

FEDERAL COURT OF AUSTRALIA

Pauga v Samoa [2022] FCA 1097

File numbers: SAD 143 of 2021

Judgment of: **COLVIN J**

Date of judgment: 16 September 2022

Catchwords: **EXTRADITION** - application for review under s 21 of the *Extradition Act 1988* (Cth) - where applicant submits that the supporting documents produced to the magistrate under s 19(2)(a) were not duly authenticated - where supporting documents consisted of a bundle of documents affixed by a ribbon and seal to a certificate purporting to authenticate the bundle - where the seal of the Supreme Court of Samoa was affixed to the certificate - whether the seal affixed to the ribbon binding the bundle of documents to the certificate corresponds to the seal referred to by the terms of the certificate - whether the seal of the Supreme Court of Samoa is a seal for the purposes of s 19(7)(b)(i) - whether the certificate must specify the dates of the documents it purports to certify - whether the certificate must list the annexures to the affidavits it purports to certify - whether the certificate must by its terms identify copies of documents as copies - whether the certificate must by its terms identify copies of documents as being true and correct copies - whether the motto for the State of Samoa appearing on the seal must be translated into English - whether the respondent can rely on legal arguments not put to the magistrate - nature of the rehearing available under s 21 - further submissions to be received regarding appropriate relief

BAIL - application for bail under s 21 of the *Extradition Act 1988* (Cth) - whether the delay in the final hearing of the substantive application is a special circumstance - whether the substantive application has strong prospects of success - application refused

Legislation: *Extradition Act 1988* (Cth) ss 19, 21, 21A

Cases cited: *Cabal v United Mexican States (No 3)* [2000] FCA 1204
Federal Republic of Germany v Haddad (1990) 21 FCR 496
Haddad v Larcombe (1989) 42 A Crim R 139
Kelly v New Zealand [2022] FCA 158

Matson v Attorney-General (Cth) [2021] FCA 161
Prabowo v Republic of Indonesia (1995) 61 FCR 258
R v Bolton; Ex parte Beane (1987) 162 CLR 514
Rahardja v Republic of Indonesia [2000] FCA 1297
Republic of South Africa v Dutton (1997) 77 FCR 128
The Republic of Finland v Tervonen [2007] FCA 2107
United Mexican States v Cabal [2001] HCA 60; (2001) 209 CLR 165
Zoeller v Federal Republic of Germany (1988) 19 FCR 64
Zoeller v Federal Republic of Germany (1989) 23 FCR 282

Division: General Division

Registry: South Australia

National Practice Area: Federal Crime and Related Proceedings

Number of paragraphs: 61

Date of hearing: 22-23, 27-28 June and 7 July 2022

Counsel for the Applicant Mr G Mancini with Mr GJ Finlayson

Solicitor for the Applicant Diaspora Legal

Counsel for the First Respondent: Mr M McKechnie with Ms G Devereaux

Solicitor for the First Respondent: Commonwealth Attorney-General's Department

Counsel for the Second Respondent: The Second Respondent did not appear

ORDERS

SAD 143 of 2021

BETWEEN: **TALALELEI PAUGA**
Applicant

AND: **SAMOA**
First Respondent

HER HONOUR MAGISTRATE PREVITERA,
A MAGISTRATE OF THE STATE OF QUEENSLAND
Second Respondent

ORDER MADE BY: **COLVIN J**

DATE OF ORDER: **11 JULY 2022**

THE COURT ORDERS THAT:

