IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No:40441/21

In the matter between:

FORUM DE MONITORIA DO ORÇAMENTO	Applicant
and	
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Third Respondent
HELEN SUZMAN FOUNDATION	Fourth Respondent
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
REPUBLIC OF MOZAMBIQUE	Seventh Respondent

FMO'S HEADS OF ARGUMENT: THE REVIEW

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I INTRODUCTION

1. In *Chang I*,[1] this Court was faced with a question: is it constitutional for the Minister of Justice and Correctional Services (**Minister**) to extradite a person to a country in which that person enjoys immunity from prosecution?

2. The Court said No. Extraditing a sought person to a country where they are immune from criminal prosecution is unlawful, irrational, and contrary to South Africa's international legal duties. This Court could not have been clearer:

> "As a starting point the former Minister did not have the power to extradite Mr Chang to Mozambique because this was prohibited by his immunity. Thus his decision was *ultra vires.* The Minister also did not take into account that Mr Chang had immunity because he did not know of it. It would furthermore be irrational for a person to be extradited so they could be prosecuted for their crimes if they were immune from prosecution for such crimes. In reality, there was no choice to make between the USA and Mozambique. The Minister did not have the option to extradite Mr Chang to Mozambique. He was faced with only one valid request – that of the USA."[2]

3. This Court set aside the then Minister's decision to extradite Mr Manual Chang to Mozambique, because Mr Chang enjoyed immunity in Mozambique. The Court remitted the decision to the Minister. This was on 1 November 2019.

4. Before retaking the decision, the Minister sought counsel. He briefed five independent lawyers to address him on whether Mr Chang enjoys immunity in Mozambique. He

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[1] *Chang v Minister of Justice and Correctional Services; Forum de Monitoria do Orcamento v Chang* [2019] ZAGPJHC 396; [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) (*Chang I*).

[2] Id at para 80.

was advised, among other things, that Mr Chang still enjoys immunity in Mozambique. Around September 2020, the Minister approved and agreed with this advice.

5. Then nothing, for about a year.

6. On 17 August 2021, the Minister decided to extradite Mr Chang to Mozambique.

7. The Minister took this decision despite this Court's judgment. He took this decision despite the evidence before him. He took this decision despite his own advisors and counsel advising him that Mr Chang is immune. He took this decision despite *agreeing* with this advice. He took this decision despite his constitutional duties. He took this decision despite South Africa's international obligations.

8. So, here we are again. The primary question before this Court is whether the Minister's decision is constitutional. This Court has already given the answer—No. The Minister cannot extradite Mr Chang to Mozambique, where Mr Chang enjoys immunity. The Minister's decision should be declared unconstitutional—again. His decision should be set aside—again.

9. But, this time, this Court should not remit the Minister's decision. This Court must do what is just and equitable. Justice and equity demand that this Court substitute the Minister's decision for one extraditing Mr Chang to the US.

10. Last time, there was only one problem with the Minister's decision—immunity. That was enough to set aside the Minister's decision, and it is more than enough now. But there are four further problems with the Minister's decision this time:

10.1. The Minister's decision was irrational because it extradited Mr Chang, who is a flight risk, to a country where no valid warrant exists for his arrest.

10.2. The Minister has no reasons for his decision, rendering it completely arbitrary and irrational.

10.3. Alternatively, if the Minister has reasons, those reasons bear no rational connection to the evidence before the Minister and his decision.

10.4. The Minister adopted an irrational process to make his decision.

11. The Court does not need to decide these further issues. The fact that Mr Chang has immunity in Mozambique is what Justice Cameron has called "*a killer point*".[3] That immunity argument is so strong that it is not necessary to go further. The point can be put another way, through a well-established rule of review: it has been held by our highest courts that a court is not obliged to pick and choose between the respondents' reasons to try to find sustenance for the decision despite the presence of one or more bad reasons. That is because of a fundamental rule laid down by Tindall J in *Patel v Witbank Town Council* 1931 TPD 284 at 290, where he asked:

> "(W)hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground

[3] *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 91.

> 3 is a bad ground for a refusal? **Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision**. . . . This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it." (emphasis added).

12. This principle was reaffirmed by Cameron JA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 8:

> "Given that the commissioner took four bad reasons into account in reinstating the employee, but that other legitimate reasons existed that were capable of sustaining the outcome, can it be said that the employee's reinstatement was 'rationally connected' to the information before the commissioner, or the reasons given for it, as PAJA requires? **In my view, it cannot. It can certainly not be said that the outcome was 'rationally connected' to the commissioner's reasons as a whole, for those reasons were preponderantly bad and bad reasons cannot provide a rational connection to a sustainable outcome. Nor does PAJA oblige us to pick and choose between the commissioner's reasons to try to find sustenance for the decision despite the bad reasons. Once the bad reasons played an appreciable or significant role in the outcome, it is, in my view, impossible to say that the reasons given provide a rational connection to it**. This dimension of rationality in decision-making predates its constitutional formulation. In Patel v Witbank town Council, Tindall J set aside a decision which had been 'substantially influenced' by a bad reason. … The same applies where it is impossible to distinguish between the reasons that substantially influenced the decision, and those that did not." (emphasis added).

13. FMO nonetheless raises these further grounds for setting aside the Minister's decision. FMO does so in the alternative. FMO also does so because some of these grounds speak to why it is just and equitable to substitute the Minister's decision.

14. These submissions deal with immunity and the four further reviewable features of the Minister's decision. Before addressing those grounds of review, these submissions canvass the relevant legal principles. The background facts of this matter are well known to this Court, so they are recounted only to the extent that they are relevant to the merits of the review.

15. These submissions do not deal with the question of costs. In its replying affidavit,[4] FMO seeks personal costs against the Minister on a punitive scale. FMO has taken the position that the question of personal costs perhaps should not be dealt with as urgently as the merits of this matter. FMO also anticipates that the Minister will wish to file further affidavits on why costs should not be awarded against him personally. Accordingly, FMO will deal with personal costs as directed by this Court.

II THE LEGAL FRAMEWORK

16. This is an application to review a decision to extradite a sought person in terms of an international treaty. There are three sets of intersecting legal principles that are relevant. The first is the law on legality review. The second is the law on extradition. The third is the relationship between international and municipal (domestic) law under

[4] Record at 16-5.

the Constitution of the Republic of South Africa, 1996. Each of these sets and its relationship to the others is discussed below.

(a) Legality review

17. The Constitution is supreme,[5] with all law and conduct inconsistent with the Constitution being invalid.[6]

18. In section 1(c), the Constitution provides that South Africa is a Republic founded on the rule of law. In *Fedsure*, the Constitutional Court held that the principle of legality, which is an aspect of the rule of law, requires that all exercises of public power must be lawful. Public power must be exercised within the four corners of authorising legislation. If not, it is subject to review.

19. In *SARFU*, the Constitutional Court developed the principle of legality. Legality implies that the holder of public power must act in good faith and not misconstrue his or her powers.[7] In *Pharmaceuticals*, this was taken further—the principle of legality requires all public power to be exercised **rationally**.[8] A decision taken in good faith, but irrationally is unconstitutional and invalid.

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[5] Section 1(c) of the Constitution.

[6] Section 2 of the Constitution; *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) at para 31; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 at para 1.

[7] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (*SARFU*) at para 148.

[8] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (*Pharmaceuticals*) at para 80.

