CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/20

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Applicant

and

LEE NIGEL TUCKER Respondent

Neutral citation:	*Director of Public Prosecutions, Western Cape v Tucker* [2021] ZACC 25
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Mathopo AJ (first judgment): [1] to [61] Theron J (second judgment): [62] to [118] Jafta J (third judgment): [119] to [135]
Heard on:	3 November 2020
Decided on:	6 September 2021
Summary:	Section 10 of the Extradition Act 67 of 1962 — magistrate's powers — extradition enquiry Leave to appeal dismissed — magistrate is entitled to receive evidence relating solely to Minister's order in terms of section 11 of the Extradition Act

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. The application for condonation is granted.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

MATHOPO AJ (Mogoeng CJ concurring):

[1] In 1997, a group of adult males who had allegedly been sexually exploiting vulnerable boys in Bristol, Cardiff, Swansea and Caerphilly in the United Kingdom, were reported to the Avon and Somerset Police Force. A major investigation into the allegations was conducted, which culminated in the conviction of ten men in 1999 for serious sexual offences committed against adolescent boys. In October and November 1999, two victims laid complaints of sexual abuse against Mr Lee Nigel Tucker and two others. As a result, Mr Tucker was arrested and charged with sexual offences on 24 November 1999.

[2] On 19 September 2000, Mr Tucker was tried at Swindon Crown Court, together with his co-accused. Mr Tucker was present at the trial up until the last day at which point he absconded to South Africa. On 2 October 2000, a warrant for his arrest was issued by the trial Judge. Mr Tucker was convicted, *in absentia* (in his absence), of nine charges and sentenced to a total of eight years' imprisonment on 4 October 2000. Despite being on the run, Mr Tucker was able to instruct his legal representatives to

appeal his conviction. His appeal was successful. On 29 May 2002, the United Kingdom's Court of Appeal quashed the conviction and ordered a re-trial.

[3] Mr Tucker was indicted on 11 July 2002 on the original eight offences, with one charge having been dropped for purposes of his re-trial. The re-trial was meant to take place at Bristol Crown Court. However, Mr Tucker did not attend his re-trial and a warrant of arrest was issued by the Bristol Crown Court on 19 July 2002.

[4] While Mr Tucker remained on the run, further investigations were conducted into his offences. These investigations revealed additional evidence of abuse with more victims coming forward. All eight of the complainants had been between the ages of 12 and 15 years when the sexual offences were allegedly committed against them. The commission of the sexual offences allegedly often took place at a lodging house which was run by Mr Tucker. It was also discovered by the police that Mr Tucker and his co-accused ran a homosexual pornographic film company which used young boys as subjects. Mr Tucker also allegedly prostituted some of the complainants.

[5] In terms of a new warrant at first instance issued by the North Avon Magistrates' Court on 26 February 2016, Mr Tucker was charged with a total of 42 sexual offences committed against eight complainants between 1983 and 1993. A fresh warrant for Mr Tucker's arrest was issued on 31 March 2016 by the Bristol Crown Court.

[6] Upon learning of his whereabouts in South Africa, 16 years after his disappearance, the United Kingdom made a request for Mr Tucker's provisional arrest by the South African authorities. On 4 March 2016, the Pretoria Magistrates' Court issued a warrant for Mr Tucker's arrest under section 5(1)(b) of the Extradition Act.[1] Mr Tucker was subsequently provisionally arrested on 18 March 2016 in Cape Town.

[1] 67 of 1962.

[7] On 19 April 2016, South Africa received a request from the United Kingdom for Mr Tucker's extradition, which was followed by the requisite certificate issued in terms of section 10(2) of the Extradition Act, on 23 June 2016. According to the extradition request, he was charged with buggery against minor boys and other persons; indecent assault and acts of gross indecency against minor boys and majors; and living on the earnings of prostitution and conspiracy to live on the earnings of prostitution in terms of the United Kingdom's respective Sexual Offences Acts.[2]

Litigation history

Proceedings before the Magistrates' Court

[8] Subsequent to Mr Tucker's arrest, he appeared before the Cape District Magistrates' Court on 13 October 2017, for an enquiry in terms of section 9 of the Extradition Act, and for a determination in terms of section 10(1) on his liability to be surrendered to the United Kingdom and his committal to prison awaiting the decision to surrender by the Minister of Justice and Correctional Services.

[9] Before the Magistrates' Court, the Director of Public Prosecutions, Western Cape (DPP) submitted that both jurisdictional facts in section 10(1) of the Extradition Act had been established to warrant Mr Tucker's committal to prison.

[2] Sexual Offences Act 1956 (1956 Act) and Sexual Offences Act 1967 (1967 Act). The relevant sections of these Acts have been repealed by the Sexual Offences Act 2003. However, these offences were committed between 1983 and 1993, and are subject to the law as it was then. The charges against Mr Tucker were in terms of sections 12(1), 13 and 15(1) of the 1956 Act, and section 5(1) of the 1967 Act. The charges in the extradition request were equivalent to the following offences in South Africa, in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:

(a) Rape of a minor boy per *anum*.

(b) Sexual assault.

(c) Compelled sexual assault, consisting of masturbating an underage boy.

(d) Sexual exploitation and sexual grooming of children; and using children for or benefiting from child pornography.

In our law, these offences attract varying terms of imprisonment ranging from life imprisonment to lengthy terms of imprisonment.

[10] Section 10(1) of the Extradition Act provides for both convicted and accused persons. It requires an enquiry into whether a person is liable to be surrendered to a foreign State and committed to prison pending the Minister's final decision to surrender.[3] In this enquiry, referred to as committal proceedings, a magistrate is required to determine whether the following two jurisdictional facts have been established when committing an accused person to prison:

(a) The person is a person liable for extradition; and

(b) There is sufficient evidence to warrant that person's prosecution in the foreign State.[4] However, this jurisdictional fact need not be established in the case of a person already having been convicted of an offence.

[11] Mr Tucker accepted that the second jurisdictional fact had been established through the issuance of the section 10(2) certificate – the authenticity of which he did not challenge. However, he did challenge the establishment of the first jurisdictional fact on three grounds. I now proceed to deal with them in turn. The first ground, Mr Tucker submitted, was that he could not be charged with the offences contained in the extradition request, as section 7(2) of the United Kingdom's Criminal Appeal Act[5] prohibited the re-trial of offences for which the accused was not convicted at the original trial.

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[3] Section 10(1) of the Extradition Act reads:

> "If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the Magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the Magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court."

The United Kingdom is a foreign non-associated state for the purposes of section 9(4)(a) of the Extradition Act, section 10 of the Extradition Act applies.

[4] See *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (1) SACR 404 (CC); 2004 (9) BCLR 895 (CC) at para 36.

[5] 1968.

[12] In respect of the second ground, Mr Tucker submitted that he could not be extradited to face punishment which was inconsistent with the Constitution. On this point, he submitted that his right to equality would be infringed should he be made to stand trial in the United Kingdom, as he would be discriminated against on the basis of sexual orientation. His claim was based on allegedly discriminatory criminal laws in respect of heterosexual and homosexual sexual offences.

[13] The third ground was based on a contention that he would not receive a fair trial because of the negative media attention that his case had attracted in the United Kingdom. The United Kingdom's criminal justice system is based on a jury system and, for that reason, Mr Tucker submitted that such negative publicity would influence the pool of laypersons from which the jury would be drawn, and consequently infringe on his right to a fair trial.

[14] By making these submissions, Mr Tucker was requesting the Magistrate to permit him to put forward evidence for the Magistrate to include in his section 10(4) report to the Minister. The evidence which Mr Tucker sought to adduce did not relate to the section 10 enquiry, but was relevant to the Minister's considerations in terms of section 11 of the Extradition Act. As a result, the Magistrate refused the request.

[15] On 10 November 2017, the Magistrate found that the evidence placed before him by the DPP complied with section 9(3) of the Extradition Act; that Mr Tucker was a person liable to be surrendered to the United Kingdom; and that there was sufficient evidence to confirm that Mr Tucker had committed extraditable offences in the United Kingdom. The Court therefore made an order committing Mr Tucker to prison awaiting the Minister's decision to surrender him to the United Kingdom. Mr Tucker was to be detained at Pollsmoor Prison pending extradition.

Proceedings before the High Court

[16] Aggrieved by the decision of the Magistrate, Mr Tucker applied to the High Court of South Africa, Western Cape Division, Cape Town to both appeal and

review the Magistrates' Court judgment. He contended that the Magistrate improperly admitted hearsay evidence during the section 10 proceedings, and that the United Kingdom was not entitled to request his extradition on fresh charges of sexual assault. Principally, he argued that the Magistrate should have admitted the evidence relating to trial fairness in the United Kingdom.

[17] In essence, Mr Tucker contended that the Magistrate's refusal to allow him to adduce expert evidence on British criminal law – that it discriminated unfairly against homosexuals – as well as furnish the Court with extracts of media reports showing what he had been subjected to, infringed his right to a fair trial. Relying on *Geuking*[6] and *Garrido*,[7] Mr Tucker submitted that the Magistrate was obliged to permit him to give and adduce evidence at the enquiry which would have a bearing, not only on the Magistrate's decision under section 10, but on the discretion exercised by the Minister in terms of section 11 of the Extradition Act.

[18] Mr Tucker did not take issue with the fact that the final determination rested with the Minister, but urged the High Court to review and set aside the proceedings before the Magistrates' Court on the grounds that they were manifestly and grossly irregular, and in breach of his constitutional rights.

[19] Relying on the Supreme Court of Appeal's decision in *Garrido*, the High Court held that the Magistrate was obliged to receive any evidence that could have a bearing on the exercise of the Minister's decision to extradite. The Magistrate's failure to do so, the Court found, constituted an irregularity in that it breached Mr Tucker's procedural rights and the *audi alteram partem* principle (to listen to the other side).[8]

[6] *Geuking* above n 4.

[7] *Garrido v Director of Public Prosecutions, Witwatersrand Local Division* [2006] ZASCA 169; 2007 (1) SACR 1 (SCA).

[8] *S v Tucker* 2019 (2) SACR 166 (WCC) (High Court judgment) at para 75.

[20] In respect of the Magistrate's refusal to consider evidence pertaining to the alleged potential infringement of Mr Tucker's fair trial rights, the High Court held that the Magistrate was correct to do so. However, when considering the decision of this Court in *Robinson II*,[9] the High Court went further and disagreed with this Court's relegation of the magistrate's role to that of a "mere scribe and record compiler".[10] The High Court held that inasmuch as the magistrate's function in an extradition enquiry was to determine whether the person was liable to be surrendered, that was primarily a legal question – the answer to which rested on a consideration of the relevant provisions of the law.[11] The High Court therefore held that the Magistrate could not refuse to accept any evidence which Mr Tucker wished to tender, even though the Magistrate would be unable to pronounce on it.

[21] With regard to the alleged irregularities of the proceedings before the Magistrate, the Court disagreed with Mr Tucker and held that it could not be said that the irregularities were of such a nature as to vitiate the proceedings. Despite its interpretation of *Robinson II* and *Garrido*, it dismissed Mr Tucker's appeal, and confirmed the order of the Magistrates' Court. However, in line with its aforesaid interpretation, the High Court ordered the re-opening of the proceedings of the extradition enquiry to allow Mr Tucker the opportunity to put before the Magistrate an affidavit by an expert on the United Kingdom's laws; and any documentary evidence pertaining to the unfair media coverage. The purpose was that the Magistrate include such evidence in his report to the Minister in terms of section 10(4) of the Extradition Act.

[22] Dissatisfied with the decision, Mr Tucker applied for special leave to appeal to the Supreme Court of Appeal. His application was dismissed. He subsequently petitioned the President of the Supreme Court of Appeal, and his petition was also

[9] *Director of Public Prosecutions, Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC) (*Robinson II*).

[10] High Court judgment above n 8 at para 47.

[11] Id at para 46.

dismissed. The DPP had simultaneously sought leave to appeal paragraph 3 of the High Court's order which provided for the re-opening of the extradition proceedings to allow Mr Tucker the opportunity to file evidence for purposes of the section 10(4) report to the Minister. This application was also refused.

[23] Mr Tucker intimated to the DPP that he would appeal to this Court, however, he took no steps in this regard. The DPP relied on Mr Tucker to bring the application for leave to appeal, and when he did not, the DPP proceeded to lodge an application with this Court. The appeal was accompanied by an application for the condonation of its late filing. It is paragraph 3 of the High Court's order relating to the re-opening of the extradition proceedings that the DPP seeks to appeal before us.

In this Court

DPP's submissions

[24] The DPP submitted that the central question in this appeal is whether the constitutional or fair trial rights of a person potentially liable to be surrendered may be considered by a magistrate conducting an enquiry in terms of section 10, or whether that may only be considered for the first time by the Minister. The DPP therefore submitted that the appeal raised an important constitutional issue impacting on fundamental rights, and that certainty is required in respect of the ambit of a magistrate's power in an extradition enquiry.

[25] The DPP submitted that *Geuking*, *Garrido* and *Robinson II* may be read harmoniously, as *Geuking* and *Garrido* did not give the sought person *carte blanche* to give and adduce evidence which had no bearing on the section 10 enquiry. On the other hand, although *Robinson II* was silent on the question of adducing evidence at a section 10 enquiry, it was clear that evidence relating to fair trial rights was not relevant to such an enquiry.

[26] *Geuking*, which was a challenge against the constitutionality of section 10(2) of the Extradition Act, and the certificate that it provided for, held the following:

> "In considering the constitutionality of section 10(2) [of the Extradition Act] it must be borne in mind that:
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> . . .
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> (e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the Magistrate's decision under section 10, but *could have a bearing* on the exercise by the Minister of the discretion under section 11."[12]

[27] The DPP submitted that a contextual reading of the judgment revealed that what was meant by the Court is that there should be no limitation placed on the evidence to be adduced in relation to a section 10(2) certificate, albeit that the challenge and evidence might also relate to aspects of the certificate which were unassailable before a magistrate, and which would only become relevant to the Minister's decision in terms of section 11. In such an instance, the leading of evidence relating to section 11 would be admissible, as long as the purpose for which it was being led related to the section 10 enquiry, and the establishment of the two jurisdictional facts. That was what was meant by the Court having held that a person was entitled to give and adduce evidence which "*could* have a bearing on the exercise by the Minister of the discretion under section 11", so the DPP submitted.

[28] In a similar fashion, the DPP submitted that the High Court's understanding and application of *Garrido* was incorrect. In *Garrido*, the good faith of the "appropriate authority in the requesting State", in respect of the certificate issued in terms of section 10(2) of the Extradition Act, was being challenged. Therefore, the argument continued, *Garrido* was distinguishable from the current case, as it concerned the establishment of the second jurisdictional fact in section 10(1), and not the first as in this case. The Supreme Court of Appeal in *Garrido* held:

[12] *Geuking* above n 4 at para 42(e).

> "The Magistrate's power to make such report to the Minister as he or she may deem necessary is clearly designed to enable him or her to give assistance to the Minister in regard to the matters on which the Minister has to exercise a discretion under section 11. That being so, it is clearly appropriate that the person whose surrender to the foreign State making the request is sought should be entitled to place material before the Magistrate holding the enquiry in the hope of persuading the Magistrate to include material in a report to be submitted to the Minister which may induce the Minister to order that the person concerned not be surrendered on one or other of the grounds set forth in section 11(b)."[13]

The DPP submitted that the above paragraph should not be dislodged from the facts of that particular case, and should be read in context.

[29] The DPP also proceeded to highlight the practical implications of accepting evidence that was not relevant to the section 10 enquiry. In doing so, the DPP questioned the role of the magistrate in such an instance where he or she would be unable to make pronouncements on fair trial rights in a foreign jurisdiction and where the DPP would be unable to challenge such evidence. In argument, the DPP suggested that it would be the equivalent of having the magistrate turn on a recorder and switch it off again once the evidence had been adduced. The DPP stressed that this would have the effect of overburdening the record of proceedings, which would have the opposite effect of assisting the Minister in coming to his decision. It was further submitted that Mr Tucker would have the opportunity to make written representations to the Minister subsequent to the section 10 enquiry. It was contended by the DPP, in conclusion, that oral evidence was only adduced before a magistrate in instances where such evidence could be challenged and findings on the credibility of such evidence could be made, which could not be done in the case of evidence relating to section 11 of the Extradition Act.

[13] *Garrido* above n 7 at para 25.

Mr Tucker's submissions

[30] Mr Tucker submitted that this application raised three issues, namely:

(a) whether a magistrate was obliged to admit evidence relating to a final decision to extradite;

(b) whether the High Court was permitted to uphold the Magistrates' Court's committal order, and simultaneously order the re-opening of proceedings to allow him to adduce further evidence; and

(c) what would be considered a just and equitable remedy in the circumstances?

[31] Mr Tucker contended that *Geuking* and *Garrido* authoritatively stated that a magistrate holding a section 10 extradition enquiry was under a duty to admit evidence relating to the Minister's final decision to surrender in terms of section 11. He placed emphasis on *Geuking*, where it was held that the person concerned was entitled to give and adduce evidence relating to surrender at the section 10 enquiry.[14] He further submitted that *Garrido* found that, because section 9(2) of the Extradition Act required section 10 enquiries to proceed in a manner in which a preparatory examination was to be held, a person potentially liable to be surrendered had the right to lead evidence with respect to charges put to him by the foreign State. Mr Tucker also submitted that *Garrido* held that the aim of the extradition enquiry, and the magistrate's subsequent section 10(4) report, was to include material to convince the Minister to make an order not to surrender the person sought. In argument, it was further submitted that it would ease the process for the Minister to receive a section 10(4) report containing evidence relating to his section 11 decision, as opposed to a dossier filled with representations.

[32] Mr Tucker submitted further that the DPP's reliance on *Robinson II* was incorrect, as that matter was concerned with whether a magistrate could decline to commit a person to prison awaiting the final decision of the Minister for reasons relating

[14] *Geuking* above n 4 at para 42(e).

to the person's fair trial rights in the foreign State. Mr Tucker submitted that this Court in *Robinson II* did not pronounce on whether or not evidence could be led at a section 10 enquiry, which was relevant to the Minister's final decision to surrender. Additionally, it did not hold that a magistrate was precluded from admitting evidence relating to a final decision to surrender. This Court only held that a magistrate should not discharge a person liable to be surrendered for reasons envisaged in section 11. Therefore, Mr Tucker concluded, *Robinson II* and *Geuking* were compatible.

[33] With respect to the High Court's order confirming his committal, but re-opening the extradition proceedings nonetheless, Mr Tucker submitted that the Magistrate had no power to consider further evidence once a committal was made, because the leading of evidence had to occur in the proceedings of the section 10 enquiry. There could be no additional, separate or self-standing hearing. Section 9(1) also envisaged a single enquiry, which was confirmed by section 9(2). Finding otherwise would mean that magistrates have undefined discretion to preside over proceedings for purposes of producing a section 10(4) report.

[34] Finally, Mr Tucker submitted that the order sought by the DPP could be granted only because the Magistrate was not empowered to hear further evidence when a valid order committing him to prison existed. In respect of the issue of a just and equitable remedy, Mr Tucker submitted that he had a right to adduce evidence and advance arguments to the Minister in relation to his final decision to surrender him. Mr Tucker also had the option of taking the Minister's decision on judicial review if he was not satisfied with the outcome.

Jurisdiction and leave to appeal

[35] Extradition proceedings by their very nature implicate the sought person's rights in the Bill of Rights. This matter concerns the proper interpretation and application of

section 10 of the Extradition Act which raises a constitutional issue as it implicates sections 12 and 35 of the Constitution.[15] Thus, it engages this Court's jurisdiction.

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[15] Id at para 1. Section 12 of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
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> (d) not to be tortured in any way; and
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> (e) not to be treated or punished in a cruel, inhuman or degrading way.
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> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

Section 35 of the Constitution states the following:

> "(1) Everyone who is arrested for allegedly committing an offence has the right—
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> (a) to remain silent;
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> (b) to be informed promptly—
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> (i) of the right to remain silent; and
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> (ii) of the consequences of not remaining silent;
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> (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
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> (d) to be brought before a court as soon as reasonably possible, but not later than—
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> (i) 48 hours after the arrest; or
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> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
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> (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
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> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
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> (2) Everyone who is detained, including every sentenced prisoner, has the right—
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> (a) to be informed promptly of the reason for being detained;
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> (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
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> (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[36] Furthermore, the question whether the magistrate can receive evidence relating to the sought person's fair trial rights in the foreign State raises an arguable point of law

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(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

of general public importance which ought to be considered by this Court. This matter arises as a result of the decision of the High Court, which seems to be at odds with decisions of this Court in *Geuking* and *Robinson II*. A final decision of this Court is necessary to resolve the confusion concerning the ambit of the powers of the magistrate in extradition enquiries. The order of the High Court has also created practical delays in extradition proceedings which will frustrate the prompt and predictable resolution of committal proceedings. This necessitates this Court's intervention and the pressing need that the decision be given as soon as possible. Thus, it is in the interests of justice that leave to appeal is granted.

Issues for determination

[37] This Court is required to determine whether the High Court was entitled to order that the committal proceedings in the Magistrates' Court be re-opened to allow Mr Tucker to adduce further evidence despite having dismissed both the appeal and review against his committal order.

[38] Central to this issue is determining whether a magistrate is required to accept evidence in a section 10 enquiry, which is relevant only to the decision to surrender taken by the Minister in terms of section 11 of the Extradition Act.

Analysis

Legal framework for extradition

[39] Extradition proceedings are a three-phase process which entail:

(a) an administrative phase initiated by the receipt of the extradition request by South Africa and the arrest of the person sought;

(b) a judicial phase which requires the holding of an enquiry by a magistrate to determine whether the person sought should be committed to prison or discharged; and

(c) an executive phase, which concerns the decision by the Minister on whether to order the surrender of the person sought.

[40] This Court in *Harksen* neatly set out the process to be followed in extradition proceedings, from arrest to surrender, as follows:

> "[B]efore the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the [Extradition] Act must be completed. This includes the arrest of the person under section 5(1), the holding of an enquiry under section 9(1), and a finding by a Magistrate under section 10 that the evidence is sufficient to make the person liable to surrender. If the Magistrate makes that finding, the Minister of Justice is given a discretion under section 11 to order the surrender of the requested person to any person authorised by the foreign State to receive him or her."[16]

Thus, subsequent to an arrest, an enquiry is held in terms of section 9(1), with a finding for a committal being made in terms of section 10, and the final decision to surrender lying within the Minister's discretion in terms of section 11.

[41] Section 9(1) of the Extradition Act requires that any person detained under a warrant of arrest be brought before a magistrate to hold an enquiry with a view to surrendering such a person. Section 9(2) and 9(3) set out the procedure and form of such an enquiry, while sections 10(1) and 12(1), respectively, set out the jurisdictional facts to be established in the enquiry. Section 9(2)[17] requires that the enquiry take the form of a preparatory examination conducted in criminal proceedings,[18] which has now

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[16] *Harksen v President of the Republic of South Africa* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) at para 14.

[17] Section 9(2) of the Extradition Act provides:

> "Subject to the provisions of this Act the Magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held."

[18] See sections 123 to 143 of the Criminal Procedure Act 51 of 1977. See also Kruger "Preparatory Examinations" in *Hiemstra's Criminal Procedure* (2020) at pages 20-2:

fallen into disuse in the practice of public law.[19] Section 9(3) then sets out the type of evidence which may be received by the magistrate in a section 10(1) enquiry, which evidence pertains to the person's prosecution in the foreign State.[20]

> "In the preparatory examination all of the state's witnesses are called before a Magistrate in the presence of the accused. The accused may choose to testify but ordinarily does not. The accused then gets a complete version of the state's case, with ample time to prepare. Should the state find additional evidence after the conclusion of the preparatory examination, the accused has to be given the full text thereof otherwise it cannot be used in the trial."

[19] See *Shabalala v Attorney-General, Transvaal* [1995] ZACC 12;1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 18.

[20] Section 9(3) of the Extradition Act provides:

> "Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such enquiry if such document is:
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> (a)
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> (i) accompanied by a certificate according to the example set out in Schedule B;
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> (ii) authenticated in the manner provided for in the extradition agreement concerned; or
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> (iii) authenticated by the signature and seal of office—
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> (aa) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office in a foreign State or a South African foreign service officer grade VII or an honorary South African consul general, vice consul or trade commissioner;
>
> (bb) of any government authority of such foreign State charged with the authentication of documents in terms of the law of that foreign State;
>
> (cc) of any notary public or other person in such foreign State who shall be shown by a certificate of any person referred to in item (aa) or (bb) or of any diplomatic or consular officer of such foreign State in the Republic to be duly authorized to authenticate such document in terms of the law of that foreign State; or
>
> (dd) of a commissioned officer of the South African National Defence Force in the case of a document executed by a person on active service; or
>
> (b) certified as original documents or as true copies or translations thereof by a judge or Magistrate, or by an officer authorized thereto by one of them, of the associated State concerned, in the case of an enquiry with the view to the extradition of a person to an associated State."

[42] This Court in *Geuking* summarised the manner in which an enquiry before the magistrate is to be held, in terms of section 9 of the Extradition Act, as follows:

> "After the process of extradition has been initiated by the issue of a warrant of arrest by a Magistrate under section 5(1)(a), section 9(1) requires that the arrested person be brought before him or her as soon as possible for the purpose of holding 'an enquiry with a view to the surrender of such person to the foreign State concerned'. Under section 9(2) the enquiry 'shall proceed in the manner in which a preparatory examination is to be held', i.e. a preparatory examination held in terms of Chapter 20 of the Criminal Procedure Act (the CPA). This means that the enquiry must be held in open court (section 152 of the CPA), subject to the provisions of section 9(3) of the Act; the evidence must be led on oath or affirmation (sections 162 and 163 of the CPA); and oral evidence is subject to cross-examination and re-examination (section 166 of the CPA). The State first leads evidence and thereafter the person has the opportunity of making a statement, testifying or calling witnesses (sections 128, 133 and 134 of the CPA)."[21]

[43] As stated earlier, section 10(1) of the Extradition Act requires an enquiry into whether or not a person is liable to be surrendered to a foreign State and committed to prison pending the Minister's final decision to surrender.[22]

[44] Section 10(2) of the Extradition Act provides for a certificate issued by an appropriate authority in charge of the prosecution, in the foreign State concerned, to be considered by the magistrate as *conclusive proof* that there is sufficient evidence to warrant prosecution in that State.[23] This subsection applies to persons referred to in section 10(1). The production of a section 10(2) certificate establishes the second jurisdictional fact if the certificate is not challenged.

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[21] *Geuking* above n 4 at para 13.

[22] See [10] above.

[23] Section 10(2) of the Extradition Act provides:

> "For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the Magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."

[45] Pursuant to an order being made in terms of section 10(1), a magistrate shall, in terms of section 10(4), forward to the Minister a copy of the record of the proceedings together with such report as he or she may deem necessary.[24] Unfortunately, there is no authority or legislation which details what is required to be included in such a report, if anything at all. Counsel for both parties conceded as much. There is also no authority to suggest that the submission of such a report is mandatory. In fact, the words "as he may deem necessary" suggests that its submission is entirely voluntary or discretionary.

[46] In the section 10 enquiry, the magistrate does not adjudicate on whether it is unjust or unreasonable to surrender the person sought. *A fortiori* (from the stronger argument) the issues relating to fair trial, which Mr Tucker contends ought to have been considered by the Magistrate, are similarly irrelevant at this stage. This simply means that it is the role of the Minister to determine whether it is in the interests of justice to surrender a person sought prior to their extradition.

[47] Once the magistrate has established an appropriate basis for extradition, namely the fulfilment of the two jurisdictional requirements, it is then left to the Minister, pursuant to section 11 of the Extradition Act, to determine whether the person sought may be surrendered. A person sought is entitled to take the decision of the Minister on review.

Must the Magistrate receive evidence relating to fair trial rights?

[48] What is abundantly clear is that we are not concerned with the magistrate's power to consider whether the sought person would have their rights violated if they were to be extradited. This Court's decision in *Robinson II* was unequivocal on that point when it held that–

[24] Section 10(4) of the Extradition Act provides:

> "The Magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary."

> "an extradition Magistrate conducting an enquiry in terms of section 10(1) of the [Extradition] Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of section 11 of the [Extradition] Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control."[25]

[49] What this Court is concerned with is whether the sought person can adduce evidence relating to her or his fair trial rights in the foreign State, and whether a magistrate may accept such evidence so that it may be included in either the record of proceedings or the magistrate's section 10(4) report to the Minister. The inclusion of such evidence in either the record or the report would, according to Mr Tucker, assist the Minister when making his determination on whether or not to surrender him.

[50] In coming to a determination on the above, this Court is required to consider the alleged conflicting decisions in *Geuking*, *Robinson II* and *Garrido*.

[51] Read in isolation, paragraph 42(e) of *Geuking*[26] may be understood to mean that a sought person is entitled, in committal proceedings, to adduce evidence affecting her or his fair trial rights, and that a magistrate is obliged to accept it. When read in context, however, the above extract takes on a different meaning. What this Court said in the preceding paragraphs, is the following:

> "It follows that this Court is now obliged to decide the constitutionality of section 10(2) of the Act. I turn to that question.

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[25] *Robinson II* above n 9 at para 71.

[26] *Geuking* above n 4 at para 42(e) reads as follows:

> "In considering the constitutionality of section 10(2) [of the Extradition Act] it must be borne in mind that:
>
> . . .
>
> (e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the Magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11."

The starting point of this enquiry is to consider the nature of the enquiry which the Magistrate is obliged to hold under the Act. As appears from para [15] above, in terms of section 10(1) of the Act the Magistrate must consider the evidence adduced and, in order to issue a committal warrant, he or she must be satisfied that:

(a) the person brought before him or her is liable to be surrendered to the foreign State concerned and;

(b) in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State.

In a case such as the present, in considering whether the person brought before him or her is liable to be surrendered, the Magistrate must be satisfied that:

(a) the person who has been brought before him or her is the person sought by the requesting State;

(b) the President has consented to the surrender of that person under section 3(2);

(c) the offence in respect of which the person is sought by the foreign State is an extraditable offence. An 'extraditable offence' is defined in section 1 of the Act to mean:

> 'any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State';

(d) there is sufficient evidence to warrant a prosecution of the offence in the foreign State;

(e) if a section 10(2) certificate is relied on, that it was issued by an appropriate authority in charge of the prosecution in the foreign State concerned."[27]

[27] *Geuking* above n 4 at paras 35-7.

[52] It is clear from the quoted paragraphs above that the evidence referred to in paragraph 42(e) of *Geuking* relates to the enquiry before the magistrate as described by this Court in the quoted paragraphs.[28] Therefore, the evidence which may be adduced by the sought person is that which would challenge the evidence adduced by the prosecuting authority in establishing the jurisdictional facts, set out in section 10, and as confirmed by this Court in *Geuking*.

[53] I pause here to emphasise that the evidence referred to above does not relate to whether the person sought will have a fair trial in the foreign State, nor does it relate directly to any of the considerations in section 11 of the Extradition Act. The purpose of adducing evidence in committal proceedings, according to *Geuking*, is to satisfy the magistrate that the jurisdictional facts for a surrender, in terms of section 10, have been met.[29] If such evidence were to have a bearing on the exercise of the Minister's discretion under section 11, it would still be permissible. That is what was meant by this Court in paragraph 42(e). There is no other manner in which to interpret it, as the sudden reference to section 11 would otherwise be illogical – given the detailed manner in which this Court described committal proceedings in the paragraphs preceding paragraph 42.

[54] The Supreme Court of Appeal's decision in *Garrido* concerned a challenge to Ms Fernandez, the appropriate authority of the requesting State. Again, that matter concerned a challenge against the section 10(2) certificate produced, and therefore the establishment of the second jurisdictional fact in a section 10 enquiry. Mr Garrido sought to lead evidence to show that the request by the United States of America was not made in good faith and, by implication, that the DPP had failed to establish the second jurisdictional fact. The Supreme Court of Appeal held that it was questionable whether the good faith determination was an aspect for the Minister's consideration under section 11(b)(iii) of the Extradition Act or the magistrate's determination because

[28] Id.

[29] Id.

of its implication on section 10(2).[30] It further held that it was a matter which the Magistrate could deal with in her report to the Minister, if persuaded to do so.[31] A reading of the Supreme Court of Appeal's decision makes it clear that this was a narrow issue for determination – the evidence which should have been received and formed part of the record for submission to the Minister. *Garrido* therefore does not conflict with this Court's decision in *Geuking* as interpreted above.

[55] As stated earlier, it is incontestable that fair trial rights, or any section 11 considerations, may not be considered by a magistrate in committal proceedings, unless they implicate section 10. It has now also been firmly established that committal proceedings are concerned purely with the establishment of the jurisdictional facts in section 10. It follows that any evidence adduced on fair trial rights, or any section 11 considerations, which are not for purposes of establishing the jurisdictional facts in section 10, would be irrelevant for purposes of committal proceedings, and therefore inadmissible. Section 2 of the Civil Proceedings Evidence Act,[32] and its sister provision in the Criminal Procedure Act (CPA),[33] provide that "[n]o evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible". Although, extradition proceedings are *sui generis* in nature, the provisions in the aforementioned Acts reflect the general evidentiary rule regarding the admissibility of irrelevant evidence.

[56] A magistrate may therefore neither consider nor receive evidence relating to the Minister's section 11 considerations. Any other interpretation would cause practical difficulties for both the prosecuting authorities and the magistrate, and would unduly prolong the extradition process.

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[30] *Garrido* above n 7 at para 22.

[31] Id at para 25.

[32] 25 of 1965.

[33] See section 210 of the Criminal Procedure Act above n 18.

[57] This Court is not seized with the question of the procedure to be followed by the sought person when bringing evidence relating to her or his fair trial rights before the Minister, thus it would be inappropriate of us to make a finding in that regard. What I do find is that the Magistrate is not required to act as a reservoir for evidence with which he cannot deal, simply because section 11 does not expressly state the procedure for making representations before the Minister. This seems to me to be an oversight which the Legislature may have to correct.

May the High Court order the re-opening of committal proceedings?

[58] This appeal is against paragraph 3 of the High Court order. Having found that the High Court was incorrect in deciding that a sought person may adduce evidence, in committal proceedings before a magistrate, which pertain solely to the Minister's considerations in terms of section 11 of the Extradition Act, it follows that the re-opening of proceedings before the magistrate, on that basis, is impermissible.

Conclusion

[59] These findings do not mean that Mr Tucker has no remedy. Both parties are agreed that a person liable to be surrendered has a right to make representations to the Minister in respect of his decision to surrender. I am mindful of the fact that section 11 is silent on the procedure to be followed when making representations to the Minister, and of the absence of regulations in this regard, but this requires a separate challenge to the one before us. For purposes of this appeal there is no doubt that Mr Tucker is entitled to make such representations to the Minister, and that, should he fail to accept or consider them properly, the Minster's decision would be subject to review by the courts.[34]

[60] I would uphold the appeal, set aside paragraph 3 of the High Court's order and replace it with the following:

[34] *Robinson II* above n 9 at para 71.

> "Mr Tucker is to remain in prison pending the decision of the Minister of Justice and Correctional Services as to whether he should be surrendered to the United Kingdom."

[61] As a final word, I would like to take the opportunity to thank the Cape Bar Council for appointing Mr Katz and Mr Perumalsamy to represent Mr Tucker on a *pro bono* basis. We are greatly indebted to it. A word of gratitude is likewise extended to Mr Katz and Mr Perumalsamy for promptly and ably assisting the Court in the preparation of written submissions and presentation of oral argument before this Court.

THERON J (Khampepe J, Madlanga J, Mhlantla J, Tshiqi J and Victor AJ concurring):

Introduction

[62] I have had the benefit of reading the well-crafted judgment by my Brother Mathopo AJ. Regrettably, I do not agree that paragraph 3 of the High Court's order should be set aside, for two reasons. First, case law and the scheme of the Extradition Act, properly interpreted, make it clear that a magistrate is obliged to admit evidence relating to the Minister's surrender decision during committal proceedings, notwithstanding the fact that the enquiry is solely concerned with the committal of the sought person. Secondly, contrary to what the parties contend, it was open to the High Court to re-open the proceedings before the Magistrate in order to receive evidence relevant to the Minister's surrender decision.

The scheme of the Extradition Act

[63] Extradition is a process whereby one sovereign State (requesting State) requests of another sovereign State (requested State) the surrender of an individual (sought person) to the requesting State. The sought person must be within the requested State's territory and must be sought for the purposes of trial and sentencing in the requesting

State.[35] South Africa enacted the Extradition Act to prescribe domestic procedures before a person may lawfully be extradited from South Africa. All extradition requests to South Africa are processed domestically through the provisions of the Extradition Act.[36]

[64] The Extradition Act prescribes different processes for extradition depending on whether a requesting State is a foreign or an associated State.[37] The United Kingdom, the requesting State in this matter, is a foreign State.

[65] If the requesting State is a foreign State then the process for surrendering a person to that requesting State can be divided into three phases.[38] First, there is the administrative phase, which is initiated by receipt of the extradition request,[39] followed by the issuing of an arrest warrant,[40] and the arrest of the person sought.[41] The administrative phase of Mr Tucker's extradition is not in issue in these proceedings.

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[35] *President of the Republic of South Africa v Quagliani* [2009] ZACC 1; 2009 (2) SA 466 (CC); 2009 (4) BCLR 345 (CC) at para 1.

[36] *Harksen* above n 16 at para 4. In *Harksen* this Court explained that extradition operates at both an international and domestic level:

> "An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite."

[37] Section 1 of the Extradition Act defines a foreign State as including any foreign territory. An associated State is any foreign State in respect of which section 6 of the Act applies. There are three requirements for a State to be an *associated* State, one of which is that the State must be in Africa.

[38] *Carolissen v Director of Public Prosecutions* [2016] 3 All SA 56 (WCC) at para 69. If the requesting State is an associated State, then the second and third phases are combined into one to expedite the extradition process. See section 12 of the Extradition Act.

[39] Section 4 of the Extradition Act.

[40] Id sections 5 and 7.

[41] Id section 9.

[66] The second phase is the judicial phase.[42] An extradition enquiry is held by a magistrate in terms of section 10, read with section 9, of the Extradition Act. The judicial phase begins once the person sought is arrested. Every person arrested in terms of the Extradition Act must be brought before a magistrate as soon as possible. The magistrate must, as soon as possible ("forthwith") hold an enquiry "with a view to the surrender" of the person to the requesting State.[43] Under section 9(2) the enquiry shall proceed in the manner in which a preparatory examination in terms of Chapter 20 of the CPA is to be held.[44] In *Geuking*, this Court confirmed that, among other things, the person concerned is entitled to testify and adduce evidence in such an enquiry.[45] A debate as to the nature and content of this evidence is at the heart of this matter.

[67] Section 10 stipulates that at the conclusion of the enquiry, after the hearing of evidence, the magistrate *must* either commit or discharge the person.[46] The

[42] *Minister of Justice v Additional Magistrate, Cape Town* 2001 (2) SACR 49 (C) at 61C.

[43] Section 9(1) of the Extradition Act.

[44] See *Geuking* above n 4 at para 13. In *Geuking*, this Court held that the reference to preparatory examinations in the Extradition Act means that the enquiry must be held in open court (section 152 of the CPA); the evidence must be led on oath or affirmation (sections 162-3 of the CPA); and oral evidence is subject to cross-examination and re-examination (section 166 of the CPA). The State first leads evidence and thereafter the person has the opportunity to make a statement, testify or call witnesses (sections 128, 133 and 134 of the CPA).

[45] *Geuking* id at para 38.

[46] Section 10 of the Extradition Act reads:

> "(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the Magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the Magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
>
> (2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the Magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.
>
> (3) If the Magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.
>
> (4) The Magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary."

requirements that must be satisfied before a magistrate must commit the sought person are set out in section 10(1), which provides that a magistrate must be satisfied that two conditions are fulfilled before a committal order is made. The person must be liable for surrender to the foreign State concerned[47] and, where the person is accused of an offence, there must be sufficient evidence to warrant a prosecution for the offence in the foreign State. The first requirement – liability for extradition – is satisfied where the person is (a) accused or convicted of an extraditable offence that was (b) committed within the jurisdiction of the foreign State. Section 1 of the Extradition Act defines "extraditable offence" as "any offence which in terms of the law of the Republic and of the foreign State concerned is punishable by a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more".

[68] In relation to the second requirement, that there must be sufficient evidence to warrant a prosecution, the standard is set out in section 10. The magistrate shall accept as conclusive proof a certificate issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the requested person.[48] If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required

[47] Liability is determined in terms of section 3 of the Extradition Act. Section 3 states:

> "(1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.
>
> (2) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered.
>
> (3) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence."

[48] Id at section 10(3).

evidence is not forthcoming within a reasonable time, the sought person must be discharged.[49]

[69] A section 10 extradition enquiry is limited to establishing these two jurisdictional facts. If they are established, the magistrate shall commit the sought person to prison, pending the Minister's decision to surrender the person. Unlike in respect of extradition enquiries held in terms of section 12 read with section 9 (where extradition has been requested by an associated State), the magistrate does not consider whether to *surrender* the person before them. The enquiry before the magistrate involves establishing liability for extradition and sufficient evidence warranting prosecution in the foreign State[50] and the section 10 decision is solely whether to commit or discharge. The committal determination is "a narrow and specific issue" that does not "involve deliberation on human rights issues" or "whether it is unjust or unreasonable to surrender the applicant".[51] These are questions that are relevant to the Minister's decision to surrender the sought person, which is made in terms of section 11 (surrender decision).

[70] Whenever a magistrate makes a committal order, she is required in terms of section 10(4) to forward a copy of the record of the proceedings, together with any report that she may deem necessary, to the Minister.[52] The purpose and content of the report contemplated by section 10(4) is also at the crux of this application.

[71] The third phase of an extradition to a foreign State is the executive phase. The section 10 enquiry ends after a magistrate issues a committal order.[53] The person is

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[49] Id.

[50] *Robinson II* above n 9 at para 2.

[51] Dugard *International Law* 5 ed (Juta & Co Ltd, Cape Town 2019) at 327.

[52] Section 10(4) of the Extradition Act reads:

> "The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary."

[53] The committed person may, by virtue of section 13, appeal against a committal order and apply to the Magistrate for bail pending the appeal.

committed to prison pending the Minister's decision to surrender her under section 11. The Minister may decide to surrender the sought person,[54] or decline to surrender the committed person for various reasons[55] and on certain conditions.[56] If a committal order has not been issued by the magistrate, the Minister has no power to act and that is the end of the matter. The Minister may only order the surrender of the sought person if that person has been "committed to prison under section 10".[57]

Background

[72] The facts of this matter need only be stated briefly as they are largely common cause. On 4 October 2000, Mr Tucker was convicted *in absentia* of various sexual offences in the United Kingdom by the Swindon Crown Court. He was sentenced *in absentia* to eight years' imprisonment. Shortly before his conviction and sentencing, Mr Tucker left the United Kingdom for South Africa. On 29 May 2002, the Court of Appeal (England and Wales) quashed his conviction and ordered a re-trial. On 26 February 2016, an indictment was issued against him containing charges similar to those he had been convicted of on 4 October 2000. Another indictment was also issued in respect of further allegations of sexual assault that arose after the Court of Appeal ordered a re-trial.

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[54] Section 11(a) of the Extradition Act.

[55] Section 11(b) of the Extradition Act provides that the Minister may not surrender the sought person:

> (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
>
> (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
>
> (iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

[56] See for example *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 41.

[57] Section 11(a) of the Extradition Act.

[73] In March 2016, Mr Tucker was arrested in South Africa. A new indictment, akin to the 30 May 2002 one, was issued by the Bristol Crown Court on 31 March 2016. The United Kingdom then formally requested his extradition on 19 April 2016, attaching to its request both the new indictment from the Bristol Court and the indictment with the further allegations from the North Avon Court. On 13 October 2017, section 10 proceedings commenced before the Cape Town Magistrates' Court. During these proceedings, Mr Tucker attempted to lead evidence relating to the fairness and legality of the trial that he faced in the United Kingdom. The Magistrate refused to admit any of this evidence. The Magistrate was of the view that the issue of trial fairness in the United Kingdom was for the Minister to decide on when making his decision under section 11. On 10 November 2017, the Magistrate ordered Mr Tucker's committal.

[74] Mr Tucker brought applications to appeal and review the Magistrate's decision. The High Court dismissed the appeal and review but nevertheless held, invoking this Court's decision in *Robinson II* and the Supreme Court of Appeal's decision in *Garrido*, that the Magistrate was obliged to allow Mr Tucker to lead evidence relating to his surrender. The High Court granted an order "re-opening" the proceedings to allow Mr Tucker to lead evidence relating to surrender without setting aside the committal order. It is against this aspect of the High Court's order that the DPP appeals.

Issues

[75] The validity of the committal proceedings and committal order is not directly before this Court. At issue is whether the Magistrate's failure to admit Mr Tucker's evidence relating to surrender was an irregularity and, if it was, what remedy the High Court ought to have granted. There are therefore three questions to answer. First, in the judicial phase of the extradition process (which is concerned with committal or discharge) is a magistrate obliged to admit evidence relating to the sought person's *surrender* (which is the concern of the executive phase)? Secondly, may a High Court uphold a committal order on appeal or review but nonetheless order that the proceedings

be "re-opened" to hear evidence relating to a sought person's surrender? Thirdly, what would be a just and equitable remedy?

Must the Magistrate admit evidence relating to the sought person's surrender?

Case law

[76] The DPP argues that the Magistrate was not under a duty to hear evidence relating to the surrender decision. The mainstay of its case is that this Court's decision in *Robinson II* prohibits a magistrate from considering issues related to the surrender decision. Mr Tucker attacks the DPP's reliance on *Robinson II* and, in addition, argues that the Magistrate was instead bound by the holdings in *Geuking* and *Garrido*, which he says affirmed that the Magistrate had a duty to allow Mr Tucker to lead evidence relating to his surrender.

[77] The DPP submits that *Robinson II* is authority for the proposition that a magistrate conducting committal proceedings is not obliged, or even permitted, to admit evidence relating to the surrender decision. It accepts that *Robinson II* is silent as to the question of evidence at a section 10 enquiry, but maintains that "the judgment quite clearly defines what is relevant to such enquiry and what is justiciable before such an enquiry". The first judgment endorses this submission.[58] According to the first judgment, and on its understanding of *Robinson II*, a magistrate is prohibited from considering factors pertaining to surrender.

[78] I disagree. The two primary issues determined by this Court in *Robinson II* were (a) whether the extradition Magistrate or the Minister had the power to consider whether a sought person's constitutional rights would be violated if she is extradited and (b) whether an extradition magistrate should discharge a person sought and preclude the Minister from making a decision to extradite if there is a danger that the fair trial rights

[58] First judgment at [48].

of that person would be violated upon extradition.[59] Yacoob J, writing for this Court, described the legislative scheme of extradition under the Extradition Act:

> "The scheme of the Act makes it quite clear that the question whether a person sought to be extradited will become the victim of an unfair trial as a result of the extradition must be weighed in the equation at the time when consideration is being given to whether there should be a surrender. It is premature to take this factor into account any earlier."[60]

[79] *Robinson II* affirmed that section 10(1) concerns liability for surrender and committal to prison pending the Minister's decision to surrender. This Court did not hold that a magistrate is precluded from receiving evidence relating to surrender. It held that it was beyond the power of a magistrate to discharge a sought person who is liable for extradition for reasons envisaged in section 11, which are relevant to the surrender decision. That is the domain of the Minister.

[80] *Robinson II* did not pronounce on whether evidence led at a section 10 enquiry may concern issues that are relevant to the sought person's surrender. The crux of this Court's decision related to whether a magistrate can decline to *commit* a sought person for reasons relating to fair trial rights in the foreign State. Far from disposing of Mr Tucker's case, the *ratio decidendi* (reason or rationale for the judgment) in *Robinson II* dealt with a question that simply does not arise in this matter. Mr Tucker does not suggest that once evidence relating to the surrender decision is received by the magistrate, the magistrate ought to act on that evidence and refuse to order his committal in terms of section 10. His case is simply that the magistrate was obliged to receive that evidence.

[81] In *Geuking*, the constitutionality of section 10(2) of the Extradition Act was challenged. As mentioned, section 10(1) of the Extradition Act provides that where a

[59] *Robinson II* above n 9 at para 17.

[60] Id at para 52.

sought person is accused of committing an offence (as opposed to having been convicted), there must be sufficient evidence to warrant a prosecution for the offence in the foreign State before a committal order can be made. The sufficiency of evidence requirement in section 10(1) does not apply to extradition requests for convicted persons — only for accused persons. Because this requirement is essentially an issue of foreign law, the Act in section 10(2) provides that, for the purpose of satisfying herself that there is sufficient evidence to warrant a prosecution in the foreign State, the magistrate must accept as conclusive proof a certificate issued by the appropriate authority in the requesting State stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned. The certificate is commonly known as a section 10(2) certificate. The applicant in *Geuking* argued that obliging the Magistrate to accept the section 10(2) certificate as conclusive proof violated his rights to a fair public hearing, a fair trial, not to be deprived of freedom arbitrarily or without just cause, and undermined the independence of the Judiciary.

[82] This Court held that section 10(2) was not unconstitutional, for a number of reasons.[61] The reason most relevant to the current matter is the following:

[61] In *Geuking* above n 4 at para 42 this Court held that in considering the constitutionality of section 10(2) it must be borne in mind that:

> "(a) the proceedings before the magistrate do not constitute a trial. In the event of the surrender of the person, his or her trial will be held in the foreign state. That, after all, is the purpose for which the extradition is sought;
>
> (b) if the magistrate finds that the person is liable to be surrendered to the foreign state, the person has a right of appeal to the High Court;
>
> (c) if there is no appeal or if the decision of the magistrate is confirmed on appeal, the record of the proceedings together with such report as the magistrate may deem necessary must be forwarded to the Minister;
>
> (d) the Minister is then required to exercise a discretion under section 11 of the Act and notwithstanding the finding of the magistrate, may refuse the surrender on any one or more of the grounds specified in that section of the Act;
>
> (e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11."

> "[T]he person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11."[62]

[83] The DPP contends that this pronouncement was meant to be limited to extradition proceedings involving a section 10(2) certificate confirming that there was sufficient evidence in the foreign state to justify a prosecution. In support of this contention, reliance was placed on the statement in *Geuking* that "in the exercise of his discretion under section 11 of the Act, the Minister might well be obliged to consider an attack made in good faith against the conclusion of the foreign authority contained in the certificate".[63] This contention cannot be sustained. This is where I part ways with the first judgment.

[84] The thrust of the DPP's submissions in oral argument seemed to be that the safeguard referred to by this Court in the statement cited above was simply that the sought person would be entitled to lead evidence relating to the section 10(2) certificate that might also have a bearing on the Minister's surrender decision under section 11. The point, it seems, is that the presumption in section 10(2), which binds the magistrate's committal decision, does not bar the sought person from leading evidence regarding aspects of the section 10(2) certificate that will be relevant to the Minister's decision. In effect, this would lessen the presumption's intrusion into the sought person's fair trial rights because the sought person has an opportunity to lead evidence relevant to the Minister's determination, which seeks to impugn the section 10(2) certificate.

[85] The first difficulty the DPP faces is that in *Geuking* this Court refers to "evidence" generally and not "evidence relating to the section 10(2) certificate" in particular. The rationale that a person could give and adduce evidence at an enquiry, which could have a bearing on the manner in which the Minister exercises his discretion

[62] Id.

[63] Id at para 46.

under section 11, was not meant, and could not have been meant, to be limited to extradition proceedings involving evidence relating to a section 10(2) certificate. This Court was making a finding about section 10 proceedings generally.

[86] Restricting the *Geuking* holding to evidence that is relevant to the Minister's surrender decision, which also relates to the section 10(2) certificate, also gives rise to two anomalies. The first is that it would allow accused persons to lead evidence relevant to surrender whereas convicted persons would not be allowed to lead any evidence relating to surrender (since a section 10(2) certificate does not come into play where the sought person has been convicted). The second is that it creates an unprincipled differentiation between evidence that is relevant to both surrender and the section 10(2) certificate, on the one hand, and evidence that is relevant to surrender only, on the other. Both classes of evidence are legally irrelevant to the magistrate's decision and cannot be considered by the magistrate (since the section 10(2) certificate is conclusive proof). While it may be practical for a sought person at a section 10 enquiry to lead evidence relating to surrender which concerns the section 10(2) certificate, there is no legal basis for allowing this evidence to be lead at a section 10 enquiry while all other evidence relevant to surrender cannot.

[87] The DPP appears to offer another, less restrictive interpretation of *Geuking*, which is that this Court had in mind evidence relating to the section 10 enquiry more generally that could also be relevant to the Minister's surrender decision. The rule emerging from this would be that a sought person is entitled to lead and adduce evidence relating to the Minister's surrender decision, provided it is also relevant to the section 10 enquiry (and not just the section 10(2) certificate).

[88] But even if we widen the DPP's interpretation of *Geuking* in this way, it comes up against the language used by this Court. The use of the conjunction "but" ("which would have a bearing not only on the magistrate's decision under section 10, *but* could have a bearing on the exercise by the Minister of the discretion") calls for a disjunctive reading that separates the first part of the sentence, which deals with evidence relevant

to the section 10 enquiry, and the second part of the sentence, which deals with evidence relevant to the Minister's decision. The effect is that the sought person is entitled to lead and adduce evidence that is relevant to the committal enquiry and, equally, the sought person is entitled to lead and adduce evidence that is relevant to the Minister's decision.

[89] In oral argument, counsel for the DPP was pressed to explain why this Court should prefer a narrow interpretation of *Geuking*. Counsel's submissions revealed that at the heart of the DPP's case is that an "all-in evidence" interpretation of *Geuking* should be avoided because it would lead to significant practical difficulties. But even if an expansive reading of *Geuking* would burden the committal enquiry with a greater volume of evidence, I do not agree that the magistrate would have to remain supine and allow copious amounts of irrelevant evidence to burden the record. Why? Because, while the magistrate does not have the power to consider aspects that should be considered by the Minister when making the committal decision, it does not follow that the magistrate cannot refuse to admit evidence that is totally irrelevant to the grounds listed in section 11. If the Extradition Act, per this Court's interpretation in *Geuking*, allows the sought person to adduce evidence relevant to surrender, it would be absurd if the magistrate were not able to determine whether the evidence is at least *relevant* to the surrender decision in terms of section 11.

[90] Finally, I agree with the Supreme Court of Appeal's conclusion in *Garrido* that the statement about evidence in *Geuking* was not *obiter* because it formed part of this Court's reasons for concluding that the subsection is not unconstitutional. Those reasons, including the statement about evidence, were part of the judgment's *ratio decidendi*. It follows that the Magistrate in this case was bound by the *Geuking* holding.

[91] This reading of *Geuking* does not bring the judgment into conflict with *Robinson II*. Again, *Robinson II* holds that the reasons for discharge are narrow: they relate only to liability for surrender as defined in the Act. *Geuking* holds that, despite

the magistrate's discretion being narrow, a sought person is entitled to lead evidence beyond the issue of liability for surrender. The evidence can be included in the magistrate's section 10(4) report, which is then forwarded to the Minister.

[92] This Court's finding and reasoning in *Geuking* was followed by the Supreme Court of Appeal in *Garrido*.[64] In *Garrido*, the sought person had been prevented by the Magistrate from adducing evidence to show that the request by the United States was not made in good faith.[65] This evidence challenged whether a certain official was an "appropriate authority in the requesting State" and was aimed at revealing the "paucity of credible evidence" which the prosecution in the United States had available to lead against him.[66] The Supreme Court of Appeal, following *Geuking*, found that the sought person was entitled to lead this evidence at the committal enquiry, notwithstanding the fact that it related to surrender under section 11.[67] The Court concluded that "the magistrate failed to observe the procedural requirements of *audi alteram partem*, and that the order committing the appellant should, for this reason, be set aside".[68]

[93] As with *Geuking*, the DPP does not argue that *Garrido* is wrong. Instead, the DPP argues that *Garrido*, like *Geuking*, is distinguishable from this case and therefore was not binding on the Magistrate in this case. The DPP argues that the finding in *Garrido* is limited. It submits that the evidence sought to be led by Garrido related to whether the jurisdictional fact in section 10(2) of the Extradition Act had been established and formed the basis for the further allegation of a prosecution made in bad faith, which was an issue the Minister was enjoined to consider. Therefore, even

[64] *Garrido* above n 7 at paras 22-3.

[65] Id at paras 17, 18 and 22.

[66] Id at paras 17-8.

[67] Id at para 28.

[68] Id at para 27. The question of whether a Magistrate's refusal to allow a sought person to adduce evidence relevant to surrender is not before this Court because Mr Tucker has not sought to appeal the High Court's dismissal of his application to review the Magistrate's refusal to allow the evidence. We leave open the question whether the Supreme Court of Appeal was correct to set aside the committal order on that basis. We endorse the reasoning in *Garrido* that, in the context of a section 10 committal enquiry, a Magistrate is obliged to accept evidence relating to surrender.

though the sought person in *Garrido* was attempting to impugn the good faith of the requesting State (which is relevant to surrender), the evidence nevertheless also related to the jurisdictional facts of the section 10 enquiry. The implication is that *Garrido* is authority for a right to adduce evidence which relates to both the section 10 enquiry *and* surrender. The first judgment endorses the DPP's narrow interpretation of *Garrido*.

[94] There are three problems with the DPP's reading of *Garrido*. First, the evidence Garrido attempted to introduce was not related to the jurisdictional facts of the section 10 enquiry. The evidence was intended to demonstrate the "paucity of credible evidence", which the prosecution in the United States had available in order to show bad faith. The Magistrate was provided with a section 10(2) certificate by the requesting State. Section 10(2), the constitutionality of which was confirmed in *Geuking*, obliges the magistrate to accept the certificate as conclusive proof that the foreign State has sufficient evidence to warrant a prosecution. It follows that the evidence that Garrido attempted to lead was irrelevant to the Magistrate's committal decision. It therefore could only be relevant to the Minister's surrender decision under section 11.

[95] Secondly, in terms of both *Garrido* and *Geuking*, the sought person is entitled to give and adduce evidence relating to the surrender decision which is not relevant to either jurisdictional fact in section 10. This much is clear from the Supreme Court of Appeal's acceptance that "evidence relating to good faith" was "a matter for the Minister to consider under section 11(b)(iii) of the Act and not for the magistrate under section 10(2)".[69] The Court's finding was unambiguous in this regard and I disagree with the first judgment's finding that the Supreme Court of Appeal in *Garrido* "held that it was *questionable* whether the good faith determination was an aspect for the Minister's consideration under section 11(b)(iii) of the Extradition Act or the magistrate's determination because of its implication on section 10(2)".[70]

[69] *Garrido* above n 7 at para 22.

[70] First judgment at [54].

[96] The third difficulty I have with the DPP's narrow interpretation is that *Garrido* can also be read as concluding that evidence which is relevant to the Minister's surrender decision under section 11 is, by virtue of section 10(4), *always relevant* to the section 10 enquiry. The DPP does not dispute the Supreme Court of Appeal's finding that the rationale for entitling the sought person to lead evidence regarding surrender is to assist the Minister via the section 10(4) report prepared by the Magistrate. In *Garrido*, the Court clearly had in mind that evidence relating to good faith, which was relevant to section 11(b)(iii), was nevertheless relevant to the possible report forwarded to the Minister by the magistrate in terms of section 10(4). Relying on *Geuking*, the Court concluded that a person liable to be surrendered should be entitled to place material before the magistrate in the hope of persuading the magistrate to include it in a report forwarded to the Minister, which might induce the Minister not to surrender the sought person on one or other of the grounds set forth in section 11(b).[71]

[97] But even if *Garrido* is construed narrowly as applying to a different class of evidence than the kind of evidence Mr Tucker seeks to lead in this case, one of the reasons for the *Garrido* decision is the Supreme Court of Appeal's unqualified endorsement of the ratio decidendi in *Geuking*. Even if only this aspect of *Garrido* bound the Magistrate in this case, he was obliged to receive evidence relating to constitutional and fair trial rights.

Sections 9 and 10 of the Extradition Act

[98] Apart from cohering with *Geuking* and *Garrido*, allowing the sought person to lead evidence relating to surrender accords with the scheme of the Extradition Act and settled jurisprudence on statutory interpretation.

[99] The starting point is section 9 of the Extradition Act. Section 9(1) requires that any person detained under a warrant of arrest in terms of the Act be brought before a magistrate, whereupon the magistrate shall hold an enquiry *with a view to the surrender*

[71] *Garrido* above n 7 at para 25.

of such a person. This is the first indication that the committal proceedings are a prelude to a surrender decision and should be conducted with that in mind. It also cuts against an interpretation of the Extradition Act that allows the magistrate to refuse to receive evidence that will be relevant to the Minister's surrender decision. How can it be that a magistrate, who is conducting proceedings with a view to the Minister's surrender decision, should exclude evidence that is plainly relevant to that decision?

[100] Section 9(2) and 9(3) set out the procedure and form of the enquiry before the magistrate. Under section 9(2) the enquiry shall proceed in the manner in which a preparatory examination, i.e. a preparatory examination held in terms of Chapter 20 of the CPA, is to be held.[72] In this regard, sections 133 and 134 of the CPA provide, in relevant part:

> "An accused may [after the charge has been put to him and he has pleaded thereto] . . . give evidence or make an unsworn statement in relation to a charge put to him.
>
> An accused may call any competent witness on behalf of the defence."

[101] The evidence which the accused is entitled to lead is qualified only by the phrase "in relation to a charge put to him". In the context of extradition proceedings, the sought person has the right to lead evidence with respect to the charges put to her by the foreign State, even if the magistrate is not required to consider and rule on the sought person's surrender. This interpretation is supported by the fact that in terms of section 9(3) "any deposition, statement on oath or affirmation taken . . . may be received in evidence at any such enquiry".

[72] Section 9(2) of the Extradition Act provides:

> "Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held."

[102] The first judgment contends that the scope of the evidence adduced at a committal enquiry is narrowed by section 2 of the Civil Proceedings Evidence Act and its sister provision in the CPA, which provides that "no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible".[73] It accepts that even if the extradition proceedings are *sui generis* in nature, they are nevertheless bound by "the general evidentiary rule regarding the admissibility of irrelevant evidence".[74] Yet the very fact that extradition proceedings are *sui generis* – comprising both a judicial phase, as well as an executive phase, which takes place outside the context of criminal or civil proceedings – means that they cannot be shoehorned into the rules of evidence that apply to ordinary criminal and civil proceedings. And, in any event, if the language of the Extradition Act, read purposively, creates a "bridge" between the judicial and executive phases that allows the leading of evidence which is not relevant to the decision taken at the judicial phase, it effectively qualifies or amends the usual rules regarding the admission of evidence in ordinary criminal and civil proceedings. Moreover, the Civil Proceedings Evidence Act and the CPA do not envisage a second non-judicial decision maker involved in the decision making process, as is the case here. These pieces of legislation would thus not cater for the admission of evidence that was not directly relevant to the decision being made by the judicial officer. The standard they impose for admissibility is therefore not entirely helpful in the context of extradition proceedings.

[103] The final piece of the puzzle is section 10(4), which states that "the magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary". This provision is the clearest "bridge" between section 10 and section 11. In this regard, I can do no better than the Supreme Court of Appeal's finding in *Garrido*:

[73] Section 210 of the CPA.

[74] First judgment at [55].

> "The magistrate's power to make such report to the Minister as he or she may deem necessary is clearly designed to enable him or her to give assistance to the Minister in regard to the matters on which the Minister has to exercise a discretion under section 11. That being so, it is clearly appropriate that the person whose surrender to the foreign State making the request is sought should be entitled to place material before the magistrate holding the inquiry in the hope of persuading the magistrate to include material in a report to be submitted to the Minister which may induce the Minister to order that the person concerned not be surrendered on one or other of the grounds set forth in section 11(b)."[75]

[104] In short, the procedural regime put in place by sections 9 and 10(4) points toward a more expansive right to adduce evidence in the context of a section 10 enquiry. This interpretation, which does not unduly strain the language of the text, should be preferred over the restrictive interpretation proposed by the DPP. It is trite that courts must read legislation, where possible, in ways which give effect to the Constitution's fundamental values.[76] Courts are required to interpret legislation not only so that legislation does not limit rights, but in a manner that promotes rights.[77] In addition, courts have always interpreted legislation *in favorem libertatis* (in favour of freedom or liberty). There is a presumption that a reasonable interpretation of a statute that is less restrictive on the liberty of an individual is to be preferred over one that is more restrictive.[78]

[105] In the context of extradition, this Court has cautioned that "[e]xtraditing a person, especially a citizen, constitutes an invasion of fundamental human rights".[79] Allowing a sought person to lead evidence relating to surrender promotes their right to a fair hearing. It affords them the liberty to raise pertinent evidence that they feel might

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[75] *Garrido* above n 7 at para 25.

[76] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 49 and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 22.

[77] Section 39(2) of the Constitution. See most recently *Chisuse* id at paras 46-59.

[78] *Djama v Government of the Republic of Namibia* 1993 (1) SA 387 (NM) at 394H-J; *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C) at 434I-435A; and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 552.

[79] *Geuking* above n 4 at para 1.

be relevant to the Minister's decision from the start of their extradition proceedings and have that evidence recorded in open court. It does so without prejudicing or disadvantaging the prosecuting authorities or the requesting State, and ensures that the sought person's concerns relating to surrender are recorded in the transcript of proceedings and the possible report forwarded to the Minister in terms of section 10(4).

[106] It is no response that a sought person is in any event entitled to lead evidence relating to surrender before the Minister. Whether the Minister is obliged to give the person concerned a hearing before making a decision to surrender under section 11 has not been conclusively pronounced on by this Court. In oral argument, counsel for the DPP admitted that the Extradition Act does not afford sought persons the right to make representations to the Minister but assured this Court that it was "common practice" to afford them this right. As this Court noted in *Teddy Bear Clinic*, a discretion on the part of an authority is not sufficient to save a provision from unconstitutionality[80] and the same reasoning applies to the interpretation of legislation in light of section 39(2) of the Constitution.

Conclusion on the magistrate's duty to admit evidence relating to the sought person's surrender

[107] For the reasons set out above, the interpretation of the Extradition Act advanced by Mr Tucker would give better effect to his section 34 right to a fair hearing and it would be less restrictive on the liberty of sought persons in the context of extradition proceedings.

[108] *Geuking* and *Garrido* authoritatively state that magistrates holding section 10 committal enquiries are under a duty to admit evidence relating to the Minister's surrender decision. As demonstrated, *Robinson II* does not disturb or contradict this finding. Accordingly, the Magistrate was bound to admit evidence relating to the

[80] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*).

surrender decision during the section 10 proceedings. In this case, the Magistrate breached that duty.

Re-opening of proceedings before the Magistrate

[109] The High Court held that the Magistrate's failure to admit Mr Tucker's evidence relating to surrender constituted an irregularity in that it breached his procedural rights and the *audi* principle.[81] The High Court nevertheless confirmed the committal order on the basis that the irregularity which occurred was not of "such a nature as to vitiate the proceedings as a whole, nor such that it can be said that there was a fundamental failure of justice".[82]

[110] In relation to the failure by the Magistrate to allow Mr Tucker to adduce evidence relating to surrender, the High Court sought to remedy the situation by referring the matter to the Magistrate and affording Mr Tucker an opportunity to lead the further evidence. Paragraph 3 of the order of the High Court reads:

> "The proceedings of the extradition enquiry which was held before the magistrate of Cape Town shall be re-opened, in order to allow the appellant an opportunity, if he so wishes, to put before the magistrate (for his consideration and report to the Minister in terms of section 10(4) of the Extradition Act, 62 of 1967, if he deems it fit) within 15

[81] High Court judgment above n 8 at para 75. The reasoning of the Court is in para 73 where it is stated:

> "Given the decision of the Constitutional Court in [*Robinson II*], the magistrate was correct in adopting the attitude that it was not within his remit to consider whether or not either the appellant's fundamental human rights or his rights to a fair trial before an English court would be breached, were he to be extradited, and that this was something which the Minister needed to determine. But that does not mean that the magistrate could simply refuse to accept any evidence which the appellant wished to tender, which might have reflected upon these aspects. In fact, somewhat anomalously, although the magistrate was unable (as a result of the decision in *Robinson),* to pronounce on these issues and whether or not any breach of a constitutional, fair trial, or fundamental human right would possibly take place were the appellant to be extradited, he was nonetheless obliged in terms of the decision of the Supreme Court of Appeal in *Garrido* to receive any evidence which the appellant wished to adduce, pertaining to these aspects, inasmuch as these could have a bearing on the exercise of the Minister's discretion as to whether or not he should order that the appellant be surrendered, and to any report which the magistrate might deem necessary to submit to the Minister."

I reiterate that the question whether the Magistrate's refusal to accept evidence relating to surrender vitiated the committal decision is not before this Court.

[82] Id at para 80.

> days from date hereof an affidavit by an expert on UK law, in relation to the alleged discriminatory features thereof pertaining to the sexual offences for which the appellant is sought for extradition to the UK, and any documentary evidence pertaining to the alleged unfair media coverage which the appellant has received."

[111] The magistrate's refusal to receive evidence relating to the surrender is valid until set aside.[83] Although Mr Tucker initially indicated that he would appeal against the High Court's dismissal of his review application, he has not done so.

[112] Both parties agree that paragraph 3 of the High Court's order should be set aside, albeit for different reasons. The DPP says the High Court's order is unsustainable because the Magistrate's refusal to hear evidence relating to surrender was not irregular. Mr Tucker contends that paragraph 3 of the High Court's order should be set aside because the Magistrate is not empowered under the Extradition Act to "re-open" proceedings to hear evidence relating to surrender when a valid committal order exists. Mr Tucker has consented to the order sought and accepts that if it is granted he will not be left without recourse. However, notwithstanding the parties' agreement on this score, this Court must satisfy itself whether, as a matter of law, paragraph 3 falls to be set aside. This Court is not bound by the common approach of parties if it is based on an incorrect perception of the law.[84]

[113] Mr Tucker's counsel contended that in light of the valid committal order, paragraph 3 of the High Court's order is not competent because the Magistrate does not have the power to hear evidence relating to the surrender decision after and in a separate self-contained hearing once she has made a valid committal order. It was contended that section 9(1) envisages a single enquiry before the magistrate with a view to the surrender of the sought person and this enquiry, by virtue of section 10(1), is only aimed at committal. It was further contended that section 10(4) implies that the evidence relating to the surrender decision must be led within the committal extradition enquiry

[83] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 103.

[84] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 67.

and not separately. According to this argument, the "record of proceedings" that the magistrate is obliged to forward to the Minister in terms of section 10(4) refers to the committal proceedings under section 10 and the report which the magistrate may forward to the Minister pertains only to what occurred in the committal proceedings. The reference to "proceedings" is thus a reference to the committal proceedings which culminate in the magistrate's committal decision and until such decision is set aside, it stands in the way of a re-opening of the proceedings.

[114] In my view, these submissions are based on an unduly narrow view of extradition proceedings conducted in terms of sections 9 and 10 of the Act. According to section 9(1), an enquiry is held by the magistrate *with a view to the surrender of the sought person*. In terms of section 10, the magistrate shall make a committal order provided the jurisdictional requirements for committal are met. To that extent, the extradition enquiry is concerned primarily with committal. That said, I have taken great pains to emphasise that the enquiry is conducted "with a view to surrender" and I have concluded that the sought person has a right to lead evidence relevant to the Minister's surrender decision under section 11. The correlative of the sought person's right to adduce this evidence, is the magistrate's obligation to receive it. The magistrate fulfils this obligation while, in a simultaneous but parallel process, discharging her obligation to make a decision on committal. It is the magistrate's failure to comply with the obligation to receive evidence relating to surrender that paragraph 3 of the High Court's order seeks to correct, while keeping the committal leg of the inquiry intact.

[115] Is there anything in the Extradition Act which stands in the way of re-opening the proceedings for the limited purposes of correcting the magistrate's failure to receive Mr Tucker's evidence relating to his surrender? Counsel for Mr Tucker submitted that the effect of section 10(1) of the Act is that the proceedings are only aimed at committal and that section 10(4) makes it clear that the Magistrate is only empowered to hold an enquiry with respect to the committal of the sought person. I disagree. Section 10(1) does say that a committal order is based on "evidence adduced at the enquiry" but I do not read this as meaning that the enquiry is about committal alone. Section 10(4)

imposes certain reporting duties on the magistrate who issues a committal order to forward to the Minister a record of the extradition proceedings. If those proceedings are re-opened in order to correct an irregularity, the magistrate would have an obligation to forward a record of that portion of the proceedings to the Minister.

[116] The finding that extradition proceedings can be re-opened to correct a failure to receive evidence relating to surrender flows from a proper interpretation of sections 9 and 10, which envisages a *sui generis* enquiry that may serve a dual purpose, namely, the committal decision and the receiving of evidence that will inform the Minister's surrender decision under section 11. Thus, the *raison d'etre* (purpose) of the extradition enquiry is not the magistrate's committal decision alone. It follows that it was competent for the High Court to direct that the Magistrate receive evidence relating to surrender even though the committal aspect of the enquiry has been finalised.

Conclusion

[117] A magistrate is obliged to admit evidence that is relevant to the Minister's surrender during committal proceedings, notwithstanding the fact that the enquiry is solely concerned with the committal of the sought person. In this matter, having concluded that the Magistrate did not fulfil this obligation, it was competent for the High Court to order that the extradition enquiry in terms of sections 9 and 10 of the Act be re-opened and direct that the Magistrate receive Mr Tucker's evidence relating to surrender. For these reasons, I would dismiss the appeal and preserve paragraph 3 of the High Court's order.

Order

[118] In the result, the following order is made:

1. The application for condonation is granted.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

JAFTA J:

[119] I have had the pleasure of reading the judgments of my colleagues Mathopo AJ (first judgment) and Theron J (second judgment). I agree with the second judgment that a magistrate who conducts an enquiry in terms of section 10 of the Extradition Act is obliged to receive evidence relevant, not only to the issues to be determined by the magistrate, but also to the issues to be decided later by the Minister.

[120] This interpretation of section 10 of the Extradition Act was affirmed first in *Geuking* by this Court, where it was held that the person against whom an enquiry under the section is conducted "is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11".[85] Later the Supreme Court of Appeal followed that interpretation in *Garrido* and held that evidence relevant to issues to be determined by the Minister must be received by the magistrate during the section 10 enquiry and that such evidence must form part of the report submitted to the Minister by the magistrate.[86]

[121] However, it appears that in *Garrido* the Supreme Court of Appeal went further to hold that the magistrate's decision to commit a person to prison pending the Minister's decision to have him extradited, is vitiated by the magistrate's failure to receive evidence relevant to matters to be decided by the Minister. For a number of reasons this is not correct. This failure has no bearing on the issues to be determined by the magistrate. It will be remembered that under section 10 there are only two issues on which the magistrate must be satisfied before ordering committal pending extradition. The first is that the person concerned is liable to be surrendered to a foreign state. The second is that there is sufficient evidence to warrant prosecution of the offence he or she is accused of.

[85] *Geuking* above n 4 at para 42.

[86] *Garrido* above n 7 at paras 22-5.

[122] Once these two conditions are met, the magistrate is obliged to commit the person concerned to prison pending his or her surrender by the Minister. This decision is taken regardless of whether the Minister would surrender the person or not. This illustrates that the magistrate and the Minister take separate decisions and one of them has no power to take a decision vested in the other.

[123] Consequently, an irregularity committed by one of them in relation to process concerning a decision by the other cannot vitiate a properly taken decision by the erring functionary. For example, the magistrate's failure to receive evidence relevant only to issues to be decided by the Minister cannot invalidate the magistrate's decision to commit the person to prison. To vitiate the magistrate's decision, the error must have a bearing on the making of that decision. For an irregularity to be a basis for setting a decision aside, it must affect or be involved in the making of the impugned decision. The failure to receive evidence relevant to the making of a decision by the Minister has no bearing on the magistrate's decision and as a result cannot justify rescission of the latter decision.

[124] In this matter, it cannot be gainsaid that the Magistrate rightly took the decision to commit Mr Tucker to prison pending his surrender by the Minister. Nor can it be disputed that the Magistrate refused to receive evidence relevant to issues to be determined by the Minister. Unhappy with this decision, Mr Tucker appealed to the High Court. The High Court dismissed the appeal against the committal order that was issued by the Magistrate but overturned the refusal to receive evidence relevant to the issue to be decided by the Minister. The High Court issued the following order:

> "[T]he proceedings of the extradition enquiry which was held before the magistrate of Cape Town shall be re-opened, in order to allow the appellant an opportunity, if he so wishes, to put before the magistrate (for his consideration and report to the Minister in terms of section 10(4) of the Extradition Act 62 of 1967, if he deems it fit) within 15 days from date hereof an affidavit by an expert on UK law, in relation to the alleged discriminatory features thereof pertaining to the sexual offences for which the appellant

> is sought for extradition to the UK, and any documentary evidence pertaining to the alleged unfair media coverage which the appellant has received."

[125] It was this part of the order the DPP sought leave to appeal against. He argued that the High Court had no authority to reopen the enquiry and direct the Magistrate to receive evidence relevant to issues to be decided by the Minister. Once those proceedings were closed, it was submitted, they could not be reopened because sections 9 and 10 contemplate a single enquiry. For a number of reasons, this argument is untenable.

[126] First, the argument overlooks the appeal procedure created by the Extradition Act itself. Section 10(1) explicitly obliges a magistrate who orders committal of a person to prison to inform that person of his or her statutory right to appeal the magistrate's decision to the High Court.[87] Section 13 provides that a person against whom a committal order is made may appeal such order to the High Court.[88] Here Mr Tucker, against whom the order was made, appealed to the High Court. Section 13(2) mandates the High Court to make any order it deems fit following a consideration of the appeal.[89]

[127] In adjudicating the appeal, the High Court realised that with regard to the decision to commit Mr Tucker to prison, no irregularity was committed by the

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[87] Section 10(1) provides:

> "If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court."

[88] Section 13(1) provides:

> "Any person against whom an order has been issued under section 10 or 12 may within fifteen days after the issue thereof, appeal against such order to the provincial or local division of the Supreme Court having jurisdiction."

[89] Section 13(2) provides:

> "On appeal such division may make such order in the matter as it may deem fit."

Magistrate. This meant that this decision was to be left intact. But the refusal to receive evidence on the fairness of the trial in the United Kingdom was found to have been in breach of section 10 of the Extradition Act, as interpreted in *Geuking* and *Garrido*. Having reached this conclusion, the High Court deemed it necessary to direct that the Magistrate reopen the enquiry for the limited purposes of taking evidence relevant to the issues to be decided by the Minister. There can be no doubt that this order falls within the ambit of the wide remedial power conferred on the High Court by section 13(2) of the Extradition Act. This provision grants the High Court an unqualified remedial power. That Court may make any order it considers necessary or fit in the particular appeal.

[128] Properly construed, the reach of section 13(2) is not limited by sections 9 and 10 of the Extradition Act. It is wrong to apply section 13(2) as if its operation is dependent on sections 9 and 10. There is simply nothing in those provisions which suggest that they have a bearing on the scope of section 13(2). To read section 13(2) as being subject to sections 9 and 10 does not only lack textual foundation but also leads to an absurdity. On that approach, errors committed by a magistrate during a section 10 enquiry can never be corrected on appeal because that enquiry cannot be reopened. This would render the entire appeal nugatory. If a statute, like the Extradition Act, affords an appeal against decisions taken under it, there can be no denying that the statute anticipates errors to be made and if such errors occur, that they should be corrected on appeal.

[129] The proposition that section 10 read with section 9 of the Extradition Act permits only a single enquiry, misses the point. Properly construed, these provisions oblige the magistrate to take disparate steps towards distinct objectives. That is, the enquiry entails two separate processes. One process leads to taking the decision to commit a person to prison and the other relates to collecting evidence relevant to the decision to surrender that person, which is taken by the Minister. An irregularity in respect of one process cannot vitiate the other process. To do otherwise would be tantamount to using a sledgehammer to kill an ant. The sledgehammer approach is not warranted by the language of those provisions. Nor is it supported by principle or logic.

[130] Over and above the authority in section 13, the source of the High Court's remedial powers in constitutional matters like the present is section 172(1) of the Constitution.[90] This provision provides wide remedial powers to courts adjudicating constitutional matters. Considerations of justice and equity determine the nature and scope of the order to be issued.[91] Here, those considerations are that the committal order was properly made. The error was limited to the refusal to take evidence relevant to the decision that was to be made by the Minister. In these circumstances, a just and equitable order is an order that is directed at correcting the defect in the section 10 proceedings. The order granted by the High Court here meets the requirements of justice and equity.

[131] The correct approach to applying constitutional remedial powers was outlined by this Court in *Höerskool Ermelo*:

> "It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair

[90] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[91] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo)* at para 96.

> to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution."[92]

[132] Therefore, even if section 13(2) did not exist, the order granted by the High Court would still be competent under the Constitution, our supreme law.

[133] The other contention advanced against the High Court's order quoted above was that since that Court had dismissed the appeal and review, it was not competent for it to make that order. There is no merit in this argument. It is common for appeal courts to dismiss an appeal whilst upholding it in part. A reading of the High Court's judgment makes it clear that the appeal was partly successful. That court said:

> "Insofar as costs are concerned, both parties may claim a measure of success. Although the state was successful in warding off an order in the review application that the proceedings be set aside, the appellant equally was successful in obtaining an order allowing him to put forward certain evidence which the magistrate was not prepared to receive, for his consideration and submission to the Minister."[93]

[134] Therefore, there was partial success for each party. The state succeeded in the review and Mr Tucker in the appeal. However, the order that was granted failed to accurately reflect that the appeal was dismissed save to the extent of paragraph 3 of that order. For a proper understanding of the order, it must be read with the preceding reasons in the judgment.

[135] It is for all these reasons that I disagree with the first judgment on remedy. Instead, I support the order proposed in the second judgment which effectively preserves the order issued by the High Court.

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[92] Id at para 97.

[93] High Court judgment above n 8 at para 81.

For the Applicant:	D Damerell and C Burke instructed by the Director of Public Prosecutions
For the Respondent:	A Katz SC, K Perumalsamy and E Cohen on a *pro bono* basis