CASE NOTE*

COMMONWEALTH v SKASE: A MATTER OF LIFE OR DEATH OR A NOMINATION FOR AN OSCAR?

I. INTRODUCTION

The ruling of the Spanish Audiencia Nacional of 19 December 1994 was a blow to the Australian Government.[1] It concerned an application for the extradition of

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1 Extradition Procedure No 1/94 (Audiencia Nacional, Criminal Division, 19 December 1994, Madrid), Motion for Review No 31/94 (Audiencia Nacional, Criminal Division, Full Court, Presiding Judge Francisco Garcia Perez, Jose Antonio Jimenez Alfaro Giralt, Francisco Jose Carrero Muije, Jose Antonio Maranon Chavarri, Fernando Garcia Nicolas, Jose Ricardo Prada Solaesa, Angela Murillo Bordallo, and Manuela Fernandez Prado JJ, 19 December 1994, Madrid) Decisions of the Audiencia Nacional are divided into two parts: 'De Facto' refers to findings of fact as appreciated by lower courts; 'De Jure' refers to the legal principles considered by the Appeal Court. *The Australian* reported the outcome of the decision on 19 December 1994: H Trinca, "Skase Seeks Spanish Citizenship" *The Australian*, 19 December 1994, p 1; H Trinca, "Disgraced Tycoon Courts the Media" *The Australian*, 19 December 1994, p 2; D Humphries, "Lavarch Under Fire For Letting 'Big Fish' Go" *The Australian*, 19 December 1994, p 2, where it was reported that the Federal Opposition described the decision as "a bitter disappointment" and a "major embarrassment" for the Government; D Thorpe, L Scott, "Lung Condition No Barrier to Flying" *The Australian*, 19 December 1994, p 2; Editorial, "Skase Case Should Stay Open" *The Australian*,

Christopher Charles Skase submitted by the Embassy of Australia in Madrid to the Spanish Ministry for Foreign Affairs on 3 March 1994. In spite of the endorsement of Australia's extradition request by the Spanish Council of Ministers[2] and the Audiencia Nacional's finding that most of the thirty two charges against Skase constituted misappropriation of funds and attempted fraud under Spanish law, the extradition was refused and Skase was released.

The thrust of the decision, against which there is no appeal, was formulated by the Full Court of the Audiencia Nacional in the following pronouncement:

> Pursuant to the principle of proportionality - recognised by the doctrine of our Constitutional Tribunal as governing juridical relations and moderator of the resolutions emanating from Judicial Authorities and, in general, from Public Powers - the fundamental individual rights to life, physical integrity and public health must prevail over the punitive right of States - such right including a State's authority to prosecute - and for this reason, in this extradition proceedings, it is appropriate to sacrifice the right of the Australian government to prosecute and punish the offences attributed to SKASE if, in implementing such right, the health or the life of the person claimed may be endangered.[3]

The pronouncement is another "jolt to the rule of non-inquiry" under extradition law[4] because it furthers the notion that states must guarantee the protection of individual human rights during the post-extradition process. The question to be considered here is whether the judicial response of the Spanish Audiencia Nacional to humanitarian exception claims to extradition is consistent with Australian and Spanish domestic laws, the provisions of the 1987 Extradition Treaty Between Australia and Spain[5] (The Extradition Treaty), and with established principles of international human rights law.

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19 December 1994, p 7, which said the decision was "an affront to Australian justice"; H Trinca, "Breathing Easy" *The Australian*, 19 December 1994, p 10. Further reports appeared daily until 25 December: M Coffey, "Skase's Story a Turkey" *The Australian*, 20 December 1994, p 1; S Emerson, "Lavarch Sets Up Review of the Skase Case" *The Australian*, 20 December 1994, p 4; H Trinca, "Skase Ineligible For Spanish Citizenship" *The Australian*, 21 December 1994, p 4; H Trinca, "Skase Freed on Medical Grounds" *The Australian*, 22 December 1994, p 1; H Trinca, S Emerson, "Lavarch Concludes Skase Out of Reach" *The Australian*, 23 December 1994, p 1; H Trinca, "Spanish Found Skase Too Feeble for Air or Sea" *The Australian*, 23 December 1994, p 2; H Trinca, "Resuscitated Skase Gains Second Wind" *The Australian*, 24-25 December 1995, p 15.

2 AAP, "Spanish Cabinet Approves Skase Extradition Moves" *The Australian Financial Review*, 25 March 1994, p 4.

3 Motion for Review, note 1 *supra* at [5].

4 IA Shearer, "Extradition and Human Rights" (1994) 68 *Australian Law Journal* 451, referring to the decision of the European Court of Human Rights in the *Soering* case (1989) 28 *International Legal Materials* 1063.

5 Treaty on Extradition Between Australia and Spain (1987); hereafter referred to as "the Extradition Treaty". The Treaty entered into force on 5 May 1988. It was incorporated into Australian law as a schedule to the *Extradition (Spain) Regulations* 1988 (Cth), pursuant to s 4 of the *Acts Interpretation Act* 1901 (Cth) and the *Extradition Act* 1988 (Cth).

II. THE LAWS APPLICABLE TO THE CASE

It is a general principle of international law that a state has no jurisdiction to try a national of another state for offences committed in the territory of the latter,[6] unless the offences also constitute crimes under international law. There is neither a general duty to extradite nor to prosecute fugitive offenders. A state's decision to extradite a fugitive is based on domestic law. However, the freedom of states to assent to or to refuse an application for extradition made by another state is limited in three circumstances: first, when the offence for which a person's extradition is sought has been committed against fundamental human rights arising from peremptory norms of international law (*jus cogens*); second, where there is a duty of reciprocity; and third, in the presence of legal obligations arising from a bilateral or multilateral extradition treaty.[7]

Extradition practice provides customary exceptions to a state's duty to extradite even in the presence of a treaty.[8] First, under the dual criminality principle there is no duty to extradite unless the offences for which a requested person has been accused or convicted by the requesting state also constitute a crime under the domestic laws of the requested state, regardless of the characterisation of these offences. Second, a principle of speciality requires that, once extradited, the person to be extradited may not be prosecuted or punished for offences other than those described in the request for extradition. Third, crimes of a political or military nature have been generally exemptions to the duty to extradite. Lastly, many states refuse to extradite their own nationals.

Skase could not be tried in Australia because he had taken residence in Mallorca in 1990. The island of Mallorca is the largest in the Ballearic archipelagic group. It lies in the Mediterranean sea and is under Spanish territorial jurisdiction.

The Extradition Treaty establishes a legal obligation for each contracting state:

> to extradite to the other...any persons who are wanted for prosecution or the imposition or enforcement of a sentence in the requesting state for an extraditable offence.[9]

The Treaty invests the Spanish State - its Executive and its Judiciary - with jurisdiction for the purpose of examining an application made by the Australian Government for the extradition of an Australian national. The application for

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6 IA Shearer, *Extradition in International Law* (1971); IA Shearer (ed), *Starke's International Law* (1994) pp 210, 313-22; DA Bifani, "The Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence" (1993) 41 *Buffalo Law Review* 627; R Rayfuse, "International Abduction and the United States Supreme Court: The Law of the Jungle Reigns" (1993) 42 *ICLQ* 882.