20. The test for rationality is relatively settled, having been considered by the Constitutional Court over years.

21. Rationality requires that the means selected by the functionary rationally relates to the legitimate, legally authorised objective for which the functionary's power was exercised. If not, the decision does not pass constitutional muster. This is distinct from reasonableness, which is a test that considers proportionality and other potential means.

22. As Mogoeng CJ, in the context of a case involving an international treaty, put it:

> "[Rationality is] about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."[9]

23. Mogoeng CJ affirmed the Court's finding in *Albutt,* where the Constitutional Court held that rationality has a procedural element.[10]

24. The Constitutional Court clarified in *Democratic Alliance*, that rationality in process demands that the means chosen to achieve a legitimate government purpose includes the process leading up to the decision.[11] Yacoob J held:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done *in the process of taking that decision*,

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[9] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51 at para 64.

[10] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) at para 50.

[11] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) at para 37. See most recently *National Energy Regulator of South Africa v PG Group (Pty) Limited* [2019] ZACC 28 (*NERSA*) at para 49.

constitutes means towards the attainment of the purpose for which the power was conferred."[12]

25. The Constitutional Court has consistently held that rationality does not require procedural fairness in the same way that administrative action does.[13]

26. Instead, rationality requires "testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power".[14] For example, the process can render the decision irrational if the process excluded a hearing where one was rationally necessary to achieve the statutory purpose concerned.[15]

27. The decision-making process adopted can render the decision irrational, unconstitutional and invalid if it categorically ignores information that is materially relevant to the fulfilment of the legitimate government purpose.[16]

28. Importantly, when assessing whether a decision is rational, the decision "must be evaluated on the basis of the facts as they were at the date on which the decision was taken".[17]

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[12] *Democratic Alliance* at para 36.

[13] *Law Society* at para 64.

[14] Id.

[15] As in *Albutt*. Importantly, this is to be distinguished from an argument for general public participation as contemplated by the Constitutional Court in *Law Society* at para 87.

[16] As in *Democratic Alliance* and more recently in *NERSA*.

[17] *Chang I* at para 35.

(b) Extradition law

29. In *Kaunda*,[18] *Geuking*,[19] and *Law Society*,[20] the Constitutional Court confirmed that the principle of legality equally constrains the conduct of the executive in the context of foreign and international relations.

30. The executive's conduct in foreign affairs constitutes the exercise of public power under South African law and must conform to the principle of legality.

31. All decisions taken under the Extradition Act must comply with the principle of legality.

32. Prior to the enactment of the Constitution, extradition fell within the executive's prerogative powers. Because the executive branch no longer enjoys a prerogative power in South Africa, a response to any request by a foreign state for the surrender of a person can only occur pursuant to a law, duly enacted by Parliament.[21] This is an implication of the principle of legality, as an aspect of the rule of law, which requires that all exercises of public power must be done in terms of an empowering legal provision.

33. In *Harksen* the Constitutional Court stated:

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[18] *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 80.

[19] *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 27.

[20] *Law Society* at para 61.

[21] *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras 32-33; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 8.

> "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.
>
> In South Africa, extradition is governed domestically by the provisions of the Extradition Act."[22] (Footnotes omitted.)

34. South Africa enacted the Extradition Act to prescribe domestic procedures before a person may lawfully be extradited from South Africa.[23]

35. All extradition requests to South Africa are processed and executed through the provisions of the Extradition Act.[24] The supremacy of the Constitution means that the provisions of the Extradition Act and their implementation in and application to all cases must be consistent with the Constitution. All conduct by the executive and the courts in terms of the Extradition Act must comply with the Constitution.[25]

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[22] *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) at paras 3-5.

[23] The Extradition Act was assented to on 13 June 1962, came into force on 20 June 1962, and has been amended on several occasions, the last of which was by the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

[24] *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC) at para 2.

[25] See *Zuma v National Director of Public Prosecutions* 2008 (1) SACR 298 (SCA) at para 15:

> "It is true, as counsel for the appellants reminded us, that the rule of law and the principle of legality require State conduct (which includes the conduct of a judge) to be in accordance with law."

36. Accordingly, the Minister, in deciding to surrender Mr Chang to Mozambique must have complied with the provisions of both the Constitution and the Extradition Act.

37. The Extradition Act prescribes *different processes* for extradition depending on whether a requesting state is a foreign or associated state.

38. The Extradition Act defines a foreign state as including any foreign territory.[26]

39. If a requesting state is a foreign state, then the process for surrendering a person to that requesting state can be divided into three phases.[27]

40. First, there is the administrative phase of the extradition. This phase concerns receipt of the extradition request, the issuing of arrest warrants, and the execution of arrest warrants. The administrative phase of Mr Chang's extradition is not contested in these proceedings.

41. The second phase in an extradition to a foreign state is the judicial phase, an enquiry in terms of section 10 read with section 9. This phase begins once a person is arrested. Every person arrested in terms of the Extradition Act must be brought before a magistrate as soon as possible. Once brought before a magistrate, the magistrate must hold an enquiry "with a view to the surrender" of the person to the requesting state.[28] The judicial phase of Mr Chang's extradition is no longer at issue.

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[26] Section 1 definition of "foreign state".

[27] "Extradition" in Dugard et al (ed) *International Law: A South African Perspective* (5 ed) (Juta & Co Ltd, Cape Town, 2019) at 323.

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

42. At the conclusion of the enquiry, after hearing evidence, in terms of section 10 the magistrate *must* either commit (section 10(1)) or discharge (section 10(3)) the person.[29]

43. The section 10 decision is only to commit or discharge. If the sought person is committed, then it is the Minister who decides if the person should be surrendered in extradition.

44. The third phase of an extradition to a foreign state is the executive phase. When a Magistrate issues a committal order, the section 10 enquiry ends, and the person is committed to prison pending the Minister's decision to surrender him or her under section 11. This constitutes the start of the executive phase of the extradition process to foreign states. That is the phase we are in.

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[29] Section 10 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."

45. Under section 11, the Minister may decide to surrender the sought person (section 11(a)), or he can decline to surrender the committed person for various reasons and on certain conditions.[30]

46. The Minister's surrender decision is an exercise of public power and must comply with the principle of legality. His decision under section 11 is subject to review.[31]

(c) International law

47. The present applications concern various international treaties, in which it is alleged that the Minister and South Africa will violate if the surrender decision by the Minister is not set aside.

48. Most importantly, FMO submits that the Minister could stand to violate directly certain provisions of the SADC Protocol.

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[30] Section 11(b) 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
>
> (iv) 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."

[31] See for example *Robinson v Minister of Justice and Constitutional Development* 2006 (6) SA 214 (WCHC).

49. In *Chang I*, this Court considered it unnecessary to decide whether the relevant provisions of the SADC Protocol have become part of South African law. Instead, this Court invoked South Africa's international legal duties indirectly through section 7(2) of the Constitution. This Court held that if the Minister's decision caused South Africa to breach the provisions of the SADC Treaty, then the Minister would be in breach of section 7(2) of the Constitution.[32]

50. FMO submits that this approach is well-founded. It is an appropriate basis on which to decide this case.

51. Section 233 of the Constitution mandates that reasonable interpretations of legislation that accord with international law must be preferred over an alternative interpretation that is inconsistent with international law. And section 39(1)(b) mandates courts to consider international law when interpreting the Bill of Rights.