1. The application for bail is refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

SAD 143 of 2021

BETWEEN: **TALALELEI PAUGA**
Applicant

AND: **SAMOA**
First Respondent

HER HONOUR MAGISTRATE PREVITERA,
A MAGISTRATE OF THE STATE OF QUEENSLAND
Second Respondent

ORDER MADE BY: **COLVIN J**

DATE OF ORDER: **16 SEPTEMBER 2022**

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The question of any order as to costs of the proceedings be reserved for determination on a date to be fixed.
3. On or before 7 October 2022 any party seeking an order for costs of the proceedings shall file a minute of proposed orders stating precisely the terms of the cost order sought together with submissions of no more than 5 pages and any affidavit in support.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 On 9 July 2021, a Queensland magistrate acting administratively under the *Extradition Act 1988* (Cth), determined that Mr Talalelei Pauga was eligible for surrender to the Independent State of Samoa and ordered that he be committed to prison to await surrender. Section 21 of the Act provides that in such a circumstance, a person the subject of the order may apply to this Court for a review of the order. On review, this Court may by judicial order confirm the order of the magistrate or quash the order.

2 Section 19(2) provides that a person is only eligible for surrender if the matters listed in that provision pertain. The first of those is that 'the supporting documents in relation to the offence [that is, the offence in relation to which the person is sought to be extradited] have been produced to the magistrate'. The term 'supporting documents' is defined in s 19(3). It describes various documents as being 'duly authenticated'.

3 Section 19(6) then provides that any document that is 'duly authenticated' is admissible in the proceedings before the magistrate. Section 19(7) then provides:

A document that is sought by or on behalf of an extradition country to be admitted in the proceedings is duly authenticated for the purposes of this section if:

- (a) it purports to be signed or certified by a judge, magistrate or officer in or of the extradition country; and
- (b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:
 - (i) in any case--of the extradition country or of a Minister, Department of State or Department or officer of the Government, of the extradition country; or
 - (ii) where the extradition country is a colony, territory or protectorate--of the person administering the Government of that country or of any person administering a Department of the Government of that country.

4 Before the learned magistrate, Samoa tendered a bundle of documents that were certified by Ms Moliei Simi-Vaai as Registrar of the Supreme Court of Samoa and a copy of that bundle. Having inspected the original and the copy, the magistrate returned the original to counsel and retained the copy.

5 The original bundle was before this Court on the application to review the magistrate's order. The original comprises the certificate of Ms Simi-Vaai as the first page (**Certificate**) followed

by a bundle of documents (**Bundle**). The Certificate and the Bundle are together punched through in the top left hand corner by a single eyelet. Through the eyelet is a red ribbon fashioned so that it wraps around each side of the corner of the Bundle with the two ends (each longer than the diagonal of the bundle) laid out across the back of the last page of the bundle and there fixed by a red embossed seal (**Red Seal**).

6 The Red Seal is endorsed with the words 'Public Seal' and 'Independent State of Samoa', noting that the letters 'Inde' of the word Independent are partly cut off by reason that the embossing on the Red Seal is not neatly aligned with the centre of the seal. By reason of the manner of its attachment, the Red Seal indicates that it has been applied to the whole of the Bundle including the Certificate.

7 The Certificate contains two certifications. First, a certification that the documents attached to the certificate (namely the documents comprising the Bundle) - which are then described - 'are submitted in support of the request from Samoa to the Commonwealth of Australia for the extradition of Talalelei Pauga'. It is a statement certifying that the 'documents attached' are those that are submitted to support the extradition request (**First Certification**).

8 Second, there is a certification that 'the seal affixed to this certificate is the official seal of the Supreme Court of Samoa and authenticates all of the documents attached to this certificate' (**Second Certification**). By this separate Second Certification, the seal of the Supreme Court of Samoa (being the only seal affixed to the Certificate itself) is applied to authenticate all of the documents attached to the certificate (namely the documents comprising the Bundle).

9 After the two certifications, there is the following declaratory statement as to the manner in which the certification was being effected (**Declaration**). It says:

Given under my hand and the official seal of the Supreme Court of Samoa affixed to this certificate and the ribbon binding all of the attached documents.

10 Underneath the Declaration is the seal of the Supreme Court of Samoa and the signature of Ms Simi-Vaai as Registrar.

11 The contentions advanced for Mr Pauga on the final hearing of the statutory review application in this Court all concerned whether the documents in the Bundle had been 'duly authenticated' for the purposes of s 19. Various other points were not pressed.

12 In the result, there were seven contentions advanced. They were as follows:

- (1) The Declaration refers to a bundle of attached documents to which the official seal of the Supreme Court of Samoa has been affixed to the ribbon binding all of the attached documents. It is the Red Seal and not the official seal of the Supreme Court of Samoa that is affixed to the ribbon. Therefore, the description in the Declaration is not a description of the Bundle. For that reason, it must be some bundle other than the Bundle that is the subject of the Declaration.
- (2) The seal of the Supreme Court of Samoa is not an official or public seal for the purposes of s 19(7)(b)(i), yet it is that seal which purports to authenticate the Bundle. Therefore, the documents in the Bundle have not been duly authenticated.
- (3) The description of the documents comprising the Bundle that is set out in the Certificate is insufficient because it does not specify the date of the documents and, in the case of the affidavit of the investigating officer does not list the documents that are annexures to the affidavit (and in the case of annexures that are themselves affidavits does not list the annexures to those annexed affidavits). Such descriptions are required in order for a document to be duly authenticated.
- (4) The description in the Certificate of annexures B, C, D and E did not identify them as copies. In order for a copy of a document to be duly authenticated it needed to be described as a copy.
- (5) There was no statement as to documents that were a copy that the copy was true and correct. In order for a copy of a document to be duly authenticated it needed to be certified as being a true and correct copy.
- (6) The Red Seal included the words of the motto for the State of Samoa beneath the escutcheon shape of the coat of arms. As those words had not been translated, there had been no authentication of the documents.
- (7) As Samoa had not relied expressly upon the Red Seal before the magistrate, Samoa could not now do so.

13 For the following reasons, each of the above contentions should be rejected.

Some general matters concerning due authentication by resort to s 19(7)

14 It may be accepted that compliance with extradition laws is a matter of utmost seriousness. Such laws provide for circumstances in which a person may be deprived of their liberty at the

instigation of the governmental authorities of another country. Therefore, it is reasonable to expect that there will be strict compliance with its requirements: *Prabowo v Republic of Indonesia* (1995) 61 FCR 258 at 271 (Hill J) adapting what was said by Brennan J in *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523.

15 Section 19(7) requires two matters to pertain in respect of the document if the extradition country seeks to admit a document on the basis that it is 'duly authenticated'. First, it must purport to be signed or certified by a judge, magistrate or officer. It was accepted for Mr Pauga that a Registrar of the Supreme Court of Samoa was an 'officer'. It was not contended for Samoa that the documents had been signed. Therefore, in the present case the first requirement to be met was that each document in the Bundle must purport to be certified by the Registrar. I will refer to this as the certification requirement.

16 Second, the document must purport to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal. Again there are two alternatives, the document must purport to be (a) authenticated; or (b) sealed. In the latter case, there is no requirement for authentication in addition to the document being sealed. The affixing of the seal is sufficient in and of itself. I will refer to this as the seal requirement. For Samoa, it was not suggested that there was an oath or affirmation authenticating the documents in the Bundle. Rather, Samoa claimed that the documents had been sealed with the seal of Samoa by being tied together using the red ribbon to which the Red Seal was affixed. It was not suggested for Mr Pauga that the Red Seal was not a seal for the purposes of s 19(7)(b)(i). The question is whether the documents were sealed by the Red Seal.

17 Further, as to both the certification requirement and the seal requirement, what was required was for the documents in the Bundle to *purport* to be authenticated and sealed.

Contention 1: The Declaration and the description of the Bundle

18 Both the Second Certification (that the seal affixed to the seal is the official seal of the Supreme Court of Samoa) and the Declaration which follows immediately after the Second Certification (which is to the effect that the certificate is given under the hand of the Registrar and the official seal of the Supreme Court is affixed to the Certificate and the ribbon binding all of the attached documents) form part of the Certificate. They are to be construed in that context. An important part of that context is that the First Certification concerns 'the documents attached to this certificate'.