7 T Stein, "Extradition" and "Extradition Treaties" in *Encyclopedia of Public International Law* 8 (1985) 222 at 229.

8 IA Shearer, note 4 *supra* at 451.

9 The Extradition Treaty, note 5 *supra*. In the absence of the Extradition Treaty, it is doubtful that Australia could have benefited from the Bilateral Treaty on Mutual Assistance in Criminal Matters Between Spain and Australia (1989), which entered into force on 31 May 1991 (*Boletin Oficial del Estado* 11 (12 January 1991) 1103) because Art 1,3(a) excludes such mutual assistance with respect to the arrest or detention of a person for the purpose of extradition.

Skase's extradition was therefore regulated under the terms of the Extradition Treaty.

Extraditable offences are defined in Art II,1 as:

> offences however described which are punishable under the laws of both Contracting States (both at the time of the commission of the offence as well as at the time of the extradition request) by imprisonment, detention order or other deprivation of liberty for a maximum period of at least one year or by a more severe penalty...[10]

This dual criminality requirement is expressed in very broad terms in the Extradition Treaty, so that:

> it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same or similar terminology.
>
> ...in determining whether an offence is an offence against the law of both Contracting States, the totality of the acts or omissions alleged against the person whose extradition is requested shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting State.[11]

The Extradition Treaty also establishes, inter alia, the following exception to extradition:

> [W]here the requested State, while taking into account the nature of the offence and the interests of the requesting State, considers that, in the exceptional circumstances of the case, the extradition would be incompatible with humanitarian considerations.[12]

Under the terms of the Treaty, the application for extradition was regulated by the provisions of the Treaty itself, while the charges were regulated by both Australian and Spanish law, and the legal proceedings were regulated under Spanish law.[13]

A. The Charges Against Skase Under Australian Law

The Australian Government's application for the extradition of Skase was made on the basis of two sets of charges. The first set included thirty charges of dishonest conduct, through the provision of false information to independent directors, breach of fiduciary duties owed as a company officer, and improper use of position under Arts 129, 229(1)(b) and 229(4) of the *Companies (Queensland) Code* 1982.[14] The second set included seven charges for failure to disclose relevant information under s 267 of the *Bankruptcy Act* 1966 (Cth).[15]

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10 Extradition Treaty, *ibid*, Art II,1.

11 *Ibid*, Art II,2 and 3.

12 *Ibid*, Art III,2(f).

13 Constitution 1978 (Spain), Art 961, ("the Spanish Constitution") provides that valid treaties form part of Spanish domestic law upon their official publication in the Government Gazette (*Boletin Oficial del Estado*).

14 Statement of the Acts or Omissions, 2 February 1994, prepared by Graeme Delaney, Principal Advisor, Corporate Prosecutions, Commonwealth Director of Public Prosecutions. The *Companies (Queensland) Code* is hereafter referred to as the "*Companies Code*".

15 Statement of the Acts or Omissions, *ibid*, p 43.

The first set of charges was made in a warrant of arrest of the Brisbane District Court.[16] It alleged first, that between November 1987 and July 1989, Skase had infringed twice the provisions of Subsection 129 of the *Companies Code*[17] because as administrator of Qintex Australia Ltd (QAL) he had knowingly provided financial assistance of QAL relative to the acquisition by Kahmea Investments Pty Ltd (KI), under Skase's exclusive control, of stocks in the form of unsecured convertible bonds, and of shares of Qintex Ltd, the company controlling QAL.

Secondly, the warrant of arrest of the Brisbane District Court alleged that as administrator of QAL, Skase had supplied and authorised the delivery of false information to the directors of QAL concerning the payment of $79 million and the financial relation between the Qintex Group Management Services Pty Ltd (QG) and QAL. Skase was accused of having misused his position as administrator to secure benefit for KI. Also, as administrator of IPH Finance Pty Ltd (IPH), Skase authorised payments from IPH to QG from July 1987 to October 1989 to secure a benefit for KI for an amount of Australian $10 298 989.

Twenty nine charges out of thirty brought under the first set of charges were classified as infringements of s 229(4) of the *Companies Code*.[18] One charge was considered an infringement of s 229(1)(b) of the *Code*.[19]

The second set of charges was made in seven warrants of arrest issued by a Justice of the Peace in Brisbane.[20] These charges were based on the alleged failure by Skase to disclose that between July 1989 and June 1991, when he became bankrupt, he had transferred the sum of Australian $2 248 740.92 as personal payments in contravention of s 267 of the *Bankruptcy Act*. Skase failed to disclose these payments to the Registrar in Bankruptcy when he submitted his Statement of Affairs. Under the *Bankruptcy Act* he was required to disclose these payments when addressing the question:

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16 Warrant of the Brisbane District Court (25 January 1994, Justice Pratt) for the arrest of Christopher Charles Skase on the basis of count 1 under Indictment No 1(1483 of 1992) and counts 2-30 under Indictment No 2 (1484 of 1992).

17 Sub-sections 129(1) to (5) of the *Companies Code* establish a penalty of $10 000 or imprisonment for two years, or both, for infringement by company officers of the prohibition against a company providing any financial assistance, whether directly or indirectly, for the purpose of or in connection with the acquisition, or proposed acquisition, by any person, of shares or units of shares in the company or in a holding company of the company, whether the prohibited financial assistance is given before the proposed acquisition or while it takes place. Under s 772(1) of the same *Companies Code*, Skase was charged with being "knowingly concerned" in the contravention of s 129 referred to above.

18 Section 229 of the *Companies Code* deals generally with the duty and liability of company officers. Section 229(4) establishes a penalty of $20 000 or imprisonment for 5 years or more, or both, for improper use of position by an officer or an employee of a corporation to gain, directly or indirectly, an advantage for himself or herself or for any other person or for improper use of position detrimental to the corporation.

19 Section 229(1)(b) of the *Companies Code* requires an officer of a corporation to act at all times honestly in the exercise of his or her powers and the discharge of his or her office. In particular, a penalty of $20 000 or imprisonment for 5 years, or both, is imposed "where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose".

20 Warrants of a Justice of the Peace (24 November 1993, Justice Murray) for the arrest of Christopher Charles Skase for contravening s 267 of the *Bankruptcy Act* 1966 (Cth).

> Have you sold, given away or otherwise disposed of any real estate, property or goods worth more than $1 000 in the last 6 years?[21]

Both sets of charges as outlined above amounted to extraditable offences under Art II,1 and 4 of the Extradition Treaty,[22] for approximately $14 million under misappropriation and bankruptcy charges and $79 million as attempted fraud. The charges against Skase carried a punishment in excess of at least one year of deprivation of liberty.

During and after the extradition proceedings, there was certain confusion in the Australian media with respect to the amounts for which Skase was charged. It is critical to emphasise that Skase never gained control over the $79 million cited in the charges above because the directors of QAL refused to approve payment of such an amount. Indeed, the ruling of the Spanish Audiencia Nacional refers to misappropriation of about $14 million and *attempted* fraud with respect to $79 million. Therefore, while in Australia the media referred to Skase's corporate debts amounting to $1.5 billion and personal debts of more than $170 million,[23] these amounts were not at issue before the Spanish Audiencia Nacional.

It is possible that if Skase could be brought back to, and tried, in Australia, the Government could charge him for acts and omissions in addition to those included in the application for extradition. However, such an expansion of extradition charges under Australian law would be in breach of the speciality rule under international law. This rule is recognized in Art XII of the Extradition Treaty in the following terms:

> A person who has been extradited shall not be proceeded against, sentenced or detained nor be subject to any other restriction of personal liberty for any acts or omissions committed prior to that person's surrender other than those for which the person was extradited...[24]

B. The Extradition Process Under the 1987 Extradition Treaty Between Australia and Spain

When the application for Skase's extradition was received by the Australian Embassy in Madrid, it was transmitted to the Spanish Ministry of Justice.[25] This is

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21 Note 14 *supra*.

22 Extradition Treaty, note 9 *supra* Art II,1; II,4.

23 Editorial, "Skase Case Should Stay Open" *The Australian*, 19 December 1994, p 8.

24 Extradition Treaty, note 5 *supra* Art XII(a), (b) provides that the speciality rule applies unless: the requested person consents to the new charges; or, returns to the territory of the requesting state after leaving it; or, having the opportunity to leave the territory of the requesting state, she or he does not do so within 45 days of her or his final discharge.

25 Note Verbale No 26 (3 March 1994), whereby the Australian Embassy in Madrid transmitted a request for extradition to the Spanish Ministry for Foreign Affairs. The Extradition Treaty, note 5 *supra* Art V requires that all documents submitted in support of a request for extradition shall be duly authenticated, that is the documents purport to be signed or certified by a judge, magistrate, or an officer in or of the requesting state, or that the documents carry a public seal of the requesting state(Art VI, 2(a) and (b)). Since Skase had been accused but not convicted of offences committed in Australia Art V, 2(a) required the Australian Government to provide the Spanish Government with a warrant, or a copy thereof, for the arrest of Skase, a statement of each offence for which extradition was requested and a statement of the acts or omissions which were alleged against Skase in relation to each offence. These requirements were met with through the comprehensive investigation carried out by staff of the International Relations Branch and Office of the

the organ entrusted with making a recommendation to the Spanish Council of Ministers for the approval of the extradition proceedings in accordance with the terms of the Treaty as well as Spanish Law.[26] Following the approval of the Australian application by the Spanish Council of Ministers, the judicial process started.

C. The Extradition Proceedings Under Spanish Law

Extradition proceedings under Spanish law are regulated by the *Passive Extradition Act* 1985 (Spain). The Act incorporates principles of Spanish Constitutional law, such as Art 13.3 of the Spanish Constitution relating to safeguards and guarantees with respect to the fundamental right to freedom, entrusted to and under the control of the judicial authorities. The Act also accommodates domestic law to international obligations arising under the European Extradition Treaty of 13 December 1957.[27]

Fundamentally, the judicial process for extradition under Spanish procedural law comprises three or possibly four steps. The requested person first appears at a committal hearing before an examining judge ("Juez de Instruccion"). Both the legal representation of the requested person and the Government's public prosecutor must be present at this hearing. The person accused is asked whether she or he accepts or opposes the extradition. If the requested person opposes the extradition, the matter is then referred to a panel of three judges of the Criminal Section of the Audiencia Nacional.[28] The evidence is examined and the merits of the case are heard during this part of the proceedings. Finally, the decision, whether assenting to or refusing the extradition, can be appealed before the Full Court of the Audiencia Nacional. This decision is final.[29] There is no further appeal against it under Spanish ordinary tribunals. However, in extraordinary

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Chairman of the Australian Securities Commission in Sydney, the Principal Advisor, Corporate Prosecutions, of the Commonwealth Director of Public Prosecutions, with the cooperation of the Queensland Director of Public Prosecutions, Australian Embassy Staff in Madrid, and other Government senior counsel. The Statement of Acts and Omissions was translated into Spanish by Ms Susana Hovel (NAATI Translator). This writer provided legal and editorial advice concerning the dual criminality requirement and concerning the correct use of Spanish legal terminology in the translated version.

26 *Passive Extradition Act* 1985 (Spain), (Act 4/85 of 21 March, gazetted in *Boletin Oficial del Estado* 73 (26 March 1985); 90 (15 April 1985)). It abrogates in part the *Act Relating to Conditions, Procedures and Effects of Extradition* 1958 (Spain) (*Boletin Oficial del Estado* 311 (29 December 1958)). Under Spanish extradition law the act or omission which motivates the extradition must be objectively punishable according to the legislation of the requesting state, and punishable in principle in accordance with the law of the requested state.

27 Spain ratified the European Extradition Treaty on 21 April 1982 (*Boletin Oficial del Estado* 136(8 June)). It also became party to the First and Second Additional Protocols (15 October 1975 and 17 March 1978 respectively) to the European Extradition Treaty (*Boletin Oficial del Estado* 139 (11 June 1985)).

28 *Passive Extradition Act* 1985 (Spain), Arts 9-12. Under the *Judicial Powers Organic Law* 1978 (Spain), Art 65.4, the Audiencia Nacional is generally entrusted with competence and jurisdiction with respect to judicial proceedings in extradition matters, regardless of the place of residence or the place where the accused person was arrested. The competence and jurisdiction of the Spanish Audiencia Nacional are equivalent to Australia's Federal Court under the *Extradition Act* 1988 (Cth) and formerly under the *Extradition (Foreign States) Act* 1966 (Cth) and the *Extradition (Commonwealth Countries) Act* 1966 (Cth).

29 *Passive Extradition Act* 1985 (Spain), Arts 12-18.

circumstances, a *recurso de amparo* may be lodged before the Constitutional Court.[30]

Skase's extradition hearings followed exactly the process outlined above, except for the last step. Skase appeared before a single examining judge. During the course of this hearing Skase was asked whether he assented to or opposed the extradition.[31] Skase opposed the extradition and the matter proceeded before a panel of three judges of the Audiencia Nacional.[32] Due to Skase's poor health, both appearances were held in Palma de Mallorca, where the Instructing judge and the Audiencia Nacional relocated.[33]

III. THE DECISIONS OF THE SPANISH AUDIENCIA NACIONAL

A. The Extradition Hearing

The three judges of the Audiencia Nacional handed down a decision on 8 September, assenting to Skase's extradition for trial under the first set of charges (Brisbane District Court warrant) but denying the extradition for trial under the second set of charges relating to bankruptcy (Brisbane Justice of the Peace warrant). The Audiencia Nacional ordered that Skase's transport to Australia should meet the following condition:

> subject to the transfer to Australia of the prisoner being by sea with the medical and health facilities indicated in the last Legal Principle...[34]

The Audiencia Nacional's last Legal Principle provided that:

> We do nonetheless consider it feasible for him [Skase] to be transported to Australia by sea in a vessel which, in addition to the medical staff and materials proposed by the specialist Dr Griggs, has a surgeon and facilities suitable for such emergency surgery as might be required.[35]

This decision gave a false sense of success to the Australian public generally, making the rationalisation of the final decision of the Full Court much harder to accept.

The Audiencia Nacional made the extradition order conditional on the Australian Government's undertaking to guarantee that travel to Australia would follow Dr Griggs' instructions. During the course of the hearing Dr Griggs' expert medical opinion and allegations by Skase's counsels relating to Skase's poor health made significant impact on the minds of the judges of the Audiencia Nacional.

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30 Spanish Constitution, note 13 *supra* Arts 159-165. The *recurso de amparo* or protection plea entitles any physical or juridical persons invoking breach of their legitimate interest by state organs to seek protection from the Constitutional Tribunal (Art 162(b)). This is a special remedy recognized in the Constitution of the Spanish Republic 1931 (Spain) and, after 40 years of dictatorship, now recognized in the 1978 Constitution. See AEP Luno, *Los Derechos Fundamentales*, Tecnos (1986).

31 Had Skase assented to the extradition, the Court would have transmitted its decision to the Council of Ministers and Skase could have been ready to return to Australia in another two weeks.

32 Number Four Central Court Case No 1/1994. Section Three of the Criminal Division.

33 Extradition Procedure, note 1 *supra*. De Facto, no 2. The ordinary venue is Madrid.

34 *Ibid*, p 9.

35 *Ibid.*

In reaching the above decision, the trial court - and later the Full Court on appeal - relied extensively on the expert medical evidence provided on behalf of the Australian Government by specialist Dr William Griggs in several reports and during the hearings. In his report of February 10, he advised the Audiencia Nacional that, were Skase to be transported by air, he would require two doctors and two specialised nurses with significant experience in intensive care in air transportation of critical patients. With respect to the medical equipment Dr Griggs advised the aircraft should have a complete international standard resuscitation unit with electronic physiological monitors, artificial breathing apparatus, a cardiac defibrillator, electronic pumps, an oxygen-activated nebulizer, intravenous fluids, a wide variety of emergency drugs, equipment for insertion of thoracic drains, and sufficient oxygen to administer 900 litres per hour to the patient.[36]

Dr Griggs provided evidence as an expert in medical transport with the intensive care unit at the Royal Adelaide Hospital, in South Australia. His medical evidence was based on the examination of Skase's medical records and also upon observation of Skase during the half hour they both had spent in the same room during the trial hearings.[37] In his opinion, there was no doubt that Skase was suffering from emphysema.

B. The Decision on Appeal

Within the prescribed three days leave to lodge a motion for review, the Australian Government representative filed an appeal against the decision. It is not clear why the Australian Government sought to appeal against the decision with respect to sea transport which, prima facie, seemed extremely favourable to Australia's application.[38]

It is possible that travel costs may have been an issue. It is estimated that the extradition proceedings already cost the Australian Government $500 000.[39] In addition to financial considerations, the Australian Government may have been concerned about the length of maritime transportation - whether the route chosen was through the Suez or the Panama Canals. Inevitably, the vessel would be required to make stops which could provide Skase with opportunities to escape from custody. Finally, port stops would have required obtaining permission for transit through the territory and maritime waters of third states.[40]

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36 *Ibid.*

37 D Thorp, L Scott, "Lung Condition No Barrier to Flying" *The Australian*, 19 December 1994, p 2. Dr Griggs said it was common in his experience to repatriate patients without having a chance to previously examine them. Skase had refused to submit to examinations and tests by Dr Griggs.

38 Note 32 *supra*. Counsel for the applicant also challenged the decision of the three-judge panel of the Audiencia Nacional with respect to the refusal to assent to Skase's extradition to be tried under bankruptcy charges in Australia (second set of charges).

39 Note 37 *supra*.

40 Note 7 *supra*. Transit of a requested person through third states may require prior permission from the authorities of the territory of the third state.

Although not reported by the Australian media[41] it is important that Skase surrendered voluntarily to the Spanish police and judicial authorities when he was first informed about the arrest warrants issued against him by Australian authorities in November 1993. It is true that the Full Court of the Audiencia Nacional considering the motion for review found that Skase's voluntary surrender was irrelevant for the purpose of the extradition proceedings. Nevertheless, this statement needs clarification. While the voluntary surrender of the accused is not an extenuating circumstance under the *Spanish Criminal Code*,[42] Skase's good character and willingness to co-operate with the law would have affected his credibility and his representative's plea that Skase was very sick.[43] Having shown good character and willingness to cooperate with the law once, the Court would have no reason to suspect that Skase would try to escape during the return sea voyage to Australia. However, it is possible that the Australian Government may not have wished to take any risks. It would therefore be inappropriate to criticise the procedural strategy of the Australian Government without knowing the full range of details which may have motivated it.

Whatever was the underlying reasoning for appealing against the condition that Skase travel by sea, the Australian Government's counsel asked the Full Court of the Audiencia Nacional to release the Australian Government from a formal undertaking concerning the modality of Skase's transportation to Australia. Instead, the Court was asked to simply indicate that Australia had a choice between sea transport with all due facilities or, alternatively, air transport at sea level in a specially equipped air ambulance or hospital aircraft.

In the course of formulating the details of the transportation plan, the Australian Government received inaccurate advice on the exact altitude at which a Boeing 737 type aircraft may fly to avoid changes in cabin air pressure without placing the aircraft's structure and Skase's health at risk.[44] This advice was submitted as evidence to the Audiencia Nacional with respect to the safety of air travel. It consisted of a proposal for Skase's air transportation to Australia in a chartered aircraft of the Boeing 737 type, flying at an altitude of 25 000 feet with cabin pressure at sea level, which would make nine stop-overs between Palma de Mallorca and Brisbane. The trip would last 36 hours of which 28 would be spent in the air.

The accuracy of the Australian Government's proposal was contested by evidence submitted by Skase's counsel in the form of reports by the Spanish Directorate-General of Aviation and Mediterranean Air Ambulance (in a report dated 11 November 1994).[45] This evidence confirmed that, according to the manufacturer's instructions, the structure of an aircraft flying below 18 000 feet would be at risk, there would be greater risk of storms, greater fuel consumption,

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41 Note 2 *supra*. The Editorial stated that, "He was arrested and taken to the hospital, on a warrant issued by the District Court in Brisbane, on January 31".

42 *Criminal Code* 1971 (Spain) Act 44/1971 of 15 November, Art 9, (the "*Spanish Criminal Code*").

43 Extradition Procedure, note 1 *supra* De Jure, [5,B].

44 *Ibid*, De Facto [5]. This advice was referred to by the Australian Embassy in *Note Verbale* No 99 (18 October 1994).

45 *Ibid.*

more frequent landings for refuelling would be required, as well as abrupt pressure drops during takeoff and the risk of an engine breakdown.

The Australian Government's legal representation submitted new evidence aimed at providing guarantees that Skase's air transportation was possible as well as safe. Notwithstanding these assurances, some uncertainty may have been created in the minds of the Judges of the Audiencia Nacional. A reasonable degree of uncertainty would have allowed the Full Court to refuse to extradite on the basis of an extensive interpretation of Art 4.6 of the *Passive Extradition Act*.[46] This article mandates the Court not to assent to the extradition when, inter alia, the requesting state is not providing guarantees that the person whose extradition is being requested will not be subject to penalties which threaten his or her physical integrity (*integridad corporal*). The conditions surrounding air travel must therefore be regarded as an important element leading to the Court's refusal to extradite Skase. The overriding element, however, was the expert medical evidence provided to the Court in the course of the proceedings, which is dealt with in a separate section of this case note.

In response to the appeal by the Australian Government, Skase's legal counsel argued that the requirement of a formal undertaking by the Australian Government with respect to the condition of Skase's transportation to Australia was a consequence of rights and duties borne by the Spanish State. In particular, the Spanish State was under a legal duty to protect the life and physical integrity of an Australian citizen. This duty, it was argued, arose from the 1978 Spanish Constitution, from obligations undertaken by Spain as a party to international human rights treaties, and under Art III,2(f) of the Extradition Treaty between Australia and Spain. However, given his medical condition, both air and sea travel should be rejected because the risk of complication they posed to Skase's lung disease was too great to be acceptable. These arguments are examined elsewhere in this case note.

With respect to the charges, Skase's counsel never denied that these were offences under Australian law. The thrust of Skase's appeal was that the requirement of dual criminality was not met because there was a lack of correspondence or identity with respect to the offences alleged between Australian law and Spanish law.

The Full Court of the Audiencia Nacional agreed partially with this argument but dismissed it. First, it held that the lack of correspondence between Arts 129 and 229 of the *Companies Code* and those of Arts 535, 528 and 529.7 and 8 of the *Spanish Criminal Code* was of no significance in the present case.[47] The Nacional found that:

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46 *Passive Extradition Act* 1985 (Spain), Art 4.

47 *Spanish Criminal Code*, note 42 *supra*, Art 535.1, Title XIII, Chapter IV, s 4, relating to misappropriation provides that the penalties set out in Art 528 shall apply to those who, to the detriment of another, take possession of, or misappropriate money, commercial paper or any other movable asset which they have received in deposit, commission or administration, or through any other title involving the obligation to hand them over or to return them, or who deny having received them. The penalty shall be imposed in its maximum degree in the event of necessary deposit. Art 528, (in s 4 of the same Title and Chapter) deals with fraud and deceit and establishes a penalty of major arrest for fraud offences involving a sum greater than 30 000 ptas (approx. $300 Australian), imposed in its maximum degree if one aggravating circumstance

> The incorporation of the acts imputed to the accused in the judicial warrants of the petitioning State under headings of offences which do not exist in the legislation of the State petitioned does not exclude the principle of dual criminality, nor is it a cause of exclusion of the extradition, if those acts are penalised as offences with some other classification in the legislation of the State petitioned.[48]

After justifying this interpretation under the broad terms of Art II,3 the Extradition Treaty referring to "the totality of the acts or omission alleged", the Audiencia Nacional continued:

> Therefore, the fact that the judicial authorities of Queensland classified the charges in the 1992 Warrants as infringements of Articles 129 and 229 of the *Companies Code (Queensland)*, rather than typifying them as offences of misappropriation pursuant to Articles 408 and 408 (c) 2, (a) and (d) of the *1899 Queensland Criminal Code*, and as attempted fraud pursuant to Article 437 of that same text (charge one of Warrant no 1484/92) does not prevent the Spanish State from considering that these accusations may, in our law, constitute offences of misappropriation and attempted fraud.[49]

The Audiencia Nacional found that the charges made under the warrant (1484/1992) of the Brisbane District Court involved offences of misappropriation, to which were added the aggravating circumstances of a large sum of money and the highly qualified character of the offender. Thus, Skase was properly charged under charges 2-30 for an amount of $10 298 989, which constituted a crime of misappropriation as company director, involving withdrawal of funds belonging to IPH for his own benefit and that of Kahmea. Similarly, with respect to warrant 1483/1992, Skase's withdrawal of $2 256 000 as administrator of QAL and $600 000 belonging to QAL in order to finance purchases by Kahmea of shares in QL were punishable under Arts 535 and 529.7 of the *Spanish Criminal Code*.[50]

With respect to the charges under the *Bankruptcy Act* made in the seven warrants of arrest issued by the Brisbane Justice of the Peace, the Nacional Court gave a broad interpretation to Art II,2 and 3 of the Extradition Treaty. As indicated above, this article requires the existence of dual criminality and does not limit this requirement to an exact equivalence of categories, denominations or terminology between offences under Australian and Spanish law. The terms of the article, however, refer to the substantive law of the Contracting States, since they allude to the "elements of the offence". There is no provision in the Treaty dealing

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concurs. If two or more aggravating circumstances concur, the penalty imposed will be minor imprisonment. Art 78 provides a table relating to the duration of penalties. Major arrest in its maximum degree lasts from 4 months and 1 day to 6 months. Minor imprisonment may last from 6 months and 1 day to 6 years.

48 Extradition Treaty, note 1 *supra*m De Jure, [3,A].

49 *Ibid.* For presenting false invoices to charge $79 000 000 Art 304, 528, 529.7 and 529.8, reduced for being attempted fraud according to Arts 3.2 and 51 of the *Spanish Criminal Code,* note 47 *supra.* Art 304 punishes the intentional use of false documents for gain with a minor prison sentence and a penalty ranging from ptas 100 000 to 1 million (approx $1 000 to 10 000 Australian). Art 529.7 and 529.8 list circumstances which aggravate the offences of fraud and deceit. These are: the seriousness of the offence by reference to the amount defrauded; and the number of parties affected by the offence. Art 3.2 describes frustrated offences as those where the accused carries out all the acts which should produce the result of the offence, but such result is not produced due to causes which are independent of the will of the agent. Such offences are also punishable.

50 *Spanish Criminal Code,* note 42 *supra* Art 3.

specifically with the lack of equivalence between the *procedural* laws of the Contracting States.[51]

In examining the fraudulent bankruptcy charges against Skase it became evident to the Full Court that, prima facie, he could not be committed for extradition on these charges in Spain because there was an outstanding lack of equivalence between Australian and Spanish bankruptcy procedures. Under Spanish commercial and criminal law[52] the crime of fraudulent bankruptcy requires, in the words of the Audiencia Nacional:

(a) that the person concerned be a businessman;
(b) a declaration of fraudulent bankruptcy in the pertinent classification formalities in civil proceedings;
(c) actions on the part of the bankrupt, prior to the proceedings for attachment of assets in the civil proceedings, aimed at provoking the situation of insolvency; and
(d) the intention to defraud the body of creditors.[53]

With respect to elements (c) and (d) above the Audiencia Nacional found that Skase's actions and omissions as described in the seven arrest warrants (second set of charges) were not sufficient under Spanish law to prove objectively Skase's intention to defraud his creditors. First, Skase's omission to disclose relevant information before the Registrar in Bankruptcy did not fall under any of the acts described in Arts 890 and 891 of the *Spanish Commercial Code*.[54] Secondly, the seven money transfers (second set of charges) which Skase failed to disclose were neither simulated nor "without cause, and intended to trigger his insolvency". In conclusion, the Audiencia Nacional, following judicial precedent,[55] ruled that a legal presumption does not amount to conclusive evidence. In the Full Court's words:

> [T]he strict terms of the November 23 1993 Orders [issued by the Brisbane Justice of the Peace] do not necessarily imply that the accused acted to drain his assets to the detriment of his creditors.[56]

Despite the findings with respect to elements (c) and (d) above and the gulf in the two legal systems, the Full Court found with respect to element (b) above that:

> [I]t is not in order to exclude dual criminality in this case just because there was no declaration of bankruptcy in the Australian civil proceedings, and that the bankruptcy was fraudulent; according to the judicial authority with jurisdiction such a requirement is a condition of adjudication proper to Spanish law and it cannot be demanded that this be present in the Australian procedural provisions.[57]

The conclusion of the Audiencia Nacional is clear: the element of dual criminality required under the Extradition Treaty was present with respect to the first set of charges. Under Spanish law Skase's acts and omissions would have amounted to offences of misappropriation of funds and attempted fraud. The

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51 Extradition Treaty, note 5 *supra*, Art II, 2; Art II,3.

52 Arts 890 to 892 of the *Commercial Code* 1885 (Spain) [Codigo de Comercio 1885 (R.D. 22 August 1885)], Arts 890-892 (the "*Spanish Commercial Code*"). *Spanish Criminal Code*, note 42 *supra* Art 520.

53 Extradition Procedure, note 1 *supra*, De Jure, [4].

54 *Spanish Commercial Code*, note 52 *supra*, Arts 890-891, dealing with fraudulent bankruptcy.

55 Rulings of 4 July 1980, 31 October 1985 and 24 February 1994. (Tribunal Supremo (Supreme Court)).

56 Note 53 *supra*.

57 *Ibid.*

Court went further to rule that dual criminality with respect to the second set of charges should not be dismissed just because bankruptcy procedures are very different under Australian and Spanish law. The Full Court made a very broad interpretation of the Treaty's dual criminality provisions. This allowed the Full Court to find that Skase could be properly charged under the *Bankruptcy Act*, while it also acknowledged the procedural differences which had prevented the lower Court from finding Skase properly charged under the Act.

The Full Court of the Spanish Audiencia Nacional ruled that, although the criminal charges against Skase also constituted crimes in Spain, he was too sick to be extradited by air or by sea.

IV. RATIONALISING THE DECISION ON APPEAL OF THE SPANISH AUDIENCIA NACIONAL

The most controversial aspect of the Skase decision is that the refusal of the Audiencia Nacional to extradite was, prima facie, entirely dictated by findings of fact.

A. The Medical Evidence

Skase suffered, at the time of his detention, bullous emphysema, sinusitis and rhinitis, with recurrent lung infections.[58] In the course of the extradition hearing and appeal proceedings eighteen medical doctors testified for and against the safety of Skase's travel to Australia by air/sea.

Australia, the requesting state, submitted evidence from six doctors. These reports defended the feasibility of Skase's transport by air and the doctors confirmed their views during the trial hearing.[59] Counsel for Skase submitted evidence from nine doctors and three expert witnesses arguing against the safety of air/sea travel in Skase's medical condition. These included reports by doctors who had been treating him during 1993 and 1994.[60]

Following ordinary judicial procedures under Spanish law, the Instructing Judge in Palma de Mallorca also appointed three forensic doctors to examine Skase. In

58 Extradition Procedure, note 1 *supra*, De Jure, [5,C].

59 Dr Griggs (reports issued on 4 and 21 January, 11 February, 18 July, 1 December 1994); Dr William A Oliver (reports issued on 23 March and 27 July 1992; 10 March, 28 April and December 1993; 18 July and 1 December 1994); Dr Manuel Serrano Rios (report issued on 18 July 1994); Dr Joaquin Vallejo Galbeta (report issued on 10 November 1994); Dr Mariano Rosello Gabanes and Dr Matias Vaquer Albons (joint report on 15 July 1994, following an examination of the patient and a CAT scan at a clinic in Palma de Mallorca).

60 Dr Johnson in a Clinic in Palma de Mallorca; Dr Medicci in Zurich; Dr Villiger in Davon Plaz; and Dr Renom in the Judicial Department of the General Hospital in Mallorca, where Skase was held in detention. In addition, medical reports were issued by Dr Maurice Heiner, Dr Nicola D'Aloya, Dr Carlos Munoz Busquets, Dr Lucas Riquelme Pena (as Head of the Labour Medical Service at IBERIA), and Dr Bartolome Pol (as Head of Aena Medical Service). Three expert reports were provided by Jose Ma Martinez Albaca (of Ambulancias Insulares de Palma), a report from SWISSAIR, and another from a medical consultant at the English Fleet.

their final report of 19 April 1994, the three independent medical experts warned the court of the hazards of flying Skase to Australia given his medical condition.[61]

In the course of the appeal, the Full Court examined in detail the medical evidence relating to Skase's transportation by sea with a view to ascertaining whether it would entail a risk of deterioration for Skase's health. The Full Court reached the conclusion that a sea trip that might last at the least 36 days with the possibility of extending to two months, constituted a real hazard for Skase's health. In the Full Court's view:

> [S]ubmitting a person with such a clinical history to a sea trip lasting more than a month and perhaps nearly as much as two, is not a humanitarian measure, which also permits the extradition to be refused, by application of Article III,2(f) of the Extradition Treaty between Australia and Spain of April 22 1987.
>
> With the Court having held that it is not in order to transfer Christopher Charles SKASE to Australia either by air or by sea, thereby protecting his life and health and for humanitarian reasons...[62]

The preceding judgment constitutes an important precedent in the application of human rights to the extradition process. Its effects are likely to spread beyond the bilateral treaty obligations between Australia and Spain.

B. Fundamental Human Rights and their Relevance to the Case

The task of the Spanish judicial authority in Skase's extradition hearing was to hand down a judgment based on the law applicable to the case before the court according to its particular circumstances. Spanish domestic law recognises the fundamental maxim *in dubio pro reo* whereby, in case of doubt, the court must presume the innocence of the accused.[63]

As noted earlier, the Australian Government provided inaccurate information relating to the safety of Skase's air travel. As a result of this, the trial and the appeal courts were not presented with conclusive evidence that air travel was safe in Skase's circumstances. The trial court ruled in favour of sea travel as the safest means of responding to any "emergency surgery as might be required". The Full Court reexamined the issue and, in rationalising its decision the following pronouncement appears to be critical:

> [T]he full Court, may and must examine the implications for the health of Skase of his transfer to the petitioning State, Australia, given the serious progressive disease he suffers and the extremely long route to be covered to that country: it is a *fundamental function of the Spanish Courts*, according to Article 7 of the *Organic Judiciary Act* to ensure the *basic rights* of persons involved in legal proceedings against them. Pre-eminent among such rights is the *right to life and physical integrity and health* (Article 15 of the Spanish Constitution).[64]

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61 Extradition Procedure, note 1 *supra*, De Jure, [5]. These doctors were appointed by No 1 of the Preliminary Investigating Court of Palma de Mallorca following an order from the Number 4 Central Court. The forensic doctors were Dr Vidal Santos Yusta, Dr Antonio Siquier Mascaro and Dr Julio Lopez Bermejo.

62 Extradition Procedure, note 1 *supra*, De Jure, [5].

63 Spanish Constitution, note 13 *supra*, Art 24.2.

64 Extradition Procedure, note 1 *supra*, De Jure, [5]. The Spanish Constitution, *ibid* Art 15 establishes: "Everyone has the right to life and to physical and moral integrity..."

The critical aspect of this pronouncement lies in the reference to the "fundamental function of the Spanish Courts" with respect to basic human rights. This particular function arises under the *Organic Judiciary Act*, which derives its power directly from the Spanish Constitution.[65] The Constitutional function reserved for the Spanish Judiciary is that of ensuring that fundamental rights and freedoms of citizens as well as those of foreigners within Spanish territory are not undermined by any actions or omissions on the part of the Executive branch of the Spanish Government. In England, law courts are vested with the power to perform a similar function. Lord Bridge has formulated the same concerns about judicial protection of individual human rights in the following passage:

> The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[66]

In referring to the fundamental function of the Spanish Judiciary in extradition proceedings, the Full Bench of the Audiencia Nacional was also distinguishing its own approach to fundamental human rights under the Spanish Constitution from the approach to these rights under recent US jurisprudence.[67] The decision of the Spanish Audiencia Nacional in the extradition proceedings against Skase follows the approach of the European Court of Human Rights in the *Soering* case[68] and the US Second Circuit Court in *Gallina v Frazer*.[69]

Jens Soering was a German national charged with murder in the US under extradition proceedings in the UK. The issue considered by the European Court was whether a UK order for Soering's extradition to Virginia would constitute a breach of Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the basis that Soering, facing a death penalty, would be subjected to 'death row', a cruel and degrading treatment under the said

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65 Spanish Constitution, note 13 *supra* Arts 53.1 and 81.1 exclude the Executive branch of government from regulating fundamental human rights by administrative decree. These rights may only be legislated by Parliament through organic laws approved by a majority of votes.

66 *Bugdaycay v Secretary of State* [1987] 1 All ER 952.

67 MC Bassiouni, "Extradition: The United States Model" (1991) 62 *International Review of Penal Law* 469; see also comments in IA Shearer, note 6 *supra*; DA Bifani, note 6 *supra*; R Rayfuse, note 6 *supra*. C Van Den Wyngaert has also referred to the contrast between the European and US extradition jurisprudence in "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?" (1990) 39 *ICLQ* 757.

68 European Court of Human Rights: *Judgment in Soering Case*. Breach of European Convention of Human Rights; Extradition of German National from United Kingdom to United States for Trial on Charge of Murder, a Capital Crime) July 7 1989: (1989) 28 *International Legal Materials* 1063.

69 278 F.2d 77 (2d. Cir) cert. denied, 364 U.S. 851 [1960]. Gallina, an American citizen, had been charged with armed robbery, tried in absentia and found guilty by an Italian court. The US Court denied the appeal against extradition, but said that "we can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle" at 78-9. Although the Gallina Case was a landmark, it has found little application whenever the US Courts have consider it. See: *Holmes v Laird* 459 F.2d 1211 (D.C.Cir 1972); *In re Sindona* 450 F. Supp. 672 [S.D.N.Y. 1978]; *Escobedo v United States* 623 F.2d 1098 [5th Cir.1980] discussed in L Anderson "Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception" (1983) *Michigan Year Book of International Legislative Studies* 153.

article. The Court ruled that an extradition order would be in breach of Soering's rights under Art 3. The obvious effect of the *Soering* case has been described as "moving extradition law away from (international) criminal law toward public international law and constitutional law".[70]

In the *Gallina* case, a US Second Circuit Court challenged the prevailing notion that the Judiciary is barred from considering the circumstances that surround a person's extradition. In the US, this bar to the Judiciary is known as the non-inquiry rule. By virtue of this rule, the Executive branch (Secretary of State) retains the unilateral right to stay an extradition order on the basis that it may breach the individual human rights of the requested person. As a result of widespread application of the non-inquiry rule by the US Judiciary, "courts have interpreted the doctrines as protecting individual nations, not individual rights".[71]

In Europe, the non-inquiry rule is referred to as the principle of confidence, and it has been applied as a result of the division of powers between the Judiciary and the Executive. Its historical effect has been to prevent courts from refusing extradition on the grounds of potential breaches of fundamental human rights and freedoms. The *Soering* case before the European Court of Human Rights was a reaction to this practice. The Court followed and confirmed the jurisprudence of the European Commission of Human Rights over a thirty year period in over 169 judgments which react to prevent "imminent risks of infringements upon...human rights".[72]

In light of these jurisprudential currents, the decision of the Spanish Audiencia Nacional advances further the notion that fundamental human rights obligations may override other treaty obligations. The decision makes this point clear when it points out that a state's right to punish must be assessed in the light of the individual human rights of the requested person.

In this particular case, there ensued no breach of Australian-Spanish treaty obligations. The Audiencia Nacional left no doubt on this point by its reference to the "appraisal of humanitarian factors" permitted under Art III,2(f) of Extradition Treaty, transcribed above.

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70 S Breitenmoser, Wilms, "Human Rights v Extradition: *The Soering Case*" (1990) 11 *Michigan Journal of International Law* 845.

71 DA Bifani, note 6 *supra* at 649. *Neely v Henkel* (180 U.S.109 [1901]) established a general rule that the Judiciary lacks jurisdiction to entertain claims based upon humanitarian exceptions with respect to crimes committed beyond the territorial jurisdiction of the US. See L Anderson, note 69 *supra* at 655, for a discussion of *Neely v. Henkel*; see also J Semmelman, "The Doctrine of Speciality in the Federal Courts: Making Sense of *United States v Rauscher*" (1993) 34 *Virginia Journal of International Law* 71. Semmelman argues that, "Absent an exception contained in the treaty itself, a judicial bar to extradition on humanitarian grounds must be premised upon another treaty, a statute, or the Constitution." (at 123). Such a statute exists as 18 USC 3186 (1988), drafted in terms such that the US Secretary of State "may" order extradition. Semmelman concludes that both the history and the extradition legislation of the US indicate a clear intent not to vest the Judiciary with the authority to entertain humanitarian exception claims in extradition proceedings. In contrast, Semmelman points out that the legislation of Australia, Federal Republic of Germany, Great Britain, India, Israel, New Zealand, Sweden, and Switzerland allow courts to deny an extradition request upon evidence that the speciality rule may be breached by the requesting state and that breach may raise a humanitarian exception.

72 S Breitenmoser, note 70 *supra* at 872. The decisions of the European Court of Human Rights are not mandatory under municipal law, but are binding at international law for the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, note 73 *infra*, Art 53.

In addition to the 1950 European Convention of Human Rights and its Additional Protocols[73] which affect proceedings under the *Passive Extradition Law* 1985 (Spain), the sources of the principles referred to in Art 15 of the Spanish Constitution emerge from the 1948 Universal Declaration of Human Rights (Art 3) and the 1966 International Covenant on Civil and Political Rights (Art 6). They enshrine the fundamental principle that every human being has the inherent right to life and personal security and that the law must protect these rights.[74]

The Spanish Constitution has incorporated these principles and made their application mandatory throughout Spain as fundamental rights and civil liberties. Article 15 of the Spanish Constitution declares:

> Everyone has the right to life and to physical and moral integrity and under no circumstances may they be subjected to torture nor to punishments or inhuman or degrading treatment. The death penalty is abolished except as established under military law in time of war.[75]

As indicated earlier, Australia and Spain have incorporated fundamental human rights principles in the Treaty regulating their bilateral relationship in extradition matters. Article III of the Treaty provides mandatory exceptions to extradition when the offence for which extradition is requested is a political offence and when the extradition is requested in order to prosecute the person on a discriminatory basis. The Treaty also provides discretionary exceptions to extradition by either Australia or Spain if the charges against the requested person would carry the death penalty under the laws of the requesting country, and also under Art III,2(f) quoted above.

In invoking the principle of proportionality the Full Court of the Spanish Audiencia Nacional was considering the incompatibility between "humanitarian considerations" and assenting to an extradition which could put at risk not only the deteriorating health, but also the life of the requested person. The Court ruled:

> the basic individual right to life, physical integrity and health must prevail over State's right to penalise - such right including a State's authority to prosecute. Therefore, in this extradition, it is in order to sacrifice the right of the Australian Government to prosecute and punish the offences attributed to SKASE if, in implementing their right, his health may be damaged or his life endangered.[76]

Skase was not involved in offences of a violent criminal nature and the Full Court was reluctant to impose a punishment which, in the final analysis, was

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73 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 *United Nations Treaty Series* 221. Art 2 enshrines the right to life and Art 5.1(f) a person's right to liberty and security.

74 Universal Declaration of Human Rights, General Assembly Resolution 217A, UN Doc A/811; the International Covenant on Civil and Political Rights, entered into force in March 1976, (1976) 999 *United Nations Treaty Series* 171-5. Australia and Spain are parties.

75 Spanish Constitution, note 13 *supra*.

76 Extradition Procedure, note 1 *supra* [5]. The principle of proportionality between the ends pursued and the means employed in the course of extradition proceedings was discussed in *Berrehab v Netherlands* (138 *Eur Ct HR.(ser A)* [29] (1988)) with respect to Art 8 of the European Convention of Human Rights relating to the right to family life and parental rights of a Moroccan citizen residing in the Netherlands and married to a Dutch national. See S Breitenmoser, note 70 *supra* at 875.

regarded as inhumane and in breach of national and international law and, particularly, European Human Rights jurisprudence.[77]

It is impossible to predict whether the Australian Judiciary would have been as magnanimous in its interpretation of the humanitarian exception under the Extradition Treaty had Skase been a Spanish fugitive requested by Spanish authorities. However, in 1985, the Australian Government began a comprehensive review of Australia's existing extradition arrangements to bring them in line with modern extradition treaties. When introducing the Extradition Bill 1987 (Cth) into Parliament on 28 October 1987, Attorney-General Lionel Bowen explained that the Bill included important new principles designed to provide additional safeguards for the protection of people whose extradition from Australia was being sought. The Bill introduced statutory as well as discretionary bars to extradition, the two most important grounds for refusal being offences of a political nature, and the situation where the requesting state would be likely to apply the death penalty.[78] The third exception was based on the reasoning that:

> Where the age or health of a person is such as would make surrender totally incompatible with humanitarian considerations most, if not all, modern treaties give a discretion to refuse to surrender and/or to delay surrender. All of these treaty matters are matters which must be considered by the Attorney-General before he issues a warrant for surrender. The Bill recognises that there may be other circumstances where the Attorney-General may refuse surrender when it would be unjust, oppressive or too severe a punishment to extradite.[79]

The protection of a requested person against an "unjust, oppressive or too severe a punishment" order to extradite him or her is echoed in Art III of Extradition Treaty. The protection departs from a statist model of extradition (as the US extradition model) and recognises that individuals are the subjects protected by fundamental human rights principles under international law. The recognition of these individual rights may lead courts to restrict the free exercise of state powers.[80]

It is unlikely that the seven judges and the Presiding Judge of the Audiencia Nacional were aware of the transcript of the Australian House of Representatives Debate, designed to protect foreigners residing in Australia against oppressive regimes abroad. The irony of Skase's extradition proceedings is that both in spirit and *de jure* the Spanish Audiencia Nacional handed down a decision which protected an Australian national against potential breaches of his fundamental human rights by his country of origin.

In Australia, however, the decision of the Spanish Audiencia Nacional has been considered flawed because of a widespread belief that Skase's emphysema was faked. In the eyes of a majority of the Australian public, Skase deserves a

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77 S Breitenmoser, *ibid* at 875, 884; see also C Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case" (1990) 11 *Michigan Journal of International Law* 1073.

78 Australia, House of Representatives 1987, Debates, vol HR 157, p 1616, Reproduced in J Brown (ed), *Australian Practice in International Law 1986-1987*, Department of Foreign Affairs and Trade (1988), pp 99-102.

79 J Brown, *ibid* at 102.

80 S Breitenmoser, note 70 *supra* at 875.

nomination for an Oscar rather than a place in the annals of human rights jurisprudence.

V. CONCLUSION

The decision of the Audiencia Nacional in the extradition proceedings against Skase appears to have been decided in accordance with Australian and Spanish domestic law and the Extradition Treaty. The decision is a positive step in the protection of individual human rights through the application of international human rights to extradition procedures.

The decision of the Full Court of the Spanish Audiencia Nacional undermines the non-inquiry rule by following the precedent set by the *Gallina* case in the US and the *Soering* case in the European Court of Human Rights. The ruling strengthens the principle that extradition proceedings must be regarded as part of the overall criminal proceedings against a wanted person in both the requesting and the requested state. Secondly, it furthers the notion that the requested state can be held responsible for breach of the fundamental human rights of the wanted person because the Judiciary in the requested state has an important function in the implementation of international human rights norms.

Had the Audiencia Nacional ruled against Skase, he would have been able to seek protection from the Spanish Constitutional Tribunal under the *recurso de amparo*.[81] The protection plea is designed to prevent situations where a lack of proper defence may ensue with respect to, inter alia, a person's civil and political rights.[82] Skase would have been able to seek the effective protection of the Spanish Constitutional Tribunal with respect to the exercise of his legitimate rights and interests.[83]

The *recurso de amparo* would have been the last national remedy which both the representatives of the Australian Government and Skase would have been required to exhaust under Spanish domestic law before any international remedy could be sought. The Australian Government would be entitled to appeal against the ruling of the Audiencia Nacional pleading wrong application of the law; Skase's counsel could have filed a *recurso de amparo* against an extradition order pleading lack of proper defence of his legitimate rights and interests.

Skase could have further filed an individual petition against a negative finding by the Spanish Constitutional Court before the European Commission of Human Rights. Although Skase is not a European national, Art 1 of the European Convention would have protected his rights.[84] The decision of the European Commission of Human Rights may be reviewed before the European Court of Human Rights.

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81 Spanish Constitution, note 13 *supra* Art 162(b).

82 *Ibid*, Arts 53.2, 15-29 refer to protection against breaches of a person's civil and political rights.

83 *Ibid*, Art 24.

84 European Convention for the Protection of Human Rights and Fundamental Freedoms, note 73 *supra*, Art 1 provides that the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in s 1 of the Convention.

In the light of the analysis of the humanitarian principles applied by the Spanish Audiencia Nacional in the extradition request by the Australian Government, it seems likely that the European Court would have taken Skase's objections to extradition seriously. In addition, the precedent in the *Soering* case would have been available to Skase.

The Australian Government has one more remedy to exhaust under Spanish law - *recurso de amparo* - and nothing prevents it from submitting a second extradition request before Spanish authorities. However, the Australian Attorney-General's Office has desisted from pursuing the matter any further.[85] At the end of the day, Australian public opinion appears unconvinced and still regards the decision of the Spanish Audiencia Nacional as a failure and "an affront to Australian justice". Despite these general feelings, the decision is an important triumph for human rights principles.

85 Australian Attorney-General's Office, "Extradition of Christopher Charles Skase", Press Release, 1 March 1995.