Dr Bagaric acknowledging his letter, and stating as follows:

> "I note that I have not received a copy of the documentation referred to in paragraph 3 of your letter. Australia is not a party to the European Convention of Human Rights which establishes the European Court of Human Rights and therefore has no obligations under that Convention. Mr Mokbel's application to the European Court of Human Rights is a matter between Mr Mokbel and the Greek government. It would be inappropriate for me to comment further on the matter."

13. As I have already stated, subsequent to that correspondence, on 16 May 2008 the Greek government surrendered the plaintiff to Australian authorities for extradition to Australia.

**Submissions**

14. The basic proposition advanced on behalf of the plaintiff is that, notwithstanding its knowledge that the plaintiff then had on foot an application to the European Court of Human Rights relating to his extradition, the Australian government encouraged the Greek government to extradite the plaintiff, and accepted surrender of the plaintiff. In support of the proposition that the Australian government encouraged the Greek government to extradite the plaintiff while his application to the European Court had not yet been determined, the plaintiff relies on a diplomatic note communicated by Australia to Greece on or about 23 April 2008 in the following terms:

> "Australia notes that Greece is a party to the European Convention on Human Rights and it is a matter for Greece to determine how it meets its obligations under this Convention. However, Australia considers that the possibility of Mr Mokbel bringing an action before the European Court of Human Rights should not delay his surrender to Australia."

15. Mr Priest QC, who appeared with Dr Bagaric for the plaintiff, submitted that the evidence establishes that the Australian government knew that if the plaintiff succeeded in his application to the European Court of Human Rights, the Greek government would be bound by any declaration in favour of the plaintiff that his extradition was a violation of his rights under the European Convention. Thus, it was submitted that the Australian government, in encouraging the Greek government to extradite the plaintiff to Australia, and in accepting the Greek government's surrender of the plaintiff on 16 May 2008, acted in a way to frustrate the plaintiff's rights under the European Convention, and to render any success by him, in the European Court, nugatory. Mr Priest submitted that, in those circumstances, it would be an abuse of the process to permit the prosecution of the charges against the plaintiff, to which I have already referred, to proceed. Mr Priest referred me to a number of authorities in support of that proposition, and in particular *R v Horseferry Road Magistrates' Court, ex parte Bennett*[2], *Levinge v Director of Custodial Services*[3], *R v Raby*[4] and *R v Mullen*[5]. He submitted that, although the only process which is presently before the Victorian Supreme Court relates to the three charges of trafficking on which the plaintiff had been committed for trial in February 2005, nonetheless the plaintiff presently faces committal proceedings in respect of the other charges against him. He submitted that the committal proceedings are a necessary part of the process, and that this Court, by resort to the doctrine of abuse of process, has power to stay or enjoin committal proceedings.

16. In response, Dr G Griffith QC, who appeared with Mr C Young for the first defendant, submitted that in order to succeed on his application, the plaintiff must establish that the Greek state acted unlawfully in surrendering the plaintiff to Australian authorities for extradition, that the Australian authorities were a party to that unlawful conduct or connived in it, and that the Court should intervene because the seriousness of the misconduct of the Australian authorities outweighs the seriousness of the offences alleged against the plaintiff. Dr Griffith submitted that the plaintiff does not allege, and there is no evidence of, any unlawful conduct by either the Greek government or the Australian government in extraditing the plaintiff to Australia. The plaintiff has not asserted any unlawful conduct by the Greek government. Nor would he be entitled to do so, as the courts of this country will not sit in judgment on the acts of the government of another country done within the latter's own territory.[6] It has not been submitted, or established, by the plaintiff that the requirements of the Treaty on Extradition between Australia and the Hellenic Republic had not been complied with. Further, in light of the Greek government's decision to surrender the plaintiff to Australian authorities, it was the obligation of Australian authorities to accept that surrender.

17. Further, Dr Griffith pointed out that, although the plaintiff had sought "interim measures" in his application to the European Court, he had not pursued those measures, nor had the European Court granted them to the plaintiff, at the time of his extradition. In the absence, at the very least, of those interim measures, it could not be said that the Australian government's conduct, in securing the plaintiff's extradition to Australia, was an abuse of process. Australia is not a party to, and is not bound by, the European Convention. Thus, Dr Griffith submitted that the plaintiff's application to the European Court was irrelevant to the rights of the Australian government to extradite the plaintiff to Australia in accordance with the provisions of the Treaty on Extradition between Australia and the Hellenic Republic. He submitted that the acts of the Australian government, in "encouraging" the extradition of the plaintiff to Australia, could not constitute an abuse of the process.

18. In their written outline of submissions, Dr Griffith QC and Mr Young had also advanced two preliminary arguments. First, it was submitted that the plaintiff had joined the wrong parties to the proceeding, since the first defendant is not a party to any of the committal proceedings currently before the Melbourne Magistrates' Court. Secondly, it was submitted that (save in the case of the three trafficking charges for which the plaintiff had been presented for trial in the Supreme Court) the Court does not have power to stay a prosecution which has not yet come before it. That submission was based on the proposition that a committal proceeding is an administrative or ministerial proceeding, and does not involve an exercise of the judicial power. Thus, unless and until the plaintiff is presented for trial in the Supreme Court, the Court does not have power to stay such a proceeding as an abuse of its processes. However, in the course of his oral arguments before me, Dr Griffith did not seek to press either of the two preliminary submissions which I have just summarised. He stated that the parties are concerned to obtain a ruling by me on the substantive question, namely, whether the intended prosecutions of the plaintiff constitute an abuse of the process of the Court.

19. Mr Dean SC, who appeared with Mr D Gurvich on behalf of the second defendant, supported the submissions made on behalf of the first defendant. In their written outline, counsel for the second defendant commenced by submitting that the plaintiff's application should not be entertained, because it constituted a fragmentation of the criminal process. However, Mr Dean did not persist with that submission in oral argument before me.

20. Mr Dean reiterated the submissions made on behalf of the first defendant, namely, that no unlawful conduct had been demonstrated on behalf of the Greek government or the Australian government in the extradition of the plaintiff from Greece to Australia. He further submitted that there was no conduct by the Australian government, in securing the plaintiff's extradition to Australia, which could, on any view, be characterised as an abuse of process. In particular, he referred to the alleged act of "encouragement" by the Australian government to the Greek government, relied upon by the plaintiff in support of his submission that the Australian government had acted improperly in encouraging Greece to extradite the plaintiff to Australia while his application to the European Court was still on foot. He submitted that, in fact, what had been communicated by Australia to the Greek government did not constitute any encouragement at all in the manner asserted on behalf of the plaintiff. At the time at which the communication

of 23 April 2008 was made by Australia to Greece, Australia had not received formal notification of the plaintiff's application to the European Court. Thus, the communication by Australia to Greece at that time only referred to the "possibility" of the plaintiff bringing an application to the European Court. In that context, the communication constituted no more than a statement by the Australian government of its preferred position. At all times, the decision to extradite the plaintiff remained that of the Greek government, and its decision to extradite the plaintiff has not been, nor could it be, impugned in this Court. Mr Dean further pointed out that no submission had been made to me on behalf of the plaintiff that his application to the European Court had merit. The plaintiff was relying solely on the proposition that the making of that application, without more, precluded the extradition of the plaintiff to Australia from Greece.

21. Finally, Mr Dean submitted that, in determining whether or not to order a permanent stay of a prosecution on the grounds of an abuse of process, the Court is required to balance, on the one hand, the public interest in ensuring that an abuse of process is not countenanced by the Court, with, on the other hand, the public interest in having serious criminal charges against the plaintiff tried and determined. Mr Dean submitted that the plaintiff had precipitated the application for extradition, by absconding while on bail and during the course of a criminal trial. He was extradited to Australia to serve a substantial term of imprisonment imposed on him in that trial. In addition, he was extradited to Australia to face very serious criminal charges, including two charges of murder. In those circumstances, he submitted that the public interest in having the criminal proceedings against the plaintiff heard and determined far outweighs any competing public interest in the plaintiff not being extradited to Australia while he still had outstanding an application to the European Court.

**Conclusions**

22. It is convenient for me to state, first, my conclusions on the issues raised by the plaintiff's claim, and then to set out my reasons for those conclusions. In summary, I have reached the following two conclusions. On the basis of either, or both, of those conclusions, the plaintiff's application for relief must fail. Those conclusions are:

> (1) Apart from the three trafficking charges on which the plaintiff has been committed for trial, and in respect of which a presentment has been filed in this Court, no judicial process has been engaged by the prosecution, which might be the subject of an application by the plaintiff based on the doctrine of abuse of process.
>
> (2) Further, and in any event, in the circumstances established by the plaintiff before me, even if judicial process has been thus far engaged, no abuse of process has been established by the plaintiff.

23. I shall now set out my reasons for those conclusions.

**Abuse of process – requirement for judicial process**

24. It is necessary for me, first, to refer to the two preliminary submissions made on behalf of the first defendant. The first submission related to the correct identity of the defendants. That submission was not pursued by either defendant. As I understood it, each defendant is prepared to accept that its role in the prosecution of the charges, which are the subject of this application, is such that, were I to grant the relief claimed by the plaintiff, that would be efficacious to stay the prosecutions against him. Based on that concession, I need not be further troubled by the first submission made by the first defendant.

25. However, the second point raised by the first defendant is not one just of form, but, rather, one of substance. Notwithstanding that neither defendant sought to press that argument before me in oral submissions, nonetheless the nature of the point made by the first defendant, in its written submission, is, I consider, one which goes to the heart of the current application. Essentially, the doctrine of abuse of process describes the inherent (or in some cases implied) power of a court or tribunal to protect its own judicial processes from abuse. Ordinarily, the doctrine is invoked before the court whose processes, it is alleged, are the subject of the relevant apprehended abuse. However, and in any event, it is the judicial process which is the subject of the doctrine of abuse of process. In invoking its power to prevent such an abuse, the court is thereby preventing an abuse of its judicial processes, or, where it is acting on review, the judicial processes of an inferior court or tribunal. Thus, the doctrine of abuse of process does not extend to providing relief in relation to non-judicial, ministerial, functions of a court or of an inferior court or tribunal. It is now well

established that committal proceedings constitute the exercise by a magistrate of a ministerial, and not judicial, process. Thus, it necessarily follows that the doctrine of abuse of process does not apply, and may not be invoked, where a magistrates' court is exercising its powers to conduct a committal proceeding.

26. Furthermore, a second, associated, principle is brought into application by the plaintiff's claim in this case. It is well established that the courts do not purport to supervise the exercise of the prosecutorial discretion, save and except where, as a consequence, there is an abuse of the court's process, or of the process of a court or tribunal in respect of which the court is exercising relevant supervision. That doctrine reflects the important distinction between, on the one hand, the judicial functions of the court, and, on the other hand, the independent functions of the prosecuting authorities.

27. I now turn to identify the authorities on which the principles, to which I have just referred, are based. It is useful to commence with the appropriate characterisation of committal proceedings. In *Phelan v Allen*[7], the Full Court held that a stipendiary magistrate, in a committal proceeding, exercises a ministerial, and not judicial function, and accordingly an order by him striking out the information and discharging the defendant might not be the subject of judicial review under s155(1) of the *Justices Act* 1958. In *Grassby v R*[8], the High Court held that a magistrate does not have power to stay committal proceedings as an abuse of process. In reaching that conclusion, Dawson J (with whom Mason CJ and Brennan, Deane and Toohey JJ agreed) recognised that it had been "consistently held" that committal proceedings do not constitute a judicial inquiry, but " ... are conducted in the exercise of an executive or ministerial function".[9] As such, the role of a magistrate or justice in holding a committal is essentially inquisitorial and administrative.[10] Finally, in *Potter v Tural; Campbell v Bah*[11], two defendants sought judicial review of the decision of the magistrate refusing leave to cross-examine certain witnesses in the course of criminal proceedings against them. On review, the primary judge quashed the decisions of the magistrate. That decision was reversed by the Court of Appeal. Batt JA (with whom Tadgell and Callaway JJA agreed) commenced his reasons by stating:

> "It is established by a long line of authority in Victoria that a magistrate's order committing for trial or refusing to commit is ministerial and not judicial and also is not amenable either to *certiorari* ... or to appeal under statutory appeal procedures replacing *certiorari.*"[12]

28. As I have stated, abuse of process is the doctrine which describes the inherent power of a court to prevent abuse of its judicial processes. Axiomatically, central to that doctrine is the concept of the court protecting its own judicial processes. In an often cited passage, Lord Morris of Borth-y-Gest stated in *Connelly v Director of Public Prosecutions*[13]:

> "[A] court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction ... A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempt at thwarting of its process."

29. That passage was quoted and adopted in the joint judgment of Mason CJ, Dawson, Toohey and McHugh JJ, in *Williams v Spautz*[14]. Their Honours further stated:

> "As Lord Scarman said in *R v Sang*[15], every court is 'in duty bound to protect itself' against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. ... The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."[16]

30. Over the last two decades, the High Court has had occasion to consider the concept of abuse of process on a number of separate occasions. In each of those cases, the Court has referred to abuse of process in the terms which I have described, namely, as deriving from the Court's inherent power to protect its own judicial processes from abuse.[17]

31. While, ordinarily, the abuse of process principles are invoked where a court is invited

to stay its own processes upon such an alleged abuse, it has also been held that the doctrine is available where a court, exercising a supervisory jurisdiction over another court or tribunal exercising judicial power, is satisfied that the proceedings before that other court or tribunal constitute an abuse of process. Thus, in *Walton v Gardiner*[18], the majority of the High Court held that the Court of Appeal of New South Wales had power, on application to it, to grant a stay of proceedings of the medical tribunal in respect of disciplinary proceedings before that tribunal against three medical practitioners. The majority of the High Court held that the Court of Appeal had that power pursuant to s23 of the *Supreme Court Act* 1970 (New South Wales), which reposed in the Supreme Court "all jurisdiction which may be necessary for the administration of justice in New South Wales".

32. In the course of submissions, the decision of the Court of Appeal of New South Wales in *Levinge v Director of Custodial Services*[19] was referred to as an authority supporting the power of the Supreme Court, in an appropriate case, to stay a prosecution which had not reached committal proceeding. In that case the appellant, Levinge, had been extradited to Australia from the United States of America. He sought an order for his release from custody, and alternatively an order prohibiting the continuance of proceedings against him, on the grounds that they were an abuse of the process of court. The gravamen of his complaint was that he had been forcibly removed from Mexico to the United States, before his extradition to Australia. At first instance, Smart J, of the Supreme Court, rejected the application, holding that if there was any illegality in the removal of Levinge from Mexico to the United States, Australia had not participated in, nor connived at, that illegality. That finding of fact was upheld by the Court of Appeal. However, the Court of Appeal recognised that in an appropriate case the Supreme Court, and thus the Court of Appeal, had power to grant the relief sought by the appellant.[20] The Court rested that power on s23 of the *Supreme Court Act*, which it considered was sufficiently wide to provide to the Supreme Court supervisory power over the processes to which the appellant was then subject.

33. In *R v Horseferry Road Magistrates' Court, ex parte Bennett*[21], the House of Lords held that the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction, and had power to stay a prosecution against that person as an abuse of process. In that case the defendant had been forcibly removed from South Africa to England. He was arrested and charged before a magistrates' court to be committed to the Crown Court for trial. The magistrate refused the defendant's application for an adjournment, to enable him to challenge the court's jurisdiction. The defendant was committed for trial. He sought judicial review of the magistrate's decision. The Divisional Court refused that application, holding that the English court had no power to inquire into the circumstances in which the defendant had been brought within the jurisdiction. The House of Lords allowed the defendant's appeal from that decision. It held that the High Court, in exercise of its supervisory jurisdiction, had power to inquire into the circumstances in which the defendant had been brought into the jurisdiction. That power extended to providing relief in respect of those proceedings, if they were an abuse of the process. The leading speech was delivered by Lord Griffith. In respect to the question of the amenability of committal proceedings to the doctrine of abuse of process, his Lordship stated:

> "I would accordingly affirm the power of the magistrates, where the sitting is committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of a particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal procedures... [I]f a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as a proper forum in which such a decision should be taken."[22]

34. It is clear that in *Bennett's case*, the House of Lords' characterisation of a committal proceeding is different to, and in conflict with, that of the High Court.[23] The difference between the approach in the United Kingdom, and the approach in Australia, may be explained by the different role played by the committal proceeding in the United Kingdom than it does in Australian jurisdictions. That difference was described, in some detail, by Dawson J in *Grassby v R*[24]. As

His Honour explained, unlike in the United Kingdom, committal for trial in New South Wales (and in Victoria) does not determine whether a person charged with an offence will be indicted. Thus, the committal proceeding, while usually anterior to a trial, is nonetheless a different proceeding, and does not have the same connection to a trial that it has in the United Kingdom. For those reasons, I do not consider that the decision of the House in Lords in *Bennett's case* conflicts with the views which I have already expressed, namely, that as the committal proceedings in respect of the charges against the plaintiff are not judicial by nature, they are not amenable to the doctrine of abuse of process.[25]

35. That conclusion is reinforced by the well established principle that a court should not, save in particular exceptional circumstances, interfere with the prosecutorial discretion to lay charges, and to bring those charges before a court. Thus, in *Maxwell v R*[26], the High Court held that, except to prevent an abuse of the court's process, a judge has no power to review the election by a prosecutor to accept a plea of guilty to a lesser offence, nor to intervene and reject that plea. In their joint judgment, Gaudron and Gummow JJ stated the relevant principles as follows:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The independence of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[27]

36. The effect of the principles, to which I have thus far referred, is that, in my view, the doctrine of abuse of process is only available to prevent an abuse of a court's judicial processes. Save in the case of the three trafficking charges, for which the plaintiff has already been presented for trial in the Supreme Court, the other charges against the plaintiff, which are the subject of the application before me, have not yet been the subject of committal proceedings. The forthcoming committal proceedings in respect of those charges are not part of the judicial process, and are not amenable to the doctrine of abuse of process. Furthermore, the relief sought by the plaintiff, in respect of those charges, is an invitation to the Court to enter upon an interference with the prosecutorial discretion, which was proscribed by the High Court in *Maxwell's case*. In short, apart from the three trafficking charges, there is no court process which is capable of being the subject of an abuse. It is not for this Court to interfere with the exercise of the prosecutorial discretion in charging the plaintiff, and bringing him before the Magistrates' Court for the purpose of the ministerial function of that Court of conducting committal proceedings in respect of those charges.

37. As I have stated, there are three charges against the plaintiff, which are the subject of a presentment filed in this Court. As such, the Court has before it a process, which is amenable to the doctrine of abuse of process. Those three charges were laid under State law. The present application is brought, not in the criminal proceeding instituted by the filing of the presentment, but, rather, in a civil proceeding commenced by originating motion. Indeed, Mr Dean submitted that the current proceedings before me constitute, strictly, an exercise by this Court of its federal jurisdiction.[28] Whether that is correct or not, where criminal proceedings are currently before a court, it is appropriate that any application in respect of an abuse of process constituted by them should be brought within the criminal proceeding, rather than by way of collateral civil process. It is not necessary for me to determine, in this case, whether the procedure thus adopted in respect of the three trafficking charges is so flawed as to constitute a basis for dismissing the plaintiff's claim. For, as I have already indicated, and for reasons I shall now enunciate, I am of the opinion that those proceedings are not an abuse of the process of the Court. For the same reasons, if, contrary to my views just stated, the other charges against the accused are amenable to the doctrine of abuse of process notwithstanding that they have not proceeded to committal, it is my opinion that none of those charges constitute an abuse of process.

**Abuse of process**

38. The next question, then, is whether the prosecution of the charges, on which the plaintiff was extradited to Australia, would be an abuse of the process in any event. Abuse of process is a protean concept. It is well recognised that the classes of case in which an abuse might be found are not fixed.[29] In *Rogers v R*[30], McHugh J nonetheless was able to identify three broad categories in which abuses of process may be found. His Honour stated:

> "Inherent in every court of justice is the power to prevent its procedures being abused. Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute."

39. In this case, it is the third category, referred to by McHugh J which, in a broad sense, is invoked by the plaintiff. In essence, it is submitted that the circumstances in which the plaintiff was brought to Australia would bring the administration of justice into disrepute, if the plaintiff were tried for the charges in respect of which he was extradited. In support of that proposition, Mr Priest referred me to a number of cases in which, in recent times, it has been held that the doctrine may be invoked, where an accused person has been brought into the jurisdiction in such circumstances that the administration of justice would come into disrepute, should the accused be tried as a consequence of his forcible removal into the jurisdiction. Thus, in *R v Horseferry Road Magistrates' Court, ex parte Bennett*[31], Lord Griffith stated:

> "The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take action of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution. In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party. If extradition is not available very different considerations will arise on which I express no opinion."[32]

40. The next question is whether, in the circumstances of this case, prosecution by the first and second defendants of the charges, on which the plaintiff was extradited to Australia from Greece, would constitute an abuse of process, assuming, for the purpose of that question, there is on foot a "process" which might be the subject of abuse.

41. As I have stated, the plaintiff's case is that the circumstances in which he was extradited, while his application to the European Court of Human Rights was still on foot, are such as to render the prosecution of the charges, on which he was extradited, an abuse of process. The basic contention advanced on behalf of the plaintiff is that Australia encouraged the Greek government to extradite the plaintiff, and Australia accepted the surrender by the Greek government of the plaintiff, when the Australian authorities, responsible for the plaintiff's extradition, knew that the plaintiff had made an application to the European Court of Human Rights in respect of his extradition, and that that application had not been determined. It was submitted that in those circumstances the Australian authorities, responsible for the plaintiff's extradition, well knew that, in effecting the plaintiff's extradition at that time, they would thereby render futile the plaintiff's application to the European Court.

42. Mr Priest acknowledged that, as part of the plaintiff's application, it is not alleged that there was any unlawful conduct by the Australian government, or indeed by the Greek government. He did not contend that there was any breach of the *Extradition Act*, or of any other law by the Australian government. Nor did he contend that there was any breach by either government of the provisions of the Treaty on Extradition between Australia and the Hellenic Republic. Rather, as I stated, Mr Priest relied solely on the proposition that Australia effected the extradition of the plaintiff, knowing that by doing so it thereby frustrated the plaintiff's application to the European Court.

43. In response, the defendants made two principal submissions. First, they submitted that the plaintiff could only make out an abuse of process, if the plaintiff was able to establish unlawful conduct by the Australian government, or unlawful conduct by the Greek government, to which the Australian government was a party or at which the Australian government connived. In particular, counsel for both defendants relied on a passage in the judgment of McHugh JA (as his Honour then was) in *Levinge v Director of Custodial Services*[33] to that effect. In this case, no such unlawful conduct has been proven or alleged. Nor has it been alleged that the Australian government participated in, or connived at, any unlawful conduct by the Greek government. Indeed, as observed by counsel, this Court is not entitled to pass judgment on the lawfulness or otherwise of the conduct of the Greek government in surrendering the plaintiff to Australian

authorities for extradition.[34] Secondly, in any event, it was submitted by the defendants that the conduct of the Australian government, alleged and relied upon by the plaintiff, is not of such an egregious character as to constitute an abuse of process. In particular, when balancing the conduct alleged by the plaintiff against the Australian government, against the important public interest in ensuring that persons charged with serious criminal offences be brought to justice in this country, it could not be concluded that the prosecution of the plaintiff on the charges for which he was lawfully extradited to Australia would constitute an abuse of process of the courts of this State.

44. The first question, raised by the foregoing submissions, is whether it is necessary for the plaintiff to establish unlawful conduct by the Australian government, or unlawful conduct in which the Australian government was complicit or connived, to establish an abuse of process.

45. Certainly, each of the cases on this topic, to which I was referred, involved unlawful conduct in removing the accused person to the jurisdiction which was subject to the alleged abuse. In those cases, the essence of the abuse of process alleged was that if the court permitted the trial of the accused to proceed, it would thereby countenance unlawful conduct of the prosecuting authorities in securing the presence of the accused in the jurisdiction for the purposes of his trial. In cases where the court has held that there was an abuse of process, it was concluded that the conduct of the prosecution, in removing the accused into the jurisdiction, constituted an affront to justice, and that accordingly it would undermine public confidence in the system of justice, should the court permit the prosecution before it of an accused brought into its jurisdiction in such circumstances.

46. In *Levinge v Director of Custodial Services*[35], the Court was concerned with an allegation that the accused had been forcibly removed from Mexico to the United States of America, whence he had been extradited to Australia. At first instance, Smart J rejected the accused's contention that the prosecution of him in Australia was an abuse of process, on the grounds that there was no evidence that the Australian authorities had connived in or participated in the unlawful conduct of the Mexican and American authorities.[36] The Court of Appeal upheld that decision. McHugh JA stated his conclusions in the following terms:

> "... before a stay can be granted the prosecution must have been either a party to the unlawful conduct or connived at it. ... In the present case there is no evidence that the Australian police were involved in or connived at the expulsion of the plaintiff from Mexico."[37]

47. In *R v Hartley*[38], the New Zealand Court of Appeal was concerned with a case in which the accused had been unlawfully brought back from Australia to New Zealand, without extradition, in order to face prosecution there. Woodhouse J, delivering the judgment of the Court of Appeal, observed that if the accused had made application at trial, he would have had good grounds to stay his prosecution, because his removal to New Zealand had been "so much at variance" with the requirements of the *Fugitive Offenders Amendment Act* 1976, which governed the lawful means by which a person might be extradited from one Commonwealth country to New Zealand.[39]

48. Similarly, in *R v Horseferry Road Magistrates' Court, ex parte Bennett*[40], to which I have referred, the House of Lords was concerned with circumstances in which the defendant had been forcibly removed from South Africa to England, without recourse to the extradition procedures between the two countries. It was the unlawful conduct of the British authorities, in so bringing the accused into the United Kingdom, which constituted the basis of the observations by the members of the House of Lords as to the circumstances in which the trial of the accused in England might be an abuse of process.[41]

49. The case on which the plaintiff in this case placed most reliance was the decision of the Court of Appeal in *R v Mullen*[42]. In that case the accused, Mullen, was charged with conspiracy to cause explosions. He was arrested in Zimbabwe, to which he had departed from the United Kingdom shortly after the occurrence of the events which were the basis of the charges against him. The English prosecuting authorities, knowing that extradition was available, nonetheless instigated, and in collusion with the Zimbabwean Central Intelligence Organisation procured, the accused's deportation to the United Kingdom, on the ground that the accused had made a false declaration, on entering Zimbabwe, that he had no previous convictions. Further, the

English authorities procured Mullen's deportation in circumstances in which Mullen's rights under the Zimbabwe *Immigration Act* 1979 were violated. In particular, his deportation occurred in circumstances in which he was denied access to a lawyer, and was deprived of his right to appeal against deportation, under that Act.

50. Based on those events, the Court of Appeal held that the accused's conviction should be set aside, on the grounds that the prosecution of him was an abuse of process. Rose LJ, delivering the judgment of the Court, stated:

> "In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.
>
> Finally, the events leading to the deportation as now revealed in the summary for disclosure were concealed from the defendant until last year. ... In these circumstances, we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was preceded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceeding then being stayed."[43]

51. Finally, in *R v Raby*[44], Byrne J, of this Court, was concerned with a case in which the accused had been brought involuntarily into Victoria without extradition. The accused was alleged to have raped a woman on board a New Zealand naval vessel while it was moored at Williamstown. Before the accused's arrest, the ship had departed from the jurisdiction for a short time. At the request of Australian authorities the ship returned, and the accused was handed over by the New Zealand authorities to the Victorian authorities. The accused, on his trial in the County Court, successfully applied to the trial judge for a stay of his prosecution, on the basis that he had been unlawfully brought into the jurisdiction. By originating motion, the prosecution applied to the Supreme Court for declaratory relief and for relief in the nature of *certiorari*. In granting the declaratory relief sought by the Crown, Byrne J noted[45] that the case before him proceeded on the basis that the New Zealand authorities had acted unlawfully in carrying the accused from the New Zealand warship on the high seas to Australia without his consent for the purpose of facing criminal charges in Australia. His Honour, however, held that the departure by the New Zealand authorities from normal extradition procedures was "venial", and that there was no evidence to support a finding that the Australian authorities knowingly bypassed proper extradition procedures. Accordingly, his Honour held that in those circumstances there was no basis for any stay against the Crown.[46]

52. It can be seen from the foregoing review of the authorities that the focus, in each case, was on the question of the lawfulness of the circumstances in which the accused had been brought into the relevant jurisdiction.[47] In my view, that circumstance is not a matter of form, but one of considerable substance. The extradition to Australia of an accused person from overseas is governed by the provisions of the *Extradition Act*, and the regulations made under that Act, as well as by the provisions of any treaty between Australia and the jurisdiction from which the accused person is to be extradited. It is those laws, as effected by the legislature, which prescribe the rights and duties of the Commonwealth of Australia in seeking the extradition of an accused person from an overseas jurisdiction. Equally, it is those laws which contain the correlative rights of the accused under Australian law, in respect of his or her extradition. For example, s42 of the *Extradition Act* protects an accused person, who has been extradited, from being charged with or tried in Australia for any offence, committed by that person before his or her surrender, other than the offence or offences for which the accused was extradited to Australia. Thus, the provisions of the laws relating to extradition, and the relevant treaty, are the repositories of the relevant rights and duties of the Australian authorities, and the rights of persons who are to be extradited, under Australian law. In addition, of course, the extradition laws of this country necessarily accept an obligation by Australia to comply with the laws and procedures of the jurisdiction from which the person is to be extradited. It is for those reasons that the focus of the cases, to which I have referred, is on the proper compliance by the authorities, in the jurisdiction to which the accused is brought, with the laws relating to the person's removal from the foreign jurisdiction.

53. Of course, the categories of abuse of process are not closed. However, it would clearly

be a very rare and particularly exceptional case where an abuse was made out on the basis of an accused person's extradition to Australia, notwithstanding that there has been no unlawful conduct by the Australian authorities, and no unlawful conduct by the authorities of the extraditing jurisdiction, in which the Australian authorities had been complicit, in securing the extradition of the accused to Australia.[48]

54. In determining whether there has been an abuse of process, a balance must be undertaken between the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences.[49] A court invested with jurisdiction to try a serious criminal offence should not lightly refuse to exercise that jurisdiction. For, to do so, other than on the grounds of an overriding public interest to the contrary, would be an affront to justice and would undermine public confidence in the administration of justice. Thus, it has been repeatedly emphasised that, in order that conduct constitute an abuse of the process, justifying a court in refusing to exercise its lawful jurisdiction, the conduct complained of must not simply be "venial"[50]. The conduct complained of must be "extraordinarily reprehensible, heinous in the extreme"[51], so that it would constitute an "affront to justice" for the prosecution to proceed.[52] In *R v Latif*[53], Lord Steyn, referring to the balancing exercise, held that the trial judge, in that case, had not erred in refusing to stay proceedings, because the conduct of the relevant officer, which was sought to be impugned, was "not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed". In similar terms, in *Truong v R*[54], Kirby J stated the relevant principle in the following terms:

> "Whatever the prerequisites to the exercise of the power to stay proceedings for abuse of process, it is clearly established by the cases that it is not available to cure some 'venial' irregularity. Thus where a 'technical' breach of extradition law and procedure is later found to have occurred, in circumstances where the relevant officials were determined to have had held the affirmative belief that they were acting appropriately, a stay has been refused, rightly in my view.[55] At the very least, therefore, the departure complained of must be very serious, such that in the circumstances, for the court to continue with the proceedings would offend the very integrity and functions of the court, as such."

55. In my view, in determining whether the conduct of the Australian authorities is such as to constitute an abuse of process, the answer is clear cut. It is true, as asserted by Mr Priest, that the extradition of the plaintiff to Australia might have rendered nugatory any victory he might subsequently have in the European Court of Human Rights. However, the countervailing considerations are, in my view, of significant magnitude, and far outweigh that consideration. In particular, the countervailing considerations are of such gravity that, in my view, the prosecution of the accused for the charges on which he was extradited could not, on any rational view, be considered to be an abuse of process.

56. As I have already stated, there has been no suggestion, at all, of unlawful conduct by or on behalf of the Australian authorities in securing the plaintiff's extradition to Australia. Rather, and on the contrary, the Australian authorities complied with the relevant provisions of the *Extradition Act*, the regulations under that Act, and the treaty between Australia and the Hellenic Republic. Nor is there any suggestion, at all, that the Australian authorities instigated, participated in, or even knew of, any breach by the local Greek authorities of any provision of the Greek law pertaining to the plaintiff's application to Australia. The plaintiff was extradited after being given due process in Greece, before the Athens Court of Appeal and before the Supreme Court of Greece. He was extradited after the Greek Minister of Justice duly ordered his extradition.

57. In this application, the plaintiff has relied, solely, on the bare fact that at the time at which the plaintiff was extradited to Australia, the Australian authorities knew that he had made an application to the European Court of Human Rights. The plaintiff relies on the knowledge by the Australian government of that fact as the foundation of his claim that his extradition to Australia was an abuse of process. It may not be appropriate to agitate, in this Court, the merits or otherwise of the plaintiff's application to the European Court. However, the fact remains that the plaintiff is relying solely on the circumstance that he had made such an application. Indeed, he only tendered in evidence copies of that application in the French and Greek languages (English translations were provided by the defendants).

58. Further, while the plaintiff's application to the European Court of Human Rights did include

in it a request for "interim measures", nevertheless, as pointed out by Dr Griffith, the plaintiff did not obtain interim measures under rule 39 of the *Rules of the European Court of Human Rights*, before his extradition to Australia. Nor is there any evidence that the plaintiff pursued, or sought to agitate, interim measures, in accordance with the practice direction of the European Court entitled "Requests for Interim Measures".

59. The essence of the submission made by Mr Priest before me was that the abuse of process comprised the "encouragement" by Australian authorities to the Greek government to extradite the plaintiff to Australia, and the acceptance by the Australian authorities of the surrender of the plaintiff for extradition, while his application to the European Court was still pending. In respect of the allegation that the Australian government encouraged the extradition of the plaintiff to Australia while his application to the European Court was on foot, the plaintiff places reliance on the diplomatic note by Australia to Greece on or about 23 April 2008, in the following terms: "Australia notes that Greece is a party to the European Convention on Human Rights and it is a matter for Greece to determine how it meets its obligations under this Convention. However, Australia considers that the possibility of Mr Mokbel bringing an application before the European Court of Human Rights should not delay his surrender to Australia."

60. As Mr Dean has pointed out, the note only referred to the "possibility" of the plaintiff bringing an application before the European Court. There is no evidence that the Commonwealth Attorney-General, or that any government instrumentality, received notification of that application, at least before 9 May 2008. Further, and more importantly, whether or not the stance taken by Australia in the note of 23 April 2008 could conceivably be described as "encouragement", in essence the note consisted of no more than a statement by Australia of its lawful position. Australia is not a party to, nor bound by, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. There was, in my view, nothing in the conduct of Australia, in notifying its lawful stance to Greece in the manner described in the note of 23 April 2008, which could, in any way, fall within the terms of the type of conduct described by the authorities, as the foundation of an abuse of process of the Court. There was nothing "shameful" or "unworthy" about the conduct of the Australian government, in making that request, which could render any prosecution of the plaintiff, consequent on his extradition to Australia, an abuse of process.[56]

61. The plaintiff also relies on the act of the Australian government in accepting the surrender by the Greek government of the plaintiff as a foundation for its application before me. However, as Dr Griffith has correctly observed, the Australian government was, as a matter of law, bound to accept that surrender, both pursuant to s41 of the *Extradition Act*, and also pursuant to Article 10(3) of the Treaty on Extradition between Australia and the Hellenic Republic. In any event, in my view, such conduct by the Australian authorities could not be characterised as the type of egregious conduct considered by the courts to be the proper foundation for a finding that any prosecution of an accused, brought into its jurisdiction, would be an abuse of process.

62. In considering the submissions made on behalf of the plaintiff, it is relevant to bear in mind that the plaintiff has been lawfully brought into this jurisdiction to face charges of considerable gravity. The two charges brought on behalf of the Commonwealth Director of Public Prosecutions relate to two offences of urging the importation of a commercial quantity of MDMA ("ecstasy") into Australia. In particular, the material put before me demonstrates that those charges are concerned with an agreement to supply to the plaintiff 100 kilograms of MDMA powder, at a price of 1.2M Australian dollars, and a further potential purchase of 900 kilograms of MDMA powder in the future. The Victorian charges, in respect of which the plaintiff was extradited, include two charges of murder, six charges of trafficking in a drug of dependence not less than a large commercial quantity, and three charges of conspiring to traffic in a drug of dependence not less than a large commercial quantity. In addition, the plaintiff was extradited to Australia to serve a term of imprisonment of 12 years, for the offence of knowingly being concerned in the import of a prohibited substance, namely cocaine. The reasons for sentence of Gillard J, in that case, reveal that the amount of cocaine involved in the importation was 2,933.9 grams, the selling price of which was between $730,000 and $880,000.[57]

63. The seriousness of the offences for which the accused was extradited only serves to reinforce the conclusion to which I have otherwise come, namely, that on any view of the facts, it could not be rationally maintained that the prosecution of the accused for the offences for which

he was extradited constitutes an abuse of the process. Accordingly, for the reasons which I have already set out, I reject the submission on behalf of the plaintiff that the circumstances of this case, and of the plaintiff's extradition to Australia, are such as to warrant the conclusion that the prosecution in Victorian courts of the plaintiff in respect of the charges for which he was extradited would constitute an abuse of process.

**Conclusion**

64. In summary, I have reached the conclusion in this case that the plaintiff's claim should be dismissed, on the grounds:

> (1) That apart from the three trafficking charges in respect of which the plaintiff has been presented for trial in Victoria, there is no judicial process against the plaintiff which could be the proper subject of an application based on the doctrine of abuse of process.
>
> (2) Further, and in any event, if there is relevant process to which the plaintiff is subject, the circumstances of the plaintiff's extradition from Greece to Australia do not warrant the conclusion that his prosecution for the offences for which he was lawfully extradited to Australia would be an abuse of such process.

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[1] *R v Mokbel* [2006] VSC 119 (Gillard J).
[2] [1993] UKHL 10; [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114.
[3] 89 FLR 133; (1987) 9 NSWLR 546; 27 A Crim R 163.
[4] [2003] VSC 213 (Supreme Court of Victoria, Byrne J).
[5] [2000] EWCA Crim 36; [2000] QB 520.
[6] *Mokbel v Attorney-General (Commonwealth)* [2007] FCA 1536; (2007) 162 FCR 278 [58] to [59]; (2007) 244 ALR 517, (Gordon J); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* [1988] HCA 25; (1988) 165 CLR 30, 40-41; 78 ALR 449; (1988) 10 IPR 385; (1988) 62 ALJR 344; [1988] LRC (Const) 1007 .
[7] [1970] VicRp 28; [1970] VR 219.
[8] [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[9] Ibid, 11.
[10] See also page 19.
[11] [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318.
[12] Ibid, [20].
[13] [1964] AC 1254, 1301; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145.
[14] [1992] HCA 34; (1992) 174 CLR 509, 518; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.
[15] [1979] UKHL 3; [1980] AC 402, 455; [1979] 2 All ER 1222; [1979] 3 WLR 263; (1979) 69 Cr App R 282.
[16] [1992] HCA 34; (1992) 174 CLR 509, 520; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.
[17] See for example *Jago v District Court of New South Wales & Ors* [1989] HCA 46; (1989) 168 CLR 23, 25; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Mason ACJ), CLR 56, 58 (Deane J), CLR 74 (Gaudron J); *Barton v R* [1980] HCA 48; (1980) 147 CLR 75, 96-7; (1980) 32 ALR 449; 55 ALJR 31 (Gibbs ACJ, Mason J), CLR 107 (Murphy J); *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378, 392-3 (Mason CJ, Deane and Dawson JJ); *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251, 286; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462 (McHugh J, dissenting); see also *Barac v DPP* [2007] QCA 112, [16] (Keane JA).
[18] [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378.
[19] 89 FLR 133; (1987) 9 NSWLR 546; 27 A Crim R 163.
[20] See especially at 556 (Kirby P), 565 (McHugh JA).
[21] [1993] UKHL 10; [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114.
[22] Ibid 64; see also at page 80 (Lord Lowry).
[23] *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183; see also *Ammann v Wegener* (1972) 129 CLR 415, 435-6 (Gibbs J); *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, 31 [88]; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784; *Higgins v Commans* (2005) 153 A Crim R 565; [2005] QCA 234, [34] and following (Keane JA).
[24] [1989] HCA 45; (1989) 168 CLR 1, 12 to 15; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[25] See also *Higgins v Commans* (2005) 153 A Crim R 565; [2005] QCA 234, [32], [33] and [37] (Keane JA).
[26] [1996] HCA 46; (1996) 135 ALR 1; [1997] 4 Leg Rep C1; (1996) 87 A Crim R 180; (1996) 70 ALJR 324; (1996) 184 CLR 501.
[27] 534; see also 512 to 514 (Dawson and McHugh JJ); see also *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23, 38; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Brennan J); *Barton v R* [1980] HCA 48; (1980) 147 CLR 75, 94-5; (1980) 32 ALR 449; 55 ALJR 31 (Gibbs ACJ, Mason J), CLR 107 (Murphy J), CLR 110 (Wilson J); *Jarrett v Seymour & Ors* (1993) 46 FCR 521; (1993) 119 ALR 10, 36 (Foster J); On appeal, *Jarrett v Seymour* (1993) 46 FCR 557; (1993) 119 ALR 46, 54; (1993) 71 A Crim R 245 (Lockhart and Beaumont JJ).
[28] See *Constitution Act* s75; *Judiciary Act* 1903 s38, 39B, s39B(1B).
[29] *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23, 74; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Gaudron J); *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL

13; [1982] AC 529, 536; [1981] 3 All ER 727; [1981] 3 WLR 906 (Lord Diplock); *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251, 255; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462 (Mason CJ).
[30] [1994] HCA 42; (1994) 181 CLR 251, 286; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462.
[31] [1993] UKHL 10; [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114.
[32] Ibid 62; see also at 67 to 68 (Lord Bridge); see also *Levinge v Director of Custodial Services* 89 FLR 133; (1987) 9 NSWLR 546; 27 A Crim R 163; *Truong v R* [2004] HCA 10; (2004) 223 CLR 122, 171-2; 205 ALR 72; (2004) 78 ALJR 473 (Kirby J); *R v Mullen* [2000] AC 520, 534 to 5; *R v Raby* [2003] VSC 213; *R v Hartley* [1978] 2 NZLR 199.
[33] 89 FLR 133; (1987) 9 NSWLR 546, 565; 27 A Crim R 163.
[34] *Mokbel v Attorney-General (Commonwealth)* [2007] FCA 1536; (2007) 162 FCR 278 [58] to [59]; (2007) 244 ALR 517 (Gordon J); *Cabal v United American States (No 3)* [2000] FCA 1204; (2000) 186 ALR 188, 229 [104].
[35] 89 FLR 133; (1987) 9 NSWLR 546; 27 A Crim R 163.
[36] *Levinge v The Superintendent of Long Bay Gaol* (Unreported, 23 January 1983; BC8701614).
[37] 89 FLR 133; (1987) 9 NSWLR 546, 565, see also 556 to 557; 27 A Crim R 163, 565 (Kirby P), NSWLR 567 (McLelland AJA).
[38] [1978] 2 NZLR 199.
[39] Ibid, 215.
[40] [1993] UKHL 10; [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114.
[41] See especially at page 64 (Lord Griffith), 68 (Lord Bridge), 76 (Lord Lowry), 84 (Lord Slynn).
[42] [2000] EWCA Crim 36; [2000] QB 520.
[43] Ibid, 535 to 536.
[44] [2003] VSC 213.
[45] Ibid, [24].
[46] Ibid, [35] to [37].
[47] See also *Truong v R* [2004] HCA 10; (2004) 223 CLR 122, 161 [96]; 205 ALR 72; (2004) 78 ALJR 473, (Gummow and Callinan JJ), CLR 172 [136] (Kirby J).
[48] cf *Barton v R* [1980] HCA 48; (1980) 147 CLR 75, 115-116; (1980) 32 ALR 449; 55 ALJR 31 (Wilson J).
[49] *R v Latif* [1996] UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 112 to 13 (Lord Steyn); *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 177 CLR 378, 396 (Mason CJ, Deane and Dawson JJ); *Barton v R* [1980] HCA 48; (1980) 147 CLR 75, 96; (1980) 32 ALR 449; 55 ALJR 31; *Barac v DPP* [2007] QCA 112, [35] (Keane JA); *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23, 30; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307 (Mason CJ).
[50] *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1993] UKHL 10; [1994] 1 AC 42, 77; [1993] 3 All ER 138; [1993] 3 WLR 90; (1993) 98 Cr App R 114 (Lord Lowry); *R v Raby* [2003] VSC 213, [34]; *Bou-Simon v Attorney-General* (2000) 96 FLR 325, [34].
[51] *Jarrett v Seymour* (1993) 46 FCR 521; (1993) 119 ALR 10, 36 [Foster J).
[52] *Jarrett v Seymour* (on appeal) (1993) 46 FCR 557; (1993) 119 ALR 46, 54; (1993) 71 A Crim R 245; *Bou-Simon v Attorney-General* (above), [32].
[53] UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 113.
[54] [2004] HCA 10; (2004) 223 CLR 122, 172; 205 ALR 72; (2004) 78 ALJR 473.
[55] See for example *R v Raby* [2003] VSC 213, [37] per Byrne J.
[56] cf *R v Latif* UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 113 (Lord Steyn); *R v Mullen* [1980] QB 520, 535.
[57] *R v Mokbel* [2006] VSC 119, [60].

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