19 There are two possibilities as to what is meant by the Declaration. The first possibility is that the Declaration is referring to the seal of the Supreme Court which is affixed to the Certificate itself on the basis that it is certifying both the contents of the Certificate and the fact that the red ribbon is binding all of the attachments to which reference is made in the First Certification.

20 The second possibility is that the Declaration is describing a bundle of attached documents to which the seal of the Supreme Court is affixed over the ribbon and the use of the Red Seal over the ribbon means that the attached documents do not match the description in the Declaration.

21 I prefer the first possibility. The Declaration is attesting to the First Certification and the Second Certification. They concern (a) 'the documents attached' to the Certificate; and (b) the seal affixed to the certificate itself to authenticate 'all of the documents attached'. There is no mention in the Certificate that it is attesting to the affixing of the Red Seal. The means of attachment is the red ribbon that passes through the eyelet. Given the terms of the First Certification and the Second Certification there is a need to attest to the attachment of the documents comprising the Bundle. The attestation is effected by identifying both the seal and the ribbon binding the attached documents. The reference in the Declaration is to the seal of the Supreme Court. It authenticates the documents in the Bundle (being all of the documents attached by the red ribbon). It is the means by which the documents in the Bundle are purported to be certified and the certification requirement met.

22 In addition the Red Seal is affixed over the red ribbon. It provides a separate part of the purported authentication. Its significance is addressed in dealing with Contention 2.

Contention 2: The seal of the Supreme Court of Samoa

23 The authentication of the Bundle is not confined to the affixing of the seal of the Supreme Court of Samoa. It includes the affixing of the Red Seal. There is no dispute that Red Seal is an official or public seal.

24 Therefore, the Bundle is duly authenticated because the certification requirement is met because of the signature of the Registrar as an 'officer' and the seal requirement is met by affixing the Red Seal. It is not necessary to reach any view as to whether the seal of the Supreme Court also meets the seal requirement.

Contention 3: The description of the documents

25 For Mr Pauga it was contended that there needed to be a date identified in the Certificate for each document that was being authenticated. It was further contended that it was insufficient to identify a document that comprised an affidavit and exhibits by identifying the affidavit by reference to the name of the person making the affidavit. In addition, as the affidavit itself exhibited other affidavits with exhibits, it was said that each of those affidavits and their exhibits needed to be separately authenticated.

26 It was not conceded that the description of the affidavit was sufficient to authenticate the fact that exhibits identified in the affidavit were those exhibits. However, to put the matter in that way is to misunderstand what is purported to be authenticated. The Certificate seeks only to authenticate the affidavit, including the exhibits to that affidavit. If there is significance in the fact that there is no separate authentication of each exhibit beyond the fact that it is a document that has been identified in the affidavit then that is a matter that might be raised at the hearing of the proceedings to be conducted under s 19 of the *Extradition Act*. It does not mean that the affidavit and the documents that form the exhibits to that affidavit have not been authenticated as exhibits to the affidavit by reason that the certificate only identifies the affidavit.

27 In my view, the documents were sufficiently described for the purposes of authentication. If there were any deficiency or shortfall in what they demonstrated for the purposes of establishing in proceedings under s 19 of the *Extradition Act* that the requirement of s 19(2) had been met then that was a matter that could be raised. No such point was sought to be made in the present case.

Contentions 4 and 5: Identification of copies

28 It was submitted that a person giving a certificate in respect of documents for the purposes of s 19(7) of the *Extradition Act* had to certify that the originals of the documents had been sighted and that the copies in the bundle were true and accurate copies of the original documents. Reliance was placed upon a statement by French J in *Cabal v United Mexican States (No 3)* [2000] FCA 1204 at [170] where his Honour was dealing with what was required by the words 'sign' and 'certify' as used in s 19(7) and said:

The meaning of the words 'sign' and 'certify' and their statutory purpose leads to certain conclusions relevant to this application. First, the purported signature, if it is to be relied upon, must be placed on the document which it is sought to authenticate. But the same is not true of certification. A certificate may be endorsed upon the document in question. It may also appear in a separate document **provided that it identifies the**

document to be authenticated and attests its genuineness. There is no mandate for imposing a technical requirement not derived from the meaning of the word or the terms of the Act which would require a certificate to be endorsed upon or attached to the document to be certified. No doubt as a practical matter that course is highly desirable for it then avoids debate about the relationship between particular certificates and the documents which they are said to attest. There is an overlap between authentication by signing and by certification. If a certificate is endorsed on the document to be authenticated and is itself signed by a judge, magistrate or officer in or of the extradition country, then the document itself purports to be so signed. The Act does not require that an authenticating signature be applied only by the person issuing the document. In most cases this will be academic. However where, as in some instances in this case, a certificate is at least partly illegible but the purported signature and office of the person signing the certificate can be shown, then authentication may be achieved through that mechanism. If the signature of the clerk of court on a document could authenticate it then the signature of the clerk on a certificate which appears on the document will itself be no less effective.

(emphasis added)

- 29 It is the emphasised words in the above passage upon which reliance was placed. His Honour does not suggest that the attestation as to genuineness must take the form of a statement to the effect that the person has sighted the originals and that the copy being certified is a true copy of the original.
- 30 Examination of the Bundle reveals that all documents are copies, save for the request from the Office of the Attorney General of Samoa which is an original. It may be noted that the terms of the First Certification identify in paragraph (2) that Annexures A, E and F are copies. Annexures B, C and D are not so described. In circumstances where none of the listed Annexures actually included in the bundle are originals and the certificate authenticates all of the documents, it may be inferred that the descriptions correspond with what was before the Registrar when the Bundle was certified. On that basis what is certified is that Annexures A, E and F are copies of copies and Annexures B, C and D are copies of originals. To conclude otherwise would be to disregard the descriptions given in the Certificate and the use of the word 'authenticates'.
- 31 The certified original request for extradition confirms that the warrant for the arrest of Mr Pauga authorises his arrest in Samoa.
- 32 In any event, I see no reason why the statement in the First Certificate that 'authenticates all of the documents attached to this certificate' should not be accepted as a statement that purports to verify the authenticity of the documents as described.

33 Reliance was placed upon certain extracted passages from the text *Jones on Extradition and Mutual Assistance*. Those passages were dealing with the meaning to be given to the term 'officer' when it came to certification. They reproduced the form in which certifications had been given in certain instances. They did so for the purpose of considering whether the person who provided the certification could do so. The passages relied upon were not dealing with the form in which an authentication must be expressed and did not articulate a requirement that authentication could only be effected by a statement of the kind contended for by Mr Pauga. Those passages do not assist.

Contention 6: Translation of the motto on the Red Seal

34 Whether the words in a foreign language on a seal relied upon for the purposes of s 19(7) must be translated depends upon whether, without the particular words being translated, the affixing of the seal on its face results in the document purporting to be sealed with an official seal of the required kind: *Rahardja v Republic of Indonesia* [2000] FCA 1297 at [106]-[110] (Wilcox, Spender and Dowsett JJ). In the present case, the Red Seal itself bears words which state that it is the Public Seal of the Independent State of Samoa. Those English words on the face of the seal, of themselves, mean that the affixing of the Red Seal purports to seal the document with an official or public seal of the required kind. The affixing of the seal across the ribbon in the manner I have described means that the seal is affixed to every document in the Bundle. No translation of the words of the motto appearing beneath the coat of arms would lead to a different conclusion.

35 For Mr Pauga, reliance was placed upon three authorities.

36 First, *Cabal v United Mexican States (No 3)*. In that case, French J said at [157]:

That is not to say that the magistrate can act upon untranslated documents in a foreign language. The question here is whether and to what extent translation of the supporting documents is necessary in s 19 proceedings. As a general proposition, if a particular document is authenticated in accordance with s 19(7) it is admissible. And that principle applies 'regardless of the identity of the language in which the document is written' - *Haddad v Larcombe* (1989) 42 A Crim R 139 at 140 (Wilcox J). But as his Honour held in that case, a purported authenticating document which was a certificate in the German language, could not be relied upon to determine whether the requirements of authentication had been met. *Zoeller* added to that general proposition:

While a document duly authenticated under s 19(7) is admissible in evidence it can only be acted upon if it is understood. (290)

Underlying and providing context for that statement was the subsequent proposition that for a tribunal to act upon its own understanding of a foreign language,

uncommunicated to the parties, would be a breach of natural justice. A Full Court differently constituted subsequently considered an appeal from the judgment of Wilcox J in *Haddad*. Their Honours pointed out that what the Full Court in *Zoeller* had to say about the necessity for translation of documents to be placed before the Court did not have to do with authenticating documents but was directed to the substantive documents and was obiter - *Federal Republic of Germany v Haddad* (1990) 21 FCR 496 at 498. Their Honours accepted however that the principles enunciated in *Zoeller* applied to authenticating documents. Thus material placed before the Court to satisfy the requirements of s 19(7)(b) should not be received if written in a language other than English unless the English meaning is proved or admitted. (499) The same principle was applied by Hill J to seals relied upon under s 19(7) in *Prabowo*.

37 It can be seen that his Honour is dealing with instances where translation is necessary in order to understand the content of an authenticating document, particularly a certificate. It is not concerned with translating all of the words on a seal, still less words which do not describe the nature of the seal. The reasoning does not support the proposition advanced in relation to the motto on the Red Seal.

38 Second, *Prabowo*. In that case, Hill J considered the issue of translation of seals relied upon for the purposes of s 19(7). At 268, his Honour said:

Section 19(7), so far as is relevant, requires authentication to 'purport' to be by the use of a seal which is an official or public seal. Whether the seal purports to be a seal of a particular kind must appear on its face. It is hard to know how a document could purport to be sealed with an official or public seal if one could not read the material on the seal. Put simply therefore, for an instrument to purport to be sealed by a public seal of a particular kind it will be necessary either that the seal disclose in English what it purports to be or that some person translate into English the words on the seal again so that it can be seen what the seal purports to be.

39 His Honour then went on deal with *Haddad v Larcombe* (1989) 42 A Crim R 139 (see below) and *Zoeller v Federal Republic of Germany* (1988) 19 FCR 64. Those were cases concerned with the manner in which a translation may be provided as to the contents of a certification and seal wholly expressed in a foreign language.

40 Then, Hill J returned to the case at hand and said at 270:

In the present case, the issue is a different one. Here, the Republic of Indonesia seeks to rely upon an authentication by reference to there being affixed to the document a seal of a particular kind. There is affixed to the document a seal (both a wax and an inked imprint) but the document itself does not enable one to say whether that seal purports to be a seal of the relevant kind so as to constitute an authentication. One could only ascertain that by some form of translation. Hence the documents originally sought to be tendered did not qualify as 'supporting documents' because the authentication had not been proven.

The matter was not improved following the adjournment. It is true that there is to be found now a translation on the front page of the document setting out the material that

was on the seal. But that translation is no more than the statement of a person purporting to be a translator not given in evidence. Had there appeared a certification and seal in the English language upon the translation then no doubt it would have been admissible under s 19(6). The fact, however, that another seal was affixed again in the Indonesian language prevented that course. Thus the only way the translation of the material on the original seal could be admissible was by a translator giving on oath in the Court evidence of the translation. Unfortunately this was not done.

41 It can be seen that *Prabowo* was also not a case like the present case. In that instance, the nature of the seal could not be determined on its face. As has been explained that is not the present case. It bears a description in English as to the nature of the seal. The fact that the motto is not translated is of no moment. On the face of the document the words are a motto that forms part of the coat of arms and therefore are not part of the description of the character of the seal.

42 Third, reliance was placed on *Haddad v Larcombe* at 144-145, a case in which a bundle of documents was sought to be authenticated by a certificate in the German language. The reason the documents were found not to be authenticated was that there was no translation of the certificate. The decision was upheld on appeal: *Federal Republic of Germany v Haddad* (1990) 21 FCR 496.

43 It follows that the authorities relied upon by Mr Pauga do not assist him.

Contention 7: Reliance on the Red Seal

44 It was common ground that Samoa had not relied upon the Red Seal before the magistrate. It was also common ground that the magistrate had received the original of the Certificate and Bundle together with copies of those documents. After comparing the originals with the copies, the magistrate had received the copy as an exhibit and returned the originals to counsel for Samoa. Before the magistrate, the submissions advanced for Samoa to authenticate the documents in the Bundle, relied upon the seal of the Supreme Court of Samoa and made no reference to the effect of the Red Seal being affixed over the red ribbon.

45 Section 21(6) provides that this Court on review is to have regard only to material that was before the magistrate or Judge when the proceedings were conducted under s 19 of the *Extradition Act*.

46 For Mr Pauga, reliance was placed upon *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 and *Republic of South Africa v Dutton* (1997) 77 FCR 128 for the proposition that a point not taken before the magistrate could not be relied upon on the statutory review.

47 In *Zoeller*, a Full Court was concerned with an argument on review to the effect that there was a valid objection to evidence that had been received by the magistrate when conducting the proceedings under s 19 of the *Extradition Act*. In that context, their Honours (Lockhart, Gummow and Hill JJ) said at 292:

It is unnecessary for the purposes of this cases to determine comprehensively what is contemplated by the 'review', by reference to which s 21 of the Act defines the jurisdiction of this Court. It is sufficient to say that it would be going beyond 'review' for the court to entertain a complaint in respect of the receipt by the magistrate into evidence of the translation here in question.

48 The Court then posed the following rhetorical question: 'Given that before the magistrate the appellant had not objected to the document [on a particular basis], how can he then have this Court 'review' what happened in this regard before the magistrate?'

49 Then in *Dutton*, Hill J referred to *Zoeller* and expressed the view at 134 that it was 'authority for the proposition that in a review the Court will not consider points not taken before the magistrate'. However, his Honour noted immediately: 'But the case leaves open the wider question of the general nature of the review'. His Honour then went on to consider the authorities concerning the nature of the review to be conducted under s 21 and concluded that it contemplated a rehearing in which the court undertaking the review is authorised to reach its own conclusions on eligibility for surrender 'but a rehearing which is limited statutorily to the material before the magistrate': at 136. This conclusion is reinforced by the fact that, upon review, this Court may only confirm or quash the order. There is no statutory power to remit.

50 It may be noted that since 2012, the *Extradition Act* has included a limited power for the Court on review to admit evidence that was not before the magistrate. Evidence may be admitted if a party to the relevant proceedings was 'prevented from adducing evidence' in the proceedings: see s 21A (which now qualifies the limitation on receiving evidence expressed in s 21(6)(d)).

51 The consequence is that the proposition stated by Hill J to the effect that the Court on review will not consider points not taken before the magistrate needs to take into account both the broad nature of the review and the fact that there now may be additional evidence on the review.

52 Further, reliance upon the Red Seal is not an attempt to adduce evidence that was not before the magistrate. Rather, it is to advance a legal argument by reference to what was before the magistrate. Indeed, it is a point that is made by Samoa in order to respond to points made in the present review proceedings that were not articulated on behalf of Mr Pauga before the

magistrate. There was no issue before the magistrate about the significance of the Red Seal of the kind now pressed on behalf of Mr Pauga. It is not suggested that the point opens up a new field of evidence (being the basis for the reasoning in *Zoeller*). In all the circumstances, I do not accept that there cannot be regard to the Red Seal and its significance for the purpose of the review.

Application for bail

53 By the originating application, Mr Pauga sought to be released on bail pending the hearing and determination of these proceedings. There is statutory power to do so 'if there are special circumstances': see s 21(6)(f)(iv) of the *Extradition Act*. Months later there was still no affidavit material to support such an application and the basis for the application was not apparent. I then directed that Mr Pauga file an outline of submissions specifying the grounds upon which bail was sought and any circumstances that were said to be exceptional. A time was also set for the filing of any affidavit in support and for any affidavit in opposition. It was indicated that the bail application would be listed for hearing shortly thereafter. No materials were filed.

54 The final hearing of the substantive application was listed for dates in March 2022. By that time, there still had been no papers filed to support the bail application. In the result, the hearing in March was adjourned and new dates were allocated in June 2022. A matter of days before the June hearing, papers were filed to support the application for bail. At the request of those acting for Mr Pauga, the bail application was listed for hearing on 7 July 2022.

55 No explanation was given for the delay. In the course of the conduct of these (and related) proceedings, the solicitor acting for Mr Pauga was directed to file an affidavit explaining his failure to comply with various directions. The matters raised in that affidavit did not explain the very extended delay in bringing forward the bail application. At the hearing of the bail application, there was no attempt to explain the delay.

56 The proceedings in this Court seek the review of the outcome of proceedings conducted before various Queensland magistrates following the arrest of Mr Pauga under an extradition arrest warrant in August 2020. The course of those proceedings is described in reasons in related proceedings brought in this Court which are to be delivered at the same time as these reasons. There had been no earlier bail application during the course of those extradition proceedings when Mr Pauga appeared on numerous occasions before various Queensland magistrates. As

appears from the chronology of those proceedings set out in the separate reasons, the time taken for those proceedings to reach a final hearing was not attributable to Samoa.

57 Therefore, this is not a case where there has been delay in the conduct of court proceedings of a kind that might bear upon whether bail should be granted.

58 In order for there to be 'special circumstances' for the purposes of the provisions in the *Extradition Act* that confer a statutory power to grant bail, the circumstances of the individual case must be:

... special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure when regard is had to the nature and extent of the extradition charges. This means that the circumstances relied on must be different in kind from the disadvantages that all extradition defendants have to endure. To constitute 'special circumstances', the matters relied on need to be extraordinary and not factors applicable to all defendants facing extradition'.

See *United Mexican States v Cabal* [2001] HCA 60; (2001) 209 CLR 165 at [61].

59 In *Matson v Attorney-General (Cth)* [2021] FCA 161 at [220], White J identified three matters that must be demonstrated where bail is sought on the basis of a pending application to review in this Court, namely:

- (a) the underlying application...has strong prospects of success;
- (b) special circumstances exist; and
- (c) there is no real risk of flight.

See also, *The Republic of Finland v Tervonen* [2007] FCA 2107 at [7] (Rares J). These three matters reflect the statements in *United Mexican States v Cabal* at [61]. However, it should be noted that the High Court stated that even where there are special circumstances and no real risk of flight 'ordinarily' there will also need to be strong prospects for success. See also *United Mexican States v Cabal* at [53], [62] and the discussion by Mortimer J of the way to treat prospects of success in *Kelly v New Zealand* [2022] FCA 158.

60 For reasons I have already given, at the time of hearing the bail application I had heard the whole of the substantive review application. I was in the unusual position for an interlocutory application of having received all the material and having heard all of the contentions advanced on the substantive application. For reasons I have recorded, I was not persuaded as to the merit of the contentions advanced to support the application. For that reason, I determined that the application for bail in these proceedings must be refused.

Conclusion and costs

61 For the reasons I have given the application must be dismissed. The present proceedings were heard immediately after related proceedings in which Mr Pauga sought relief in the nature of a writ of habeas corpus and related relief. As I have indicated, I will be delivering these reasons at the same time as the reasons in those related proceedings. I propose to continue to deal with the two applications together and for that reason will adopt the same course in relation to costs as I have proposed in the proceedings concerning the related proceedings.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:



Dated: 16 September 2022