52. International law for interpretive purposes includes international law that is not binding on South Africa.[33]

53. When determining whether the state has taken reasonable steps to fulfil the rights in the Bill of Rights per section 7(2), courts must have regard to international law in determining the contours of reasonableness.[34]

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[32] *Chang I* at para 71.

[33] *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 at paras 413-4; *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) at para 178 fn 28.

[34] *Glenister* id para 192.

54. The Constitutional Court has developed the indirect role of international law in determining the lawfulness and rationality of executive conduct. In *Law Society*, a majority of the Constitutional Court set aside the President's involvement in dismantling the SADC Tribunal through the adoption of an international protocol.

55. The Constitutional Court did so for two relevant reasons.

56. First, the Court held that the President, by voting for and signing the protocol, caused South Africa to violate its international legal duties under Treaty of the Southern African Development Community.[35] The Court held that the President could not in good faith and without misconstruing his powers act in a manner that causes South Africa to conduct itself inconsistent with its international legal duties.[36] Accordingly, the President's conduct was declared unlawful.

57. Secondly, Mogoeng CJ held that the President acted irrationally because his conduct did not consider South Africa's international duties and the purpose for the procedures under international that South Africa was bound to observe.[37] In other words, causing South Africa's failure to adhere to the processes required under international law rendered the President's decision irrational. The power of the President was not exercised for a legitimate government purpose and the President chose a means that was inconsistent with the SADC Treaty, making it irrational.

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[35] Id at para 53, which reads: "This means that when our President decided to be party to the suspension of the Tribunal and to actually sign the Protocol, he was acting in a manner that undermined our international law obligations under the Treaty".

[36] Id at paras 55-6.

[37] Id at para 70, which reads: "This disregard for the amendment procedure set out in the Treaty and the concomitant failure to appreciate the purpose for the exercise of the power to amend within the context of binding Treaty provisions is irrational and invalidates the President's conduct in relation to the amendment."

58. Importantly, the majority of the Constitutional Court made these findings without pronouncing on the domestication of the SADC Treaty or Protocol. They made no finding as to whether the duties to which South Africa was bound under the Treaty and the Protocol bound the President on the domestic plane. Instead, Mogoeng CJ used these duties as materially relevant considerations in the legality review, essentially holding that a decision taken by a South African functionary that flouts or ignores South Africa's international legal obligations is unlawful and irrational.

59. The majority made this clear in two parts of its judgment. First, Mogoeng CJ held:

> "All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative *and international law obligations*."

60. Mogoeng CJ clarified:

> "Any reference to the President being bound by an undomesticated treaty must be understood as a reference to the binding effect of that instrument on her merely as a representative of the State. In other words, it is the State alone that is itself bound by that undomesticated legal instrument. . . . . It has also been made abundantly clear in this majority judgment that relevant constitutional provisions, including sections 7 and 8, are relied on for the determination of the lawfulness, rationality and constitutionality of the President's conduct."[38]

61. Accordingly, if this Court finds that the Minister's decision would cause South Africa to breach its international legal duties, then it is unlawful and irrational.

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[38] Id at para 43.

III THE MINISTER'S DECISION

62. FMO has brought this application under both PAJA and legality. However, as in *Democratic Alliance*, it is unnecessary for this Court to pronounce on whether PAJA applies.[39] It is common cause that the decision constitutes the exercise of public power. The grounds of review that FMO invoke are available under both legality and PAJA. Accordingly, it is unnecessary to decide whether PAJA applies and as in *Chang I* it is appropriate to treat the matter as a review on the basis of legality.[40]

63. The Minister's decision is both unlawful and irrational. There are five reasons for why:

    63.1. Mr Chang is immune from criminal prosecution in Mozambique.

    63.2. Mr Chang was extradited to Mozambique, where there is no warrant for his arrest.

    63.3. There are no reasons for the decision.

    63.4. If there are reasons, then those reasons are not rationally related to the decision.

    63.5. The Minister's process of deciding where to extradite Mr Chang was irrational.

(a) Immunity

64. *Chang I* is clear. If Mr Chang is immune from criminal prosecution in Mozambique, then extraditing Mr Chang to Mozambique is both unlawful and irrational.

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[39] *Democratic Alliance* at para 12. See further *Albutt* at paras 79-84.

[40] *Chang I* at para 47.

64.1. The decision is unlawful because article 4(e) of the SADC Protocol on Extradition provides that extradition shall be refused "if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty". Article 4(e), this Court held, effectively prohibits the extradition of Mr Chang to Mozambique, if Mr Chang was immune there.[41]

64.2. The decision is irrational because "[e]xtradition has as its purpose the prosecution of the guilty. Thus it would make no sense to extradite a person to a place where he cannot be prosecuted."[42]

65. The record of the Minister's decision – as opposed to his after-the-fact reasons – reveals that Mr Chang *is* immune from prosecution in Mozambique. There are four key documents in this regard.

66. First, there are the submissions filed by Mr Chang (dated 21 February 2020)[43] and Mozambique (dated 17 February 2020).[44] In these submissions, Mr Chang and Mozambique briefly state that Mr Chang is no longer a member of Parliament. Therefore, "Mr Chang no longer enjoys the immunity afforded to a member of parliament".[45]

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[41] *Chang I* at paras 74-6.

[42] *Chang I* at para 76.

[43] Record at 09-36.

[44] Record at 09-133.

[45] Mozambique's submissions of 17 February 2020 at para 10.5; Record at 09-152.

67. Mr Chang appears to no longer be a member of Parliament for two reasons.

67.1. First, according to a document dated 19 July 2019, Mr Chang purportedly renounced his membership of Parliament.[46] There is a letter from the Parliament of Mozambique, dated 25 July 2019, acknowledging Mr Chang's renunciation, in the record.[47]

67.2. Second, according to Mr Chang and Mozambique, there was a general election in Mozambique in 2019. Mr Chang, at this election, was not voted into Parliament.[48]

68. Second, there are the FMO's submissions (dated 7 April 2020).[49] The threat of a lingering immunity was first raised by FMO in these submissions. The FMO made three submissions regarding immunity.[50]

68.1. First, Mr Chang has not claimed international legal immunity against criminal prosecution in Mozambique and against his arrest by South African authorities for the purposes of extradition. Instead, his immunity is based in domestic Mozambican law. The distinction is important. Had this matter been about Mr Chang's international legal immunity, then the issue would have turned on whether South Africa could arrest Mr Chang because of the immunity he enjoys

[46] Record at 09-288.

[47] Record at 09-291.

[48] Mozambique's submissions of 17 February 2020 at para 10.5; Record at 09-152.

[49] Record at 09-117.

[50] Record at 09-119 onwards.

under international law. Instead, the issue is whether Mr Chang enjoys immunity *under the domestic laws of the requesting state*.

68.2. Second, Mozambique does not explain whether it follows from his resignation as an MP that Mr Chang can now be prosecuted for conduct done during his term of office. It may well be the case that Mr Chang is still immune from prosecution for anything done during his term of office, even though he is no longer a MP. It is not made clear whether further processes, like parliamentary or court approval, are required to prosecute Mr Chang for conduct alleged committed during his incumbency.

68.3. The point was simple: Mr Chang might no longer be immune from prosecution for future conduct; but Mr Chang could still be immune from prosecution for past conduct committed during his tenancy as MP.

68.4. The question, that Mozambique failed to address, is whether Mr Chang's immunity protects him from prosecution for *conduct* committed during office. Immunity does not necessarily mean *personal* immunity while an incumbent occupies office.

68.5. Third, Mr Chang and Mozambique offer contradictory accounts of Mr Chang's immunity. Mr Chang submits that he must be surrendered to Mozambique so that he can have his immunity lifted. He then, in plain contradiction of this statement, says that his immunity is now "moot" as he has resigned from Parliament and because there is a new Parliament in Mozambique.

69. For these three reasons, FMO submitted that the Minister could not be satisfied that Mr Chang no longer enjoys immunity in Mozambique.

70. The <u>third</u> relevant document is Mozambique's supplementary submissions dated 26 May 2020.[51] Mozambique filed supplementary representations responding to FMO. With respect to immunity, Mozambique's response is difficult to understand. It makes three conflicting and baseless points.

70.1. First, Mozambique submitted that Mr Chang "has never enjoyed immunity" for the crimes of which he is accused. Instead, Mr Chang only ever enjoyed immunity from arrest and detention.[52] This is plainly wrong, given this Court's finding in *Chang I*.[53] It is also a disingenuous point that undermines the good faith of Mozambique: if Mr Chang cannot be arrested, he is effectively immune from prosecution. It is a nefarious splitting of hairs to contend otherwise.

70.2. Moving from this false premise, Mozambique then argues that Mr Chang can now be prosecuted for alleged crimes committed during his office.[54] He was never immune; so, there is no stopping a prosecution of crimes committed while Minister of Finance. Given that Mr Chang was immune, this is no answer to FMO's concern that Mr Chang is no longer immune.

70.3. Second, Mr Chang as an MP "could not be prosecuted" without the consent of National Parliament.[55] This directly contradicts the first point Mozambique makes, which is that Mr Chang had no immunity. Mozambique then continues

[51] Record at 09-190.

[52] Mozambique's supplementary submissions at paras 5.3 and 5.4; Record at 09-198.

[53] *Chang I* at paras 31 and 33.

[54] Mozambique's supplementary submissions at para 5.13; Record at 09-200.

[55] Mozambique's supplementary submissions at para 5.5; Record at 09-198.

to say that Parliament had already given its consent to lift Mr Chang's immunity when Mozambique made its extradition request.[56] This contradicts the High Court's finding in *Chang I*: "The statement in the Memorandum to the effect that Mr Chang was not subject to immunity from prosecution because of the consent of Parliament was not correct. Parliament had given no such consent and neither was it able to do so in Mr Chang's absence".[57]

70.4. Mozambique, clearly, was advancing contradictory at best, and false statements at worst, in its submissions to the Minister. Its assurance that Mr Chang is not immune in Mozambique is open to the same serious doubt that led this Court in *Chang I* to reject the contentions that Mr Chang is not immune.

70.5. Third, Mozambique submits that there is no law in Mozambique that protects members of Parliament, who have left office, from prosecution for crimes committed during office.[58] But immediately after that, Mozambique says that Mr Chang is no longer immune "in as far as that means that he could not be prosecuted without the national parliament formally lifting his immunity".[59] It appears that Mozambique considers immunity to mean whether parliamentary consent is required for prosecution. If so, this does not address FMO's concern. Perhaps Parliament's consent may not be required for Mr Chang's prosecution—but that does not mean he could not raise immunity relating to his office as a defence during his prosecution.

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[56] Id.

[57] *Chang I* at para 31

[58] Mozambique's supplementary submissions at para 5.13; Record at 09-200.

[59] Mozambique's supplementary submissions at para 5.15; Record at 09-200.

71. In sum, Mozambique failed to address FMO's concerns adequately. Mozambique offered disingenuous, baseless, and misleading answers.

72. The fourth relevant document, and this is the most important, is a memorandum of 27 July 2020 written by Mr H van Heerden, who is the Chief Directorate: International Legal Relations in the Department of Justice (**July 2020 Memorandum**).[60] The memorandum concludes that Mr Chang still enjoys immunity in Mozambique.

73. The memorandum concludes this based on five legal opinions, which have not been disclosed to this Court.

74. The first legal opinion, supposedly by South African counsel, provides as follows:[61]

    74.1. Mozambique does not explain whether Mr Chang's resignation as an MP automatically means he is no longer immune. Mozambique does not deal with how the crimes of which he is accused were committed allegedly during his time in office. Mozambique does not deal with how criminal proceedings against Mr Chang appear to have started while Mr Chang was an MP.

    74.2. Mozambique also does not explain how this termination accords with its previous contention that Mr Chang had to be in Mozambique for his immunity to be lifted.

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[60] Record at 06-206.

[61] Record at 06-227-9.

74.3. Mozambique does not explain if further processes for the removal of immunity are necessary. Mozambique just assumes that there is no need for any further judicial process.

74.4. Mozambique assumes that when Mr Chang is subjected to a judicial enquiry for the removal of his immunity, the court will remove his immunity. However, according to Mozambique, it appears that immunity will only be removed if the court finds that Mr Chang has no case to answer.

74.5. Mozambique gives no indication of the progress or status of the prosecutions of other politically connected persons accused of co-conspiring with Mr Chang.

74.6. There is a real risk that Mr Chang will raise substantive and / or procedural immunity in Mozambique.

75. For these reasons, the first legal opinion concludes that Mozambique does not address the defects identified by this Court of the previous Minister's decision, viz. that Mr Chang is immune from prosecution.[62] The opinion advises that "[s]hould the Minister in these circumstances grant the request of Mozambique it is likely that his decision will be subject to review".[63]

76. The second legal opinion, apparently also by South African counsel, acknowledged Mozambique's and Mr Chang's view that Mr Chang no longer enjoys immunity because he is no longer an MP. But the opinion provides: "It is extremely important to note that it is clearly indicated that the above-mentioned view *cannot be confirmed by*

[62] Record at 06-228.

[63] Record at 06-229.

case law and the lack of law of Mozambique".[64] This is crucial: the opinion advised that there is no law, known to counsel, justifying Mozambique's view that Mr Chang no longer enjoys immunity. The opinion concluded: "no advice therefore can be given on whether immunity still exists or not".[65] The opinion advised that the Minister consult FMO on whether Mr Chang is immune. The Minister never consulted FMO.

77. The second legal opinion went on to warn that it "is also very clear that Mr Chang would prefer to be extradited to Mozambique as he may be of the view that Mozambique will not be able to effectively prosecute him".[66]

78. The third legal opinion, apparently also South African, was largely in line with the previous two. As with the first two, the third opinion advised that it is still unclear whether the Minister can accept that Mr Chang no longer enjoys immunity from prosecution.[67] The opinion did not clearly conclude that Mr Chang no longer enjoys immunity in Mozambique. It only advised that if Mr Chang is no longer immune, he could in principle be extradited to Mozambique. Conversely, if Mr Chang is still immune in Mozambique—which is unclear—then he *cannot* be extradited to Mozambique.

[64] Record at 06-231.

[65] Record at 06-231.

[66] Record at 06-231.

[67] Record at 06-232.

79. A fourth legal opinion appears to have been procured from a Mozambican lawyer.[68] The opinion advised that Mr Chang be extradited to the US and that the request made by Mozambique was in bad faith. Counsel's reasons were as follows:

79.1. Mr Chang was not charged with an offence when Mozambique requested his extradition. Mr Chang, at the time of the opinion, was still not indicted in Mozambique. Accordingly, the request by Mozambique did not comply with international law.

79.2. The extradition request misleadingly omitted to explain that the parliamentary permission annexed to the request did not waive Mr Chang's immunity as required under Mozambican law but consented simply to a warrant of arrest. The proceedings before the parliamentary committee, moreover, were irregular.

79.3. Since Mozambique claimed that Parliament had waived Mr Chang's immunity, Mozambique had deliberately misled South Africa when it made its extradition request.

79.4. Mr Chang enjoys a right and privilege not to testify on information acquired by him in the exercise of rights and duties while he was Minister of Finance. The content and scope of this right is not explained in the July 2020 Memorandum. Crucially, the Minister has not told this Court, and presumably was not told, whether this right includes preventing the prosecution from leading evidence relating to information acquired by Mr Chang during his term of office.

[68] Record at 06-233.

79.5. Mr Chang, if he is surrendered to Mozambique, cannot be extradited anywhere else. The Mozambican Constitution forbids the extradition of its citizens.

79.6. The Mozambican request contained false, incomplete and misleading information.

80. A fifth legal opinion from a Mozambican lawyer was obtained as a matter of urgency. The opinion advised that Mr Chang, as a previous MP, still enjoys immunity for acts and omissions related to his mandate or acts committed "in lieu of" (sic) the execution of his functions as an MP.[69] However:

80.1. The scope and content of this immunity is not explained.

80.2. The legal expert, according to the memorandum, does not apply this rule to the facts of Mr Chang. It is still unclear if Mr Chang can raise this defence of immunity in response to the prosecution against him.

80.3. The opinion, in contradiction, goes on to say that members of government have been prosecuted "for committing offences during the performance of their duties as office bearers". It is unclear then how this immunity works, and whether those other office bearers were able to raise the defence of immunity.

80.4. Again in contradiction, the opinion says that Mr Chang's immunity "ceases automatically and immediately when the mandate or term office is reached [sic]". The meaning of this is totally unclear, given the previous averment that Mr Chang still enjoys immunity.

[69] Record at 06-235.

80.5. That confusion is confounded by the fact that the opinion then introduces an entirely new immunity enjoyed by Mr Chang: immunity not to be "arrested or prosecuted for offences relating to the expression of a political position, casting of votes, or adoption of a political view over the deliberation that took place in Cabinet and or [sic] Parliament and when they were still in office [sic]". The origin of this immunity is not explained. The immunity's relation to other kinds of immunity is not explained. The content of this immunity, and its implications for Mr Chang, most importantly, are not explained.

81. In sum, all five legal opinions advise the Minister that Mr Chang in all likelihood has immunity in Mozambique from criminal prosecution. The three South African opinions express grave doubts about Mozambique's representations that Mr Chang does not have immunity. The two Mozambican opinions advise that Mozambique's request was made in bad faith and that Mr Chang enjoys immunity, in some shape or form.

82. Critically, there is no subsequent memorandum or reasons or notes or scribbles in the record – nothing! – rebutting the crucial point that Mr Chang enjoys immunity in Mozambique. The only suggestion the Minister had before him that Mr Chang is not immune is the say-so of Mr Chang and Mozambique's assurances. But those averments, which are patently contradictory, were dealt with and rebutted, conclusively, by the July 2020 Memorandum and its legal opinions. Moreover, the July 2020 Memorandum introduced numerous reasons to doubt the veracity of Mozambique's assurances. And on top of all this, the Minister *signed* the memorandum, confirming that he agreed with it.

83. Furthermore, on oath before this Court, the Minister (now[70]) accepts that Mr Chang is immune for acts and omissions related to his mandate and any such acts that are committed "in lieu of" (sic) the execution of his functions attributed to members of parliament.[71] The Minister repeats verbatim the contents of the fifth legal opinion as summarised in the July 2020 Memorandum. This is a clear endorsement of the advice in the fifth legal opinion. But this opinion advised that Mr Chang *is* immune—in several different ways—from prosecution. As explained above, the issue with the fifth opinion is that the scope of the immunity is unexplained and potentially applicable to Mr Chang's charges. Accordingly, the Minister's concession that Mr Chang is immune along the lines of the fifth legal opinion is the end of the matter.

84. So, on the evidence before the Minister, and as the Minister now rightly accepts, Mr Chang enjoys immunity in Mozambique. The Minister's decision is unlawful and irrational.

85. We submit, in the alternative, that the Minister needed to have *clear evidence* that Mr Chang is not immune from prosecution. That is because, as this Court said in *Chang I*, the "Executive's part in the global commitment to fighting corruption" has led our courts to being "committed to **exacting compliance** with our obligations under International Law",[72] including because "corruption and organised crime **undermine the rights enshrined in the Bill of Rights, endangers the stability and security of**

[70] Initially, in his answering affidavit in Part A and in his reasons of 30 August 2021, the Minister denied that Mr Chang has immunity in Mozambique. We return to the import of this volte face below.

[71] Minister's Part B AA at para 31.1; Record at 06-189

[72] *Chang I* at para 68 read with para 70 – emphasis added.

society and jeopardises sustainable development and the Rule of Law".[73] And because this very Minister was on red alert since before the Court in *Chang I* he had already recognised that he was dealing with a foreign Government – Mozambique – that *he* said had "**deliberately misled**" his predecessor about immunity.[74]

86. He obviously did not have clear evidence in this case. The Minister procured *five* legal opinions, none of which advised him that Mr Chang no longer enjoys immunity in Mozambique.

87. Extraditing a sought person to a country where that person is *likely* to be immune is irrational and unlawful, certainly in these circumstances. This is for four reasons:

87.1. This Court's judgment in *Chang I*;

87.2. The Minister's advice;

87.3. South Africa's international legal duties; and

87.4. The purpose of extradition.

88. <u>First</u>, this Court's judgment in *Chang I*. The previous Minister's decision was set aside precisely because Mr Chang enjoyed immunity in Mozambique. The current Minister was on notice regarding this issue. He knew what to look out for. To ensure proper respect for this Court, and to avoid another review application on the same grounds, the

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[73] *Chang I* at para 77, emphasis added.

[74] *Chang I* at para 31, emphasis added.

Minister needed to be certain that Mr Chang no longer enjoyed immunity in Mozambique.

89. Second, the Minister was advised that if he, on the facts before him, decided to extradite Mr Chang to Mozambique, then his decision would be subject to review.[75] The Minister agreed with this advice. The Minister should have then been *certain* that Mr Chang did not enjoy immunity in Mozambique. He should have procured further information from Mozambique confirming that Mr Chang is not immune. Otherwise, he would be—irrationally—setting himself up for a review.

90. Third, South Africa's international legal obligations. As this Court held in *Chang I*:

> The underlying crimes of which Mr Chang is accused involve corruption . Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. It acknowledges as part of this participation that corruption and organised crime undermines the rights enshrined in the Bill of Rights, endangers the stability and security of society and jeopardises sustainable development and the Rule of Law.[76]

91. South Africa has signed and ratified three treaties that impose international legal duties in respect of corruption.

[75] Record at 06-229.

[76] *Chang I* at para 77.

92. First, South Africa has signed and ratified the United Nations Convention against Corruption (UN Convention), along with 185 other states.[77] Kofi Anan, in his foreword to the UN Convention, as cited by the Constitutional Court in *Glenister*,[78] held that corruption—

> "is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."

93. This description of corruption applies with significant force to the facts of this case and Mr Chang's alleged corruption.

94. The UN Convention was enacted because the General Assembly of the United Nations was "[c]oncerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law".[79]

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[77] (2004) 43 *ILM* 37. South Africa signed the UN Corruption Convention on 9 December 2003 and ratified it on 22 November 2004.

[78] *Glenister* at para 167.

[79] See the preamble to the UN Convention.

95. Article 1(b) of the UN Convention provides that the purpose of the treaty is to "promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption".

96. Chapter IV of the UN Convention deals with international cooperation. State parties are obliged to cooperate in criminal matters concerning corruption.[80]

97. The UN Convention obliges state parties to extradite persons sought for the crime of corruption.[81] Importantly, the UN Convention obliges state parties to prosecute the person sought for corruption if the state party refuses to extradite them.[82]

98. Secondly, South Africa has signed and ratified the African Union Convention on Preventing and Combating Corruption (AU Convention).[83] Like the UN Convention, the AU Convention aims to promote cooperation among African states in eradicating corruption.[84]

99. The AU Convention obliges member states to ensure that crimes of corruption are extraditable.[85] It obliges member states to prosecute those persons sought for corruption if they cannot be extradited.[86]

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[80] Article 43(1).

[81] See article 44. It even obliges them to expedite extraditions involving corruption. See article 44(9).

[82] Article 44(11).

[83] (2004) 43 *ILM* 5. The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

[84] Article 2(2).

[85] Article 15(2).

[86] Article 15(6).

100. Thirdly, South Africa has signed and ratified the SADC Protocol against Corruption (SADC Corruption Protocol).[87] The SADC Corruption Protocol has provisions concerning cooperation and extradition that are substantively like those of the UN and AU Convention.[88]

101. South Africa has acknowledged the importance of these treaties and the eradication of corruption domestically through legislation and in case law.[89]

102. The sum of these three Conventions is that South Africa is obliged to cooperate with foreign states in combatting corruption. Such cooperation is not limited to, but certainly includes, extradition.

103. South Africa's commitment to eradicating corruption, including through extraditions, entails that the Minister must be certain that Mr Chang is not immune from criminal prosecution. The Minister would cause South Africa to flout its international legal duties if the Minister extradited Mr Chang to a country where it is likely that, or there is uncertainty over whether, Mr Chang will not be prosecuted for his crimes. If South Africa extradited persons with no due regard to their immunity, or in the face of high risks of immunity, South Africa would not be effectively combatting corruption as required under international law.

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[87] The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

[88] See articles 1(b) and 9.

[89] See the preamble to the Prevention and Combating of Corrupt Activities Act 12 of 2004; *Glenister* at para 176; *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) at para 51; *S v Shaik* [2008] ZACC 7; 2008 (5) SA 354 (CC) ; 2008 (2) SACR 165 (CC) ; 2008 (8) BCLR 834 (CC) at para 75.

104. Fourth, the nature and purpose of extradition requires a high level of certainty on the part of the Minister with respect to immunity. The rationale for extradition is to ensure criminal justice.[90] If the rationale is even at risk of being undermined, because of a possible immunity to criminal proceedings, then the Minister cannot proceed to extradite. He must have clear evidence that the entire point of extradition—criminal prosecution—will be served by extraditing Mr Chang to Mozambique.

105. For these reasons, Mr Chang was immune in Mozambique, or was very likely to be immune in Mozambique, when the Minister made his decision.

(b) Arrest warrant

106. The Minister, at the time of his decision, did not have before him a valid arrest warrant for Mr Chang's arrest in Mozambique. It is irrational to extradite a sought person to stand trial for alleged corruption when that person is (a) a flight risk and (b) not wanted for arrest under a valid warrant in the requesting state.

107. As discussed above, assessing rationality can be broken down into the following steps: (a) what was the purpose for which the power was exercised? (b) is this purpose legitimate? (c) what means and processes were chosen to achieve that purpose? (c) do those means and processes link to the legitimate purpose?

[90] *Chang I* at para 76.

108. The first two steps are straightforward. In *Chang I*, this Court held that "[e]xtradition has as its purpose the prosecution of the guilty".[91]

109. More generally, extradition is a solution to the problem of impunity that could arise from strictly territorial enforcement jurisdiction when crimes and criminals transcend the territories of states. Under international law, a state cannot unilaterally enforce its laws against a person who is not physically present in its territory.[92] For a state to arrest or abduct a person in another state's territory would contravene the territorial sovereignty of the latter state, and indeed international law.[93]

110. At the same time, criminals may escape from one state to another state to evade justice. Because of territorial sovereignty, the affected state is prevented from unilaterally arresting and abducting the sought person when they are in another state's territory. This could lead to that person evading justice.

111. Extradition is the solution to this problem.

112. Extradition recognises that the requesting state cannot on its own secure the presence of the sought person in its territory. It allows states to cooperate in the surrender of the sought person to the affected state so that criminal justice can be done.

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[91] *Chang I* at para 76.

[92] See *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) at para 46; Dugard et al "Jurisdiction and International Crimes" in Dugard et al (ed) *International Law: A South African Perspective* (5 ed) (Juta & Co Ltd, Cape Town, 2019) at 213.

[93] Article 2(4) of the Charter of the United Nations states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

113. Once in the requesting state's territory, the sought person can be detained, tried and punished according to the criminal law of the requesting state. The Constitutional Court, citing La Forest, accepted in *Quagliani* that—

> "[the extradition process] strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors."[94]

114. The Constitutional Court held:

> "Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals . . . . [Extradition] furthers the criminal justice objectives of ensuring that people accused of crime are brought to trial and that those who have been convicted are duly punished. The need for effective extradition procedures becomes particularly acute as the mobility of those accused or convicted of national crimes increases."

115. The general purpose behind the extradition of a person entails, therefore, ensuring that they are held criminally responsible. This purpose is obviously legitimate. But we emphasise how this purpose has gained significance because of the mobility and transnational nature of criminals. Extradition is a critical tool in ensuring that criminals cannot use their resources to leave a country's territory to avoid criminal accountability.

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[94] La Forest *Extradition to and from Canada* 3 ed (Canada Law Book Inc, Ontario 1991) at 15 as cited by the Constitutional Court in *Quagliani* at para 40.

116. Extraditing someone to a country where they are likely—if not definitely—to evade justice by leaving the country is therefore incompatible with the rationale behind extradition.

117. However, that is exactly what the Minister has done in this case. The means chosen by the Minister—a decision to extradite Mr Chang to Mozambique—bears no relation to the purpose behind the decision—criminal accountability. There is no warrant for Mr Chang's arrest in Mozambique, allowing Mr Chang to flee the country as he arrives.

118. The Minister and Mozambique have referred to an "International Warrant of Arrest" issued by the Mozambique Supreme Court for the arrest of Mr Chang. The arrest warrant is dated 19 January 2019. The warrant was part of the record before the Minister.[95] The Minister and Mozambique argue that this warrant is still valid and can be used to arrest Mr Chang when he enters Mozambique.

119. However, there are six reasons for why the arrest warrant is not valid.

120. First, the Public Prosecutor of Mozambique, in the provisional indictment sent to the Minister on 24 November 2020, explains that the warrant of 19 January 2019 did **not** "comply with pre-trial detention timelines" because "of the concurrent extradition requests from Mozambique and the United States of America to the South African authorities".[96] The Prosecutor then proceeds to make a case for a warrant of arrest ("pre-trial detention") to be issued for Mr Chang by the Maputo City court.

[95] Record at 06-71.

[96] Record at 09-348.

121. In other words, the Public Prosecutor in Mozambique has re-applied for a warrant for Mr Chang's arrest. The basis of this application, according to the Prosecutor is that the 19 January 2019 warrant is no longer valid for failure to comply with certain timelines under Mozambican law. The implications are that (a) the prosecution in Mozambique believes the 19 January 2019 warrant cannot be enforced against Mr Chang and (b) there is no arrest warrant for Mr Chang in Mozambique. That is the only way to explain why the Mozambican prosecution saw it necessary to submit a detailed application for Mr Chang's pre-trial detention.

122. Second, the warrant was issued while Mr Chang was a member of Parliament, pursuant to a special Mozambican legal procedure. However, the Minister was told by the Mozambicans that Mr Chang renounced his membership of Parliament on 19 July 2019. It is thus unclear whether the previous warrant could still be enforced against Mr Chang when he is no longer a member of Parliament.

123. Third, the warrant was issued over two and a half years ago. It is unclear whether the warrant is valid as a matter of Mozambican law, which could prescribe timelines for the validity of such a warrant. On the contrary, given the Prosecutor's reference to timelines, the implication is that the arrest warrant has prescribed.

124. Fourth, in his answer in Part B, the Minister does not give positive reasons for why the warrant is valid. He simply denies that the arrest warrant is invalid.[97] He makes no

[97] Minister's Part B AA at para 43; Record at 06-193.

attempt to address the discrepancy between the provisional indictment and the arrest warrant of 19 January 2019.

125. Fifth, Mozambique similarly does not explain whether the arrest warrant is valid. Mozambique baldly alleges that the 19 January 2019 warrant is valid. Mozambique evades the questions FMO raised in its supplementary affidavit, especially regarding the prosecutor's reference to timelines not being complied with. It provides no legal proof or argument for why the arrest warrant is valid.[98]

126. Sixth, for the first time, Mozambique in its answering affidavit presents another arrest warrant for Mr Chang.[99] This warrant is dated 14 February 2020.[100] It is issued by the Maputo City Judicial Court. Mozambique says that this is a valid warrant for the arrest of Mr Chang. This warrant was not before the Minister when he made his decision.

127. We make four points about this "new" arrest warrant.

128. First, the 14 February 2020 warrant is not only unhelpful to Mozambique's case, but it also makes FMO's point. If this warrant is the valid warrant for Mr Chang's arrest, then a valid warrant was never before the Minister. Therefore, the Minister's decision is irrational.

[98] Mozambique's Part B AA at para 109.2; Record at 06-114.

[99] Mozambique Part B AA at para 109.2; Record at 06-114.

[100] Record at 06-147.

129. Second, Mozambique does not explain why, on its version, there are now two warrants for Mr Chang's arrest. The implication can only be that the warrant issued on 19 January 2019 is invalid. Why else would a Mozambican judge issue another arrest warrant? Another warrant was acquired after Mr Chang resigned as an MP or after a certain amount of time. If so, the warrant before the Minister was invalid, rendering his decision irrational.

130. Third, Mozambique never explains why this warrant was not produced at any stage before this. This warrant was not sent to the Minister, put up during Part A, or referred to by Mozambique at any point. The implication is that Mozambique failed to disclose a material fact to the Minister. This impugns their good faith. It suggests that there may be more that Mozambique is failing to disclose.

131. Fourth, even if this warrant was somehow before the Minister, it could not have been considered as part of Mr Chang's extradition. The crimes listed in the arrest warrant differ from the crimes for which Mr Chang has been extradited. The arrest warrant does not mention abuse of position or function, violation of budget laws, fraud by deception, embezzlement, and criminal association. The arrest warrant mentions "passive corruption for illicit act" and money laundering, which are two of the crimes for which Mr Chang was extradited. The warrant also mentions "unlawful participation in business", a crime for which Mr Chang has not been extradited. This new crime is not explained and raises issues of speciality. It also appears that the warrant has a typo, in that a name of a crime is omitted. It is unclear if this affects the validity of the warrant. Accordingly, even if the warrant was before the Minister, given the difference of crimes, it could not constitute a basis for Mr Chang's extradition.

132. For these reasons, there was no proper warrant for Mr Chang's arrest before the Minister, and no certainty at all about Mr Chang being arrested properly upon his return to Mozambique in terms of any warrant. The decision is accordingly irrational given the general purpose of extradition. Additionally, in this case, there are five further facts that make extradition in the absence of a valid arrest warrant irrational. All of them point, again, to the red lights that were flashing for the Minister when he decided to return Mr Chang to Mozambique.

133. First, Mr Chang was denied bail by a South African Magistrate. The Magistrate denied Mr Chang bail for the following reasons:[101]

133.1. Mr Chang is a powerful person of considerable influence. Nothing prevents him from applying for a new passport or finding other ways of crossing borders. He is a serious flight risk.

133.2. Mr Chang has significant wealth, evidenced by him spending R65 000 for four days in the Dubai hotel to which he was en route. His wealth would enable him to forfeit a bailed amount and flee.

133.3. Mr Chang deliberately withheld information from the Court regarding his income. He refused to disclose the details of his affairs and "kept his cards close to his chest".

[101] Record at 09-1347 onwards.

133.4. Mozambique protects its citizens from extradition. So, if Mr Chang were to flee to Mozambique, there would be no chance of the US ever prosecuting him.

133.5. Despite complaining of various medical ailments, Mr Chang provided no medical proof for any medical conditions that cannot be treated by the Modderbee Detention Centre.

133.6. Mr Chang's children and family are not dependant on him for financial support.

133.7. Most of Mr Chang's assets are in Mozambique. However, it is unclear what those assets are and whether Mr Chang has assets abroad.

133.8. Mr Chang was elusive and did not properly answer to the State's case. He refused to take the Court into his confidence and ducked the allegations made by the State.

134. These concerns about Mr Chang are echoed by the Mozambican Public Prosecutor in their arrest warrant application. The Public Prosecutor asks for authorisation to detain Mr Chang pre-trial for the following reasons:[102]

134.1. Mr Chang is a flight risk given his wealth.

134.2. Mr Chang may disturb the investigation of the prosecution's case.

134.3. The crimes of which Mr Chang stands accused have a significant impact on the public interest and Mozambican economy.

[102] Record at 09-348 onwards.

134.4. Mr Chang is likely to continue committing crimes, including money laundering, if he is not detained pending trial.

135. Second, the Minister is dealing with a country that, in his own words, previously misled his office about whether Mr Chang will stand trial.[103] Moreover, the previous decision to send Mr Chang to Mozambique had been declared unlawful. The Minister should have been alert as to whether Mozambique was misleading South Africa, or whether his decision would be irrational in any other way.

136. For the reasons given above, the Minister did not have a sufficient basis before him to justify believing that there was a valid warrant for Mr Chang's arrest in Mozambique. He should have at least inquired with Mozambique about the warrant when he saw the Public Prosecutor's application for a warrant. His predecessor had done so the moment he realised that there was a question concerning Mr Chang's immunity. But here, the Minister did nothing even though there was reason to doubt whether Mr Chang would be arrested when in Mozambique. Even now, when Mozambique pulls out of the hat a different warrant (assuming it is valid at all – which is denied) that was never put before the Minister, the Minister remains perfectly content to let Mr Chang return to the country that had failed to disclose this material issue to him.

137. Third, the Minister takes the view that it does not matter whether Mr Chang is arrested in Mozambique.[104] Well, he would have to take that view in order to be consistent with his laissez faire approach to the evidence of the warrants thus far. But his conduct is

[103] See *Chang I*, where the High Court said at para 32: "The current Minister contends that Mr van Heerden was deliberately misled".

[104] Minister's Part B AA at para 43; Record at 06-93.

patently irrational. The purpose of extradition is to ensure that Mr Chang stands a fair trial. If there is no warrant for his arrest, then that is at least relevant to the decision to extradite him.

138. Fourth, the Minister thinks that because the provisional indictment asks for the pre-trial detention of Mr Chang, there is a warrant for Mr Chang's arrest.[105] It is irrational for the Minister to think that Mr Chang can be detained pending trial only because an indictment asks a Court to do so. An indictment is not the same as an arrest warrant.

139. Finally, the Minister was faced with an obviously superior alternative. The US, in bright contrast to Mozambique, provided the Minister with a full indictment and arrest warrant as part of its extradition request. The arrest warrant, which forms part of the record, contains the following:

139.1. A clear heading of "Arrest Warrant".

139.2. It makes it clear that Mr Chang has been duly indicted and stands accused of various crimes.

139.3. It is attached to a full indictment by a grand jury, setting out the basis for charging Mr Chang.

140. For these reasons, the Minister acted irrationally by extraditing Mr Chang to Mozambique without a valid warrant of arrest.

[105] Minister's Part B AA at para 44; Record at 06-93.

(c) No reasons

141. A failure to give reasons, which includes proper or adequate reasons, should ordinarily render a decision reviewable.[106]

141.1. A decision taken without reference to any reason is arbitrary. The Constitution proscribes arbitrary action and requires that every action taken in the exercise of public power must be underpinned by plausible reasons. Such reasons must justify the action taken. If action is taken for no reason or no justifiable reason it is arbitrary.[107]

141.2. Similarly, if a decision is taken for no reason, it cannot be rational. A decision, to be rational, must be taken for a legitimate purpose. But if the decision-maker fails to provide a legitimate purpose for their decision, then the decision is irrational.

142. The Minister has given *no* reasons for why he decided to extradite Mr Chang to Mozambique. The July 2020 Memorandum, which he endorsed, contains reasons to send Mr Chang to the US. The July 2020 Memorandum cannot be used to justify sending Mr Chang to Mozambique.

143. There is no other document in the record containing reasons for extraditing Mr Chang to Mozambique. Accordingly, the Minister's decision is arbitrary.

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[106] *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; [2012] 1 All SA 451 (SCA); 2012 (4) SA 504 (SCA) at para 27.

[107] *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 55.

144. The Minister attempts to rely on a document, styled "Reasons for Decision", for his reasons to extradite Mr Chang to Mozambique.[108] But this document cannot be invoked by the Minister for two reasons: the document was filed late, and the reasons were constructed ex post facto.

(i) Lateness

145. The document was filed out of time. This document, to the extent that it formed part of the record, was due on Monday, 30 August 2021.[109] It was only filed on Thursday, 2 September 2021. The Minister has now applied for condonation for this late filing in his answering affidavit.[110] This belated condonation effort fails the test set by the Constitutional Court, where the Court stressed (in a case refusing the Minister of Justice and Constitutional Development condonation) that: "*It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default*."[111]

146. It should be refused for four reasons.

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[108] Record at 09-366.

[109] Record at 04-12.

[110] Minister's Part B AA at para 53.

[111] In *Derrick Grootboom v National Prosecuting Authority and Minister of Justice* [2013] ZACC 37, at para 23, citing *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 20 and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 22.

147. First, the late filing caused FMO significant prejudice. FMO received the record at half past the eleventh hour on 30 August 2021. FMO instructed its legal team to respond urgently to the voluminous record. When the legal team believed it was close to finalising FMO's response, with its senior counsel having been especially reserved – after discussions of timing around when the junior's first draft would be available for settling – to work on finalising the draft for filing by 2 September 2021, the Minister deigned it convenient for him to deliver this document. FMO was then put under immense pressure to consider and respond to the document. It could have had three days to respond; it was given less than one.

148. In the context of this case, that is a significant loss of time that FMO could not otherwise recover. FMO was effectively ambushed with this document on the day its supplementary affidavit was due. The supplementary affidavit was the FMO's opportunity to state its case fully considering the record of the decision. For the Minister to change the record in such a significant fashion without notice undermined FMO's efforts to draft a proper supplementary affidavit. It meant that the FMO, in light of these "reasons", had to revisit grounds of review and supplement further—all within a matter of hours.

149. Moreover, FMO could not have applied for an extension of its deadline. This matter is urgent. Mozambique and Mr Chang will want the matter to proceed on the timelines agreed upon and made an order of this Court – every party agreed before the Judge, and he too made it plain in his engagements with counsel – that the case had to be determined urgently and on a tight timetable.

150. Second, there is no explanation for delay. The Minister vaguely and pithily refers to "urgency". But this is not an explanation. The Minister also says that he could not return the signed document "due to logistical challenges as a result of other work commitments". The details of these challenges and commitments are never explained. To be clear, the Minister is not saying that he could only sign the document on 2 September 2021 because he was too busy; he is saying that he was so busy he could not send a document that <u>he had already signed</u> on 31 August 2021 until 2 September 2021. This smacks of disingenuousness. The Minister wants this Court to believe that he could not send (by email or otherwise) a document—which he had already signed—to his lawyers for *three days*.[112]

151. Third, the Minister must be held to a high standard when it comes to adhering to the procedures of this Court. As the Constitutional Court held in an analogous context:

> "To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[113]

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[112] Minister's Part B AA at para 50; Record at 06-194.

[113] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 82.

152. In this regard, the Constitutional Court in an analogous situation in *Derrick Grootboom*[114] stressed that:

> "There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

153. Fourth, the Minister has argued that given the importance of the document (to his case), it should be considered by this Court. But that is precisely the point. The Minister's reasons are crucial to this case. That document, if it contains his reasons, should have been the priority for filing. Instead, it was sent to FMO late, without notice, for no reason, and within hours of FMO's deadline for its supplementary affidavit. The importance of the document, if any, only speaks against condonation in these circumstances. That is all the more so since it has all the hallmarks of a post hoc rationalisation, which our courts have repeatedly held is "*impermissible*". We turn to that next.

(ii) Post hoc rationalisation

154. The second reason to discount this document is that the reasons it purports to record are constructed ex post facto.

[114] Supra at para 30.

155. Our courts have consistently set their faces against a decision-maker, in a review, providing *post hoc* rationalisations – it is an impermissible practice, and this has been said by High Courts,[115] the Full Court in this Division in rejecting Mr Abrahams' (the former NDPP) reasons for allowing Ms Jiba to stay on at the NPA,[116] and the Supreme Court of Appeal in rejecting the NPA's efforts revisionist efforts to justify withdrawal

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[115] *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 486F-H. See too *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South, In Re: Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* [2014] ZAGPJHC 51; [2014] 3 All SA 171 (GJ) (31 March 2014). And see Cleