FEDERAL COURT OF AUSTRALIA

Francuziak v Honourable Michael Keenan MP, Minister for Justice   
[2015] FCA 464

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| Citation: | Francuziak v Honourable Michael Keenan MP, Minister for Justice [2015] FCA 464 |
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| Parties: | **PAWEL FRANCUZIAK v THE HONOURABLE MICHAEL KEENAN MP, MINISTER FOR JUSTICE** |
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| File number: | WAD 92 of 2014 |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 15 May 2015 |
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| Catchwords: | **EXTRADITION** – review of decision to surrender under s 22 of the *Extradition Act 1988* (Cth) – whether Minister applied the wrong test under s 22(3)(b) of the Act – whether overcrowding, delays in consideration for parole, violence and other risks to personal safety, and inadequate medical facilities and illness and disease amount to torture for the purposes of s 22(3)(b) of the Act  **ADMINISTRATIVE LAW** – whether the Minister’s decision to surrender under s 22 of the *Extradition Act 1988* (Cth) was unreasonable – whether extradition would be totally incompatible with humanitarian considerations because of exceptional circumstances for the purposes of Art 3(4) of the *Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment* – whether assurances from Poland should have been sought and obtained |
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| Legislation: | *Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment* Art 3  *Extradition Act 1988* (Cth) ss 11, 18(2), 22(2), 22(3)(b), 23  *Extradition (Poland) Regulations 1999* (Cth) reg 4  *Judiciary Act 1903* (Cth) ss 39B(1), 39B(1A) |
|  |  |
| Cases cited: | *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223  *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379  *de Bruyn v Minister for Justice & Customs* (2004) 143 FCR 162  *de Bruyn v Ellison* [2004] FCA 880  *Minister for Immigration and Border Protection v Singh* (2014)308 ALR 280  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *O’Connor v Adamas* (2013) 210 FCR 364 |
|  |  |
| Date of hearing: | 28 October 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 73 |
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| Counsel for the Applicant: | Mr AG Elliott |
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| Solicitor for the Applicant: | NR Barber Legal |
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| Counsel for the Respondent: | Mr EM Heenan |
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| Solicitor for the Respondent: | Ashurst Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 92 of 2014 |

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| BETWEEN: | PAWEL FRANCUZIAK  Applicant |
| AND: | THE HONOURABLE MICHAEL KEENAN MP,  MINISTER FOR JUSTICE  Respondent |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 15 MAY 2015 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The Applicant do pay the costs of the Respondent, to be taxed if not agreed.

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

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| BETWEEN: | PAWEL FRANCUZIAK  Applicant |
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| JUDGE: | MCKERRACHER J |
| DATE: | 15 MAY 2015 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

1. Mr Pawel Francuziak is challenging the Minister’s decision to surrender him for extradition to the Republic of **Poland**. By amended application, he seeks review of the Minister’s decision that Mr Francuziak be surrendered to Poland pursuant to s 22 of the *Extradition* ***Act*** *1988* (Cth) and to issue a surrender warrant under s 23 of the Act on the basis that:
   1. the Minister applied the wrong test in considering Australia’s non-refoulement obligations under s 22(3)(b) of the Act; and
   2. the determination that Mr Francuziak should be surrendered was sufficiently irrational, capricious or so unreasonable that no reasonable person could have made it so as to be an unreasonable abuse of power in the relevant sense.
2. The nature of the relief sought in Mr Francuziak’s amended originating **application** for judicial review is pursuant to s 39B(1) and s 39B(1A) of the *Judiciary Act 1903* (Cth) and ss 19, 21 and 23 of the *Federal Court of Australia Act 1976* (Cth).
3. The parties proceed on the basis that, in substance, the relief sought is for declarations consistent with the grounds set out above, a writ of prohibition restraining the Minister from surrendering Mr Francuziak to Poland in execution of the **surrender warrant** dated 17 March 2014, which was issued under s 23 of the Act, and a writ of certiorari quashing the Surrender Warrant, either as an ancillary remedy incidental to the writ of prohibition or as a standalone remedy.
4. The outcome Mr Francuziak seeks, in effect, is that there will have been no lawful determination under s 22(2) of the Act. The Minister would have to make a determination afresh according to law. Nevertheless in those circumstances, Mr Francuziak’s detention would still be justified by the warrant of commitment issued by a magistrate on 15 February 2011 under s 18(2) of the Act following Mr Francuziak’s consent to surrender. In light of the conclusion I have reached, it is unnecessary to explore the issue as to whether the Court has the power to order the release of Mr Francuziak from custody.

# THE STATUTORY FRAMEWORK

1. Before analysing the grounds in detail, it is necessary to examine the function of s 22 of the Act. As has been recognised in several cases, the surrender determination under s 22 of the Act is the last stage of the four part process prescribed by Pt 2 of the Act before a person may be surrendered to an extradition country. The four parts of that process are:
   1. issue of a provisional arrest warrant under s 12(1) and the giving of a notice under s 16(1);
   2. remand in custody or grant of bail under s 15 for such period as may be necessary for proceedings to be conducted under s 18 or s 19 of the Act;
   3. determination by a magistrate under s 19 of whether the person is eligible for the surrender, or consent by the person to surrender under s 18; and
   4. determination by the Attorney-General (or the Minister for Justice pursuant to s 19 of the *Acts Interpretation Act 1901* (Cth)) under s 22 that the person is to be surrendered.
2. By s 23 of the Act, if the Attorney-General determines pursuant to s 22 that the person is to be surrendered, he or she must issue either a temporary surrender warrant or a warrant for the surrender of the person to the extradition country. Although the process challenged by Mr Francuziak is the surrender warrant under s 23 of the Act, he is essentially challenging the determination made by the Minister under s 22.
3. The functions to be performed by the Attorney-General or the Minister under s 22 of the Act are prescribed by s 22(2) and s 22(3) which relevantly provide:

**22 Surrender determination by Attorney-General**

…

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence; and

(b) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; and

(c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

(i) the person will not be tried for the offence;

(ii) if the person is tried for the offence, the death penalty will not be imposed on the person;

(iii) if the death penalty is imposed on the person, it will not be carried out; and

(d) the extradition country concerned has given a speciality assurance in relation to the person; and

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused; or

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances—the Attorney-General is satisfied:

(iii) where subparagraph (i) applies—that the circumstances do not exist; or

(iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

…

1. Thus, the legislature has determined that the Attorney-General must consider subparas 22(3)(a)-(e), but also has a general discretion whether or not to surrender a person for extradition pursuant to s 22(3)(f).
2. For the purposes of s 11 and s 22(3)(e) of the Act, reg 4 of the *Extradition (Poland) Regulations 1999* (Cth) provides that the Act applied to Poland, subject to the ***Treaty*** *between Australia and the Republic of Poland on Extradition* signed on 3 June 1998 in Canberra and entered into force on 2 December 1999. Article 3(1)–(3) of the Treaty set out the circumstances in which extradition shall not be granted or may be refused. Article 3(4) of the Treaty provides as follows:

**Where it appears** to the Requested Party that **extradition would be totally incompatible with humanitarian considerations** because of exceptional circumstances including the state of health or old age of the person sought, the Contracting Parties **shall consult to mutually determine whether the extradition request should continue**.

(emphasis added)

# BACKGROUND

1. In extensive submissions made to the Minister and, in turn, summarised by the **Department** of the Attorney-General to the Minister, Mr Francuziak pointed out that he was an Australian citizen who had been resident in Australia since March 2006. He asserted that Poland could not be trusted to carry out his sentences in accordance with expected standards of humanity, taking into account:
   1. the extent of delay between the commission of the extradition offence and the presentation of Poland’s extradition request;
   2. the change in Mr Francuziak’s personal circumstances since his arrival in Australia, resulting in his rehabilitation; and
   3. the inhumane consequences which would flow from him being incarcerated within the Polish penal system.
2. Mr Francuziak’s conviction and sentencing took place in October 2004 in respect of offences found to have been committed between 1995 to 1998. The convictions were upheld on appeal in February 2006 and he departed Poland in early 2006, arriving in Perth in April 2006. Poland sought his extradition in September 2008.
3. Mr Francuziak informed the Minister that the length of time from arrest to sentence was over five years, and that his appeal was not determined until almost 16 months later.
4. It appears clear that Mr Francuziak was not in custody for most of the time between the commission of the offences and the refusal of the appeal. There was a period of provisional custody from 4 August 1999 on his arrest until 18 February 2000, when he was granted bail. Although he was expected to be imprisoned shortly after dismissal of his appeal, it appears that he could not be found. This led in turn to Poland’s request for his extradition.
5. The Minister was informed of Mr Francuziak’s claim that soon after he was charged he ‘started over’, which apparently means that he started a new business and did not resume contact with his former de facto partner and her daughter in respect of whom convictions of sexual offences were recorded. Mr Francuziak also stressed that he arrived in Perth in April 2006, where he studied English for a year and a half and worked part-time as a pastry cook in a Polish cake shop. In 2007, he commenced work full-time as a pastry cook for one of the largest pastry businesses in Perth and became a qualified pastry chef, enjoying secure employment. He had been in a steady relationship with an identified person and was living with that individual and her two children prior to his detention in Perth. He stressed that he had lived openly in Australia since his arrival and had left behind his old life in Poland where there was nothing for him ‘except the gloomy prospect of imprisonment within a chronically inhumane system, which continues to fall short of appropriate standards even though the alarm bells have been ringing for many years’.
6. Mr Francuziak informed the Minister that the extradition offence was his only conviction, and he had lived in Australia for several years with no indication of any other further transgressions of the law. The Minister was informed that the sentence imposed on Mr Francuziak was of seven years, less the period of provisional custody already served.
7. In relation to the prison conditions in Poland, extensive representations were made, supported by a body of literature which Mr Francuziak said indicated:
   1. serious and chronic overcrowding;
   2. enormous delays in consideration for parole;
   3. rampant violence and other risks to personal safety; and
   4. inadequate medical facilities and widespread illness and disease.
8. These factors were raised in support of a contention that, even taken in isolation, they would support a conclusion of inhuman and degrading treatment. When viewed in combination it was said that returning Mr Francuziak to be imprisoned in Poland would be totally incompatible with humanitarian considerations.
9. Material on this topic was set out in documents provided to the Minister including:

* an article by Hans-Jőrg Albrecht, Managing Director of the Max-Planck-Institute titled ‘Prison Overcrowding’;
* *Orchowski v. Poland* – 17885-04 [2010] ECHR 2280;
* an English translation of an article titled ‘Prison[er] had no place to sleep – get compensation’ by Robert Borbaczewski;
* an English translation of a parliamentary question by Deputy Greg Kurczuk on the dramatic situation of the premises in Polish jails and prisons;
* a report prepared by Andrzej Kremplewski and Krzysztof Wilamowski of the Helsinki Foundation for Human Rights in Poland (HFHR);
* an English translation of statistical information provided by the Polish Ministry of Justice, Central Administration of the Prison Service;
* a English translation of an article titled ‘WSR: in the prisons is inadequate medical care’;
* a Warsaw Business Journal article by Alice Trudelle titled ‘Extradition to Poland reversed due to ‘systemic failings’ of Polish prison system’; and
* a decision in Minister for Justice, Equality and Law Reform v Rettinger delivered on 23 July 2010.

1. It is not the function of these reasons for judgment to examine in detail the documentation supplied in support of the arguments advanced by Mr Francuziak. It may fairly be said, in my assessment, that there was a close analysis and summary of that material in the recommendations contained in the **departmental advice** to the Minister. The consideration given to the representations made on his behalf consumed a substantial number of pages in that Departmental Advice. It (correctly) has not been suggested on this application that I should form a view that the truth of the material submitted should be totally accepted so as to displace the conclusion apparently reached by the Minister. Rather, it is said that the Minister asked the wrong question in relation to Mr Francuziak’s submissions and that the outcome of surrendering him for extradition is necessarily irrational or unreasonable in the legal sense, which I will discuss.

# grounds of the application

## Ground 1 - Application of the wrong test

1. Mr Francuziak contends that the Minister applied the wrong test when considering Australia’s non-refoulement obligations under s 22(3)(b) of the Act.
2. He argues that, in circumstances where the Minister was advised of ‘reports of overcrowding, limited access to healthcare and prison violence in some Polish prisons and instances of ill-treatment of inmates by some prison officials’, the question was not whether this was the result of deliberate Polish government policy designed to punish and harm inmates or Mr Francuziak personally. The proper question, it is said, was whether such misconduct occurs or there was a real chance of it occurring irrespective of government policy.
3. I treated the argument as being relevant to both s 22(3)(b) of the Act and Art 3(4) of the Treaty.
4. It is an important part of Mr Francuziak’s argument that Poland has declined to explain or clarify the correct position in Poland or give assurances as to his treatment in circumstances where it has had the opportunity to do so.
5. As part of the history of the delay between the request issued by Poland and the hearing of this application, Mr Francuziak points to the decision made by the Minister on 10 October 2012 which, when challenged, ultimately saw the Minister’s predecessor rescind his own decision and allow the making of further submissions by Mr Francuziak. It is argued that this is significant because the issues which are the subject of the present application, have been before the Attorney-General, the Minister and the Department for some considerable time. There has been ample opportunity therefore, it is said, for Poland to directly address the matters on which Mr Francuziak seeks to rely.
6. The primary emphasis in the various submissions made to the Minister by Mr Francuziak were the content of reports of overcrowding, limited access to healthcare and prison violence in some Polish prisons and instances of ill-treatment of inmates by some prison officials.
7. In relation to s 22(3)(b) of the Act, Mr Francuziak accepts that ‘torture’ has a specific meaning for present purposes. Australia’s non-refoulement obligation in respect of torture under Art 3 of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**) is limited to torture of a kind that falls within the scope of CAT as held by the Full Court in *de Bruyn v Minister for Justice & Customs* (2004) 143 FCR 162, per Kiefel J (with whom Spender and Emmett JJ agreed) (at [55]):

The question as to whether the prison conditions referred to in the newspaper articles, concerning the rape of inmates by gang members, amounts to torture was not raised before the Minister. As his Honour’s reasons disclose however the conclusion reached by the Minister, that the appellant would not be subjected to torture if surrendered, is correct. It is supported by a consideration of the meaning to be given to the term “torture.” His Honour held that the reference to torture in the Act is directed to **institutionalised conduct by government authorities** for the purpose of punishment, intimidation or coercion. I respectfully agree. The conduct identified by the appellant, of inmates towards other inmates, is not of this kind. And it is not converted to institutionalised conduct in the sense referred to by his Honour because some corrupt wardens ignore or even encourage it.

(emphasis added)

1. Mr Francuziak also accepts that the Departmental Advice correctly articulated the nature of that obligation when it said (at [18]):

For the purposes of Australia’s *non-refoulement* obligations under CAT, torture is defined as institutionalised conduct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or a confession, punishment, intimidation or coercion, or discrimination, where such pain and suffering is inflicted by or with the involvement of a public official.

1. He also accepts that the Departmental Advice correctly articulated the ‘real chance’ test as explained by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (at 429):

… [A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur… [A]n applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be … persecuted. Obviously, a farfetched possibility of persecution must be excluded. …

1. Mr Francuziak argues that the materials put before the Minister suggested the existence in Poland of ‘a consistent pattern of gross, flagrant or mass violations of human rights’ within the terms of Art 3 of the CAT. This was examined (at [17]) of the Departmental Advice in the following terms:

Australia has an express obligation under Article 3 of the CAT not to extradite a person to a country where there are substantial grounds for believing that they would be in danger of being subjected to torture. Article 3 provides:

1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a **consistent pattern of gross, flagrant or mass violations of human rights**. (emphasis added)

1. Mr Francuziak submits that the instances relied upon by him demonstrate a consistent pattern of gross or flagrant violations by Poland itself. While he does not challenge the definition of torture in the Departmental Advice (in [18]), essentially what is challenged is the response from Poland. It is argued by Mr Francuziak that despite the weight of secondary material supporting his claims, the issue was dealt with by Poland by:
   1. a bare assertion, unsupported by evidence, that there was no longer any overcrowding; and
   2. reference to Polish law which mandates what the conditions should be and which further describes the exceptional circumstances in which that mandate might be avoided.
2. Mr Francuziak challenged the Polish response, not only on this application, but also before the Minister. His challenge was considered in the Departmental Advice as follows (at [28]-[38]) (footnotes omitted):

28. Mr Francuziak submits the material provided by Poland in respect of Polish prison conditions is unreliable and in contrast with reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Helsinki Foundation for Human Rights, Amnesty and media report in Polish Journals.

29. Mr Francuziak comments that:

* The fact that provisions exist under Polish law to combat overcrowding implies a need for them and the problem of overcrowding continues.
* Poland’s representations regarding the measure taken by Polish authorities to reduce overcrowding speak only of the introduction of legislation/regulations – they deal with how things should operate in the prison system rather than how they actually do.
* Poland’s response does not assert any change in the ratio of facilities to prisoners. There is no suggestion of an increase in the capacity of the system or an improvement in facilities (such as the minimum space allowed per prisoner).
* While the theme of Poland’s response is that the concerns articulated in the case of *Orchowski* have been addressed, Poland gives not (sic) cogent justification for such a conclusion.

30. Mr Francuziak refers to the 2008 ruling of the Polish Constitutional Tribunal [which was attached], which notes that the Polish minimum area per prisoner of 3m2 is amongst the lowest in the penitentiary systems of European states. He says it is clear from Poland’s letter to the Department of 17 August 2011 [which was attached] that Poland’s standard remains unchanged, despite CPT recommendations that the standard per prisoner be at least 4m2.

31. In support of his contention that overcrowding remains an issue, Mr Francuziak refers to an official letter from the Helsinki Foundation for Human Rights addressed to the Minister of Justice of Poland [which was attached] and Amnesty International’s 2012 report, which all record high population levels and overcrowding in Polish prisons. Mr Francuziak notes that in 2011, the issue of non-disclosure of overcrowding by directors of some prisons was raised by the Ombudsman (in a letter to the General Director of the prison service dated 8 June 2011) and that contemporary media reports also speak of overcrowding issues.

*Departmental comment*

32. As noted above, an examination of torture under subparagraph 22(3)(b) of the Act requires consideration of whether a person faces a ‘real chance’ XXXXX or ‘more likely than not’ risk of being subjected to torture constituted by institutionalised conduct for the purpose of punishment, intimidation or coercion. **Regardless of which threshold test applies, the Department considers you may be satisfied that Mr Francuziak will not be subjected to torture on surrender to Poland**.

33. Poland ratified the CAT on 26 July 1989 and Article 40 of the Polish Constitution provides ‘that no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment’. On 19 January 1993 Poland ratified the Council of Europe *Convention on the Protection of Human Rights and Fundamental Freedoms* (the ECHR), which also prohibits torture. As a party to the ECHR, Poland is subject to monitoring by the CPT. Poland was most recently visited by the CPT in June 2013 however the CPT’s most recent available report on Poland is its Report to the Polish Government on the visit to Poland in 2009.

34. Further, Poland is a party to the Optional Protocol to CAT (OPCAT), which establishes a Subcommittee on the Prevention of Torture (SPT). The SPT is composed of 25 independent experts with an operational function of visiting all places of detention in States party to the OPCAT to prevent torture and ill treatment in prisons. As a State party, Poland is required to maintain, designate or establish a national preventive mechanism for the prevention of torture at the domestic level. Accordingly, Poland has domestic measures in place for the prevention of torture and is subject to international monitoring mechanisms for the prevention of torture.

35. The Department notes Mr Francuziak’s representations regarding treatment of convicted sex offenders in Polish prisons … together with international reports, such as the United States Department of State’s 2011 and 2012 Human Rights Country Reports on Poland and Amnesty International’s 2012 Report on Poland, which point to instances of ill-treatment of inmates by police officers and prison guards.

36. **While acknowledging the seriousness of this issue, the totality of the information before the Department indicates that such treatment is limited to a minority of law enforcement officials in some Polish prisons**. The Department understands that Polish law prohibits such practices and outlines disciplinary actions for breaches of the law. The material before the Department indicates that Polish authorities have taken active steps to investigate prisoner complaints of ill-treatment and to discipline the officials involved.

37. The Department notes the avenues open for prisoners to file complaints of ill-treatment, including with the human rights ombudsman who independently monitors prison conditions on a regular basis, as well as Poland’s Ministry of Justice. Regard may also be had to the fact that Poland is a party to the ECHR and OPCAT and is subject to review by the CPT and SPT. As a party to OPCAT, Poland is required to have in place a national prevention mechanism for the prevention of torture, which is undertaken by the Office of the Commissioner for Civil Rights Protection.

38. **Neither Mr Francuziak’s representations nor other information considered by the Department indicates that Polish government authorities engage in institutionalised conduct for the purposes of punishment, intimidation or coercion or that Mr Francuziak would personally face a ‘real chance’, XXXXXXX or ‘more likely than not’ risk of being subjected to such treatment in Poland**. The information before the Department indicates that Poland has legislated to ensure that persons are detained in adequate conditions. While the Department acknowledges reports of overcrowding, limited access to healthcare and prison violence in some Polish prisons and instances of ill-treatment of inmates by some prison officials, the Department has no information suggesting this is the result of deliberate Polish government policy designed to punish and harm inmates or Mr Francuziak personally. Accordingly, the Department considers it open to you to be satisfied that Mr Francuziak will not be subjected to torture of a kind that falls within the scope of CAT if he is surrendered to Poland.

(emphasis added)

1. Mr Francuziak stresses that the acknowledgment, as reflected in [36] of the Departmental Advice, of the occurrence of instances of ill-treatment of inmates by police officers and prison guards is demonstrative of the existence of a real chance of such misconduct eventuating (in contrast to, say, the 10% chance referred to by McHugh J in *Chan* (at 429])).
2. The proper question, Mr Francuziak submits, is whether, as a matter of fact (and particularly given the secondary evidence presented by him), there is a real chance of him being mistreated, either by, or with the condonation of, government officials. He argues that while the existence of practices and policies might serve to reduce the incidents of misconduct, the proper question is whether such misconduct occurs (or there is a real chance of it occurring) irrespective of government policy.
3. Mr Francuziak submits this was not the question that was ever raised for consideration by the Minister and there is no evidence that the Minister did have regard to that question. The content of [38] of the Departmental Advice, Mr Francuziak submits, raises the wrong question. According to Mr Francuziak, the question is not whether there is a government policy which has a certain result, but whether or not there is a real chance of Mr Francuziak being mistreated either by, or with the condonation of, government officials.
4. Moreover, Mr Francuziak argues that given his assertion of widespread misconduct of this character, supported by secondary material of such happenings, the failure by Poland to undertake that he would be protected from such misconduct is significant.
5. Mr Francuziak argues that the fact that such conduct occurs and is apparently condoned by public officials is sufficient to constitute torture, even if not specifically carried out by them. If the conduct is inflicted by or with the involvement of a public official, it is argued that is sufficient to satisfy the definition of torture for the purpose of the determination which was to be made by the Minister in respect of Mr Francuziak.

## Consideration of the ‘wrong test’ ground and argument

1. Section 22(3)(b) of the Act provides that a person may only be surrendered if:

the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; ...

1. The thrust of the argument for Mr Francuziak is that the Minister erroneously considered whether conditions in the prisons in Poland were the result of deliberate Polish government policy designed to punish and harm inmates or him personally, rather than the correct test, which was whether or not there is a real chance of Mr Francuziak being mistreated, either by, or with the condonation of, government officials.
2. Of course Mr Francuziak’s argument proceeds on the content of the Departmental Advice. In the absence of any evidence to the contrary, it may be inferred that the Departmental Advice is evidence of the matters the Minister took into account in making his or her decision (as distinct from necessarily constituting his or her personal reasons): see, as one of many examples, *O’Connor v Adamas* (2013) 210 FCR 364 per Barker J (at [248]-[250]).
3. The difficulty for Mr Francuziak in relation to this issue lies in the meaning of ‘torture’ as discussed in *de Bruyn*, both at first instance and on appeal. Although the term ‘torture’ is undefined in the Act, its meaning was considered by Dowsett J at first instance in *de Bruyn v Ellison*. His Honour discussed the dictionary definition of torture, the definition in CAT and in the *Crimes Torture Act 1988* (Cth) and made the following observations (at [15]-[16]) concerning circumstances said to apply to possible imprisonment in South Africa:

15 Mr de Bruyn’s case is that in the South African prison system, violence is often used by prisoners against fellow prisoners for coercive purposes and that this is sometimes connived at by prison officials. There is also a suggestion that from to time, prison officials encourage prisoners to offer violence to other prisoners for the purpose of reinforcing their own authority. Whilst such conduct might fall within the definitions to which I have referred, it seems most unlikely that it was the intention of the Parliament that the Attorney-General be satisfied that no such event will occur before making a decision as to extradition. Violence in prisons is not unknown; nor is corruption of prison officials. It is to be expected that violence will occur in that context and that it will sometimes be motivated by a desire to intimidate or coerce. **Paragraph 22(3)(b) of the Act is directed at institutionalised torture by government authorities, not at occasional and unpredictable violence occurring in prisons, even with the connivance of corrupt prison officers**.

16 In any event, the mere fact that incidents of that kind have previously occurred in the South African prison system does not mean that it is likely that Mr de Bruyn will suffer in that way. He has suggested that he might be subject to special attention because he is of Afrikaans extraction, well-educated, has left South Africa and because of his age. These are mere assertions which do not seem to be supported by any evidence. In any event, it cannot be said that the Minister addressed the wrong question or failed to address the issue. Nor can it be said that a proper consideration of the evidence must inevitably have led to his not being satisfied that Mr de Bruyn would not be subjected to torture. No relevant error has been demonstrated. (emphasis added)

1. The Full Court affirmed his Honour’s interpretation of s 22(3)(b) of the Act. Although the Full Court allowed the appeal on the ground that the Minister had apparently applied the wrong test in considering the applicant’s risk of contracting HIV/AIDS in a South African prison, Kiefel J (at [55]) (with whom Spender and Emmett JJ agreed) made the point that the conduct of inmates towards other inmates, even when some corrupt wardens ignore or even encourage that conduct, does not convert that conduct into institutionalised conduct so as to constitute torture for the purposes of the Act.
2. These matters were fully considered in the Departmental Advice which correctly identified the relevant principles. Moreover, the Department correctly articulated the ‘real chance’ test in considering whether there were substantial grounds for believing that Mr Francuziak would be in danger of being subjected to torture. The Departmental Advice said as follows (at [20]-[23]):

20. XXXXXX the Department notes that a recent decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 with respect to section 36(2)(aa)of the *Migration Act 1958* (which recognises Australia’s international obligations under the CAT and ICCPR) XXXXXXXXXXXXXXXXX.

21. In SZQRB, the Department of Immigration and Citizenship (DIAC) (now the Department of Immigration and Border Protection) completed an assessment which found that if SZQRB were removed to Afghanistan, Australia would not be in breach of its *non-refoulement* obligations under the CAT or the ICCPR. In completing this assessment, DIAC applied a threshold test which required that the impermissible conduct be ‘more likely than not’ XXXXXXXXXXXXXXXXXXXXXXXXXXXX as placing a heavier burden on the affected person.2 The Full Federal Court concluded that DIAC had applied the wrong legal test and the correct test was that of ‘real chance’, which reflects the test applicable in relation to the *Convention relating to the Status of Refugees 1951* and is less burdensome on the affected person than XXXXXXXXXXXXXX ‘more likely than not’ tests. The High Court has described the ‘real chance’ test in the following way:

*[A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. … an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be … persecuted. Obviously, a far-fetched possibility of persecution must be excluded.* [see *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429.]

22. In August 2013, the Australian Government filed an application with the High Court for special leave to appeal the decision of SZQRB. One ground of appeal was that the Full Federal Court erred in holding that the ‘real chance’ test is the correct test to apply in assessing Australia’s *non-refoulement* obligations under the CAT and ICCPR. In December 2013, the High Court refused the Government’s special leave application and, accordingly, the Full Federal Court’s decision stands.

23. We consider it appropriate in this case to apply the ‘real chance’ test, which is the lowest threshold and test most favourable to Mr Francuziak. As detailed below, the Department considers that, on any test, it is open to you to be satisfied that Mr Francuziak will not be subjected to torture of a kind that falls within the scope of CAT if he is surrendered to Poland.

1. Although Mr Francuziak submits that, on the facts supplied to the Minister, the Minister ought to have concluded that there was a real chance that Mr Francuziak would be mistreated, either by, or with the condonation of, government officials, he goes on to make the submission that the proper question is ‘whether such misconduct occurs (or is a real chance of occurring) **irrespective of government policy**’ (emphasis added).
2. I am unable to accept the contention that this is the test the Minister was required to consider. Imposing the test in this way is inconsistent with *de Bruyn v Minister for Justice & Customs* which provides that s 22(3)(b) of the Act is directed towards institutionalised torture by government authorities as distinct from occasional and unpredictable violence occurring in prisons, even with the connivance of corrupt prison officials. The Departmental Advice correctly and fairly summarised Mr Francuziak’s contentions, correctly identified the test to be applied under s 22(3)(b) of the Act and considered the proper question, which was whether there was evidence of institutionalised conduct constituting torture in Poland ((at [32]-[38]) extracted above (at [29])).
3. The Department did not err in suggesting that it was open for the Minister to be satisfied that Mr Francuziak would not be subjected to torture of the nature falling within the scope of the CAT were he surrendered to Poland. There is no reason to consider that the Minister asked the wrong question.
4. The first ground must therefore be dismissed.

## Ground 2 - Legal unreasonableness or irrationality

1. The second ground is directed to Art 3(4) of the Treaty.
2. Mr Francuziak does not suggest that in general terms the extensive discussion in [83]-[169] of the Departmental Advice was inappropriate. The analysis examined Mr Francuziak’s submissions concerning overcrowding, delays in consideration for parole, violence and other risks to personal safety, medical facilities and illness and disease. However, a point raised again by Mr Francuziak is that the discussion by the Department overlooked the failure of Poland to provide assurances that, despite the evidence provided by Mr Francuziak, he would not be, or there was no real chance that he would be, at risk of suffering from those consequences.
3. Mr Francuziak accepts that the Departmental Advice acknowledged that various reports pointed to instances of ill-treatment of inmates by police officers and prison guards. He points out, however, that no assurance had been given by Poland that it had eradicated such behaviour or that it could ensure that Mr Francuziak would not be incarcerated in an institution where such conduct had occurred.
4. In relation to the delay issue, Mr Francuziak submitted to the Minister that the Polish parole system operated so slowly that applications to be considered for parole could be pending for years. He asserted that if he was being considered for parole in Australia, he might now be expected to be released by reason of the circumstances discussed in [140] of the Departmental Advice, which was in these terms:

140. Mr Francuziak submits that, were he eligible for consideration for parole in Australia, he could expect that consideration would occur promptly, whereas the same cannot be said in relation to Poland. Mr Francuziak also submits that if he were considered for parole by Australian authorities his parole would be approved, on the account of:

* his change of character
* the unlikelihood of any further offending on his part (which is a consequence of that change of character)
* the overcrowding which remains rampant within the Polish prison system, and
* other inhumane features of imprisonment in Poland.

1. Mr Francuziak submitted that the time which he had spent in custody in Poland together with his time on remand in Australia constituted more than half of the length of the sentence to be served in Poland. He observed that eligibility to be considered for early conditional release accrues in Poland after serving half the sentence. The Department Advice suggested that those matters did not constitute a sufficiently compelling basis to consider that his extradition would be totally incompatible with humanitarian considerations because of exceptional circumstances. The following was expressed (at [145]):

145. The Department considers that Mr Francuziak’s representations about delay in consideration for parole in Poland, and his assertion that he would be granted parole in Australia due in part to features of the Polish prison system, do not provide a sufficiently compelling basis for you to find that his extradition would be totally incompatible with humanitarian considerations because of exceptional circumstances.

1. In reaching that conclusion, Mr Francuziak says that the Department relied upon ‘the absence of information in [human rights reports on Poland published by the US Dept of State, Amnesty and the CPT] with respect to parole consideration delays’ and dismissed Mr Francuziak’s reliance on an instance where an applicant who had served 11 years of a 15 year imprisonment sentence had his parole application pending for more than three years.
2. Mr Francuziak’s primary submission is that rather than speculating on what might occur, having regard to the obligation in Art 3(4) of the Treaty, Poland’s assurances should have been sought and obtained, especially having regard to the fact that he has been in custody at Hakea Prison in Western Australia since 9 October 2010 on his arrest pursuant to the extradition warrant. Mr Francuziak points out that despite the fact that he has been in custody in Australia for over four years, Poland has not indicated whether that time will be taken into account in determining whether to consider an application for early conditional release or in determining whether such an application should be granted.
3. Finally, in relation to the changes in Mr Francuziak’s circumstances, the position on that topic was summarised in the Departmental Advice (at [76]-[82] and [196]) as follows:

76. Through his legal representatives, Mr Francuziak submits that when considering the humanitarian article of the treaty you should consider the change in his circumstances following his arrival in Australia, including and resulting in his patent rehabilitation and change of character. Mr Francuziak also provides information about his circumstances prior to his departure from Poland. The Department understands that it is Mr Francuziak’s wish that all this information be considered with reference to this treaty ground.

77. Mr Francuziak advises that, during the six and a half years between the time of his arrest and the determination of his appeal from conviction, there were ‘substantial changes’ in his circumstances. It is stated that, ‘soon after he was charged, Mr Francuziak ‘started over’. In support of this statement, Mr Francuziak’s representations refer to the fact that he started a new business and ‘did not resume contact with his former *de facto* partner and her daughter’ (the victim).

78. After his departure from Poland, Mr Francuziak arrived in Perth in April 2006, where he studied English for a year and a half, and worked part-time as a pastry cook in a Polish cake shop. In 2007 he commenced work full-time as a pastry cook for one of the largest pastry businesses in Perth. The representations state that Mr Francuziak is now a qualified pastry chef and before his extradition arrest, he had secure employment. Mr Francuziak notes that he has been in a steady relationship with [an individual] ‘for some time’ and was living with [the individual] and her two children prior to his ‘incarceration’.

79. Mr Francuziak also notes that he has lived openly in Australia since his arrival and has left behind his old life in Poland, where there is nothing for him ‘except the gloomy prospect of imprisonment within a chronically inhumane system, which continues to fall short of appropriate standards even though the alarm bells have been ringing for many years.’ He states that the extradition offence is his only conviction, he has lived in Australia openly for more than 7 years and ‘there is nothing to indicate any further transgressions with the law.’

*Departmental comment*

80. The Department has considered Mr Francuziak’s representations about changes in his personal circumstances, both prior to his departure from Poland and since his arrival in Australia.

81. While Mr Francuziak may have made efforts to distance himself from his previous life, and may consider himself rehabilitated, the fact that a person has established a new lifestyle and has not since reoffended is not exceptional. The Department also notes that it is a normal consequence of a person being taken into extradition custody and being subject to extradition proceedings that they may lose their employment and that any relationships they have formed in the surrendering country may be affected.

82. The Department does not consider that the changes to Mr Francuziak’s circumstances constitute exceptional circumstances, such as would render his extradition totally incompatible with humanitarian considerations.

…

196. Mr Francuziak’s representations about his change of circumstances are at paragraphs 76 to 79. The Department also refers to its comments on Mr Francuziak’s representations at paragraphs 80 to 82. For the Department’s reasons set out in those paragraphs, together with Australia’s obligations to extradite under the Treaty and Poland’s legitimate law enforcement interest in seeking Mr Francuziak’s return, the Department does not consider that any change in circumstance put forward by Mr Francuziak warrants the exercise of your general discretion to refuse his surrender to Poland.

1. Mr Francuziak again points correctly to the fact that the materials that were provided to the Minister indicated that:
   1. his relationship with his former de facto soured following, or by reason of, the allegations made against him;
   2. he left Poland in April 2006;
   3. his life in Poland is at an end; and
   4. he has started a new life in Australia and had become an Australian citizen.
2. Mr Francuziak again stresses that despite having spent more than four years in custody in Australia, there remains a prospect that he will serve up to six and a half years in custody in Poland before being released. A matter of common experience would be that if this occurred, his personal relationships in Australia would be destroyed, which would leave him with little prospect of resuming his life in Australia. Mr Francuziak submits that:

Whilst this factor, in and of itself, might not alone justify the exercise of the discretion not to order the extradition of [Mr Francuziak], when considered in light of the other matters discussed above, … this aspect warranted the exercise of the discretion that it was unreasonable, in the ***Wednesbury*** sense, for [the Minister] not to have so determined.

## Consideration of the legal unreasonableness ground

1. As may be apparent from the summary of the submissions in support of the second ground, the unreasonableness argument appears to be based upon several disparate factors which, when taken together, must result in it being unreasonable, in the legal sense, for the Minister not to conclude per Art 3(4) of the Treaty that extradition would be totally incompatible with humanitarian considerations.
2. The most recent detailed examination of legal unreasonableness by the High Court was in the decision of *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, one of a small number of cases where a decision has been invalidated on the sole ground of unreasonableness. In *Li*, the High Court unanimously found that the Migration Tribunal's refusal to permit an adjournment and to rely upon an outdated skills assessment, knowing that it was to be corrected, had an arbitrariness about it which rendered adjournment referral decision unreasonable in the relevant sense.
3. In *Li*, French CJ (at [30]) made clear that *Wednesbury* unreasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is traditionally open to the decision-maker. Rather, his Honour said (at [28]) (footnotes omitted):

Beyond unreasonableness expressive of particular error however, it is possible to say, as Lord Greene MR said, that although a decision-maker has kept within the four corners of the matters it ought to consider "they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it." In such a case the court may interfere. That limiting case can be derived from the framework of rationality imposed by the statute. As explained by Lord Greene MR, it reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision. After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

1. In *Li*, the High Court did not consider *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 to be the first or only decision to import standards of reasonableness. The plurality (Hayne, Kiefel and Bell JJ) emphasised (at [76]) that unreasonableness was not confined to an irrational or bizarre decision, or one so unreasonable that no sensible decision-maker would have made it, but rather, a decision would be vitiated by legal unreasonableness where it ‘lacks an evident and intelligible justification’.
2. It has been recognised in *Wednesbury* and in numerous subsequent cases that legal unreasonableness is not an avenue by which the Court may substitute its own view of the correct decision to that of the decision-maker. In *Wednesbury*, Lord Green MR had indicated (at [230]) that something ‘overwhelming’ would be needed to demonstrate legal unreasonableness.
3. *Li* makes clear that reasonableness is an essential element of administrative decision-making and is implied as a statutory condition on the exercise of discretionary power. French CJ described it (at [26]-[28]) as a ‘framework of rationality’ premised on an implication that ‘parliament never intended to authorise’ a decision attended by legal unreasonableness. Thus in Australia, legal reasonableness in administrative decision-making is a statutory presumption which can be modified or abrogated by clear statutory language: see the discussion in *Minister for Immigration and Border Protection v Singh* (2014)308 ALR 280 per Allsop CJ, Robertson and Mortimer JJ, which provides (at [43]) (footnotes omitted):

The conditioning of a power such as the one in s 363(1)(b) of the Act with a requirement of reasonableness occurs because of an implication concerning parliamentary intention in the conferral of such a power. There is, as the High Court said in *Li…*, a presumption of law that Parliament intends an exercise of power to be reasonable. There is an analogy with the implication that Parliament intends an exercise of power to be conditioned by an obligation to afford procedural fairness... Subject to any impinging Constitutional consideration, the presence of a clear statutory qualification or contrary intention may be capable of modifying or excluding either implication.

1. The scope and purpose of the statute conferring the discretion will need to be regarded in examining the justifications for a decision: *Li* per Hayne, Kiefel and Bell JJ (at [67]-[74]).
2. In the present case the question might adequately be posed by asking whether the Minister’s decision to surrender Mr Francuziak, notwithstanding the content of his submissions and having regard to the Art 3(4) obligation, was a decision ‘lacking an evident and intelligible justification’ (a test posed by the plurality in *Li*), having regard to the tasks to be performed in discharging the duty under s 22 and the purpose of the Act.
3. The object of the statute is expressed in s 3 of the Act, which provides:

The principal objects of this Act are:

(a) to codify the law relating to the extradition of persons from Australia to extradition countries and New Zealand and, in particular, to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence;

(b) to facilitate the making of requests for extradition by Australia to other countries; and

(c) to enable Australia to carry out its obligations under extradition treaties.

1. It is also necessary in considering the argument as to legal unreasonableness, to examine what the legislature has said about the matters that must be considered before arriving at the impugned decision. I have already set out above (at [7]) the matters prescribed by s 22(3)(a)-(e) of the Act. These are the considerations the Minister or the Attorney-General must take into account in performing the duty to determine whether an eligible person should be surrendered.
2. Mr Francuziak’s argument focusses on Art 3(4) of the Treaty. Article 3(4) of the Treaty is only enlivened where Australia forms the view that extradition in light of an applicant’s exceptional circumstances would be totally incompatible with humanitarian considerations. The Minister had before him arguments from Mr Francuziak as to why this was so, as well as the Departmental Advice. I have referred to Mr Francuziak’s submission. The Departmental Advice read as follows (at [178]-[179]):

178. In conclusion, in relation to the requirement under Article 3(4) of the Treaty for Australia to consult with Poland to determine whether extradition should continue in a case where extradition would be totally incompatible with humanitarian considerations because of exceptional circumstances, the Department considers that, taken singly or collectively, the following reasons:

* the passage of time between the commission of the extradition offence and the presentation of Poland’s extradition request
* the change in Mr Francuziak’s personal circumstances following his arrival in Australia, as well as his changed character and patent rehabilitation
* Mr Francuziak’s assertions about the existence of overcrowding or the possibility that Mr Francuziak may be detained in less than 3m2 per person
* the asserted delays in consideration for parole
* Mr Francuziak’s representations about the incidence of violence and other risks to personal safety
* Mr Francuziak’s assertions about widespread illness and disease in the Polish prison system or the inadequacy of medical facilities or health care in the Polish prison system
* Mr Francuziak’s representations that his investigation and prosecution in Poland were not properly conducted and that his arrest was connected to the breakdown of his personal and business relationship with his former de facto partner, or
* Mr Francuziak’s representations that he is innocent and has not been charged or convicted of any other offence

**do not constitute exceptional circumstances which would render Mr Francuziak’s extradition to Poland totally incompatible with humanitarian considerations**.

179. Accordingly, the Department is of the view that **the requirement to mutually consult is not engaged in this case**. (emphasis added)

1. Mr Francuziak’s submissions were fairly before the Minister. There was also detailed consideration as to why it was open to the Minister to be satisfied that Mr Francuziak’s circumstances were not exceptional in the Art 3(4) sense and his circumstances were not incompatible with humanitarian considerations. If the Minister were of that view, the obligation to mutually consult would not arise at all. It is a reasonable inference, having regard to the detailed consideration in the Departmental Advice that, although Mr Francuziak’s submissions were brought to the Minister’s attention, it did not appear to Australia that the total incompatibility referred to in Art 3(4) of the Treaty was established. In those circumstances there is no obligation whatsoever for Australia to seek, or for Poland to give, the assurances identified by Mr Francuziak in his submissions. Even mutual consultation, if it does occur, does not dictate an obligation to give assurances and undertakings.
2. As to the contentions concerning Mr Francuziak’s change in circumstances, the position is the same. There is nothing raised in the matters cited, taken alone or considered together with the other matters drawn to the Minister’s attention, that are ‘exceptional’. On their face they are quite unexceptional. They would not require any assurances to be given by Poland or, more importantly, render the decision to surrender Mr Francuziak unreasonable in the *Wednesbury* sense, having regard to Art 3(4) of the Treaty and the objects of the Act.
3. In relation to Mr Francuziak’s submissions as to assurances regarding time in custody, the extradition process conducted in Australia pursuant to the Act is an administrative function in accordance with the legislative requirements as modified by the Treaty. It involves no consideration or determination of guilt or innocence and, therefore, no occasion to take into account considerations which might ordinarily apply, in this instance, in Poland in considering whether or not and, if so, to what extent, credit should be given for time already spent in custody under the administrative process in Australia.
4. Having regard to the content, purpose and policy of the Act, including s 22 and the Treaty, it cannot be said that the apparent decision of the Minister that extradition would not be totally incompatible with humanitarian considerations was a decision ‘which lacked an evident and intelligible justification’.

# CONCLUSION

1. There is little doubt that Mr Francuziak disagrees with the conclusion reached by the Minister, but that disagreement does not take him out of the realm of a merits review and into jurisdictional error.
2. For the foregoing reasons, the application must be refused. The following orders are made:
3. The application be dismissed.
4. The Applicant do pay the costs of the Respondent, to be taxed if not agreed.

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| --- |
| I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 15 May 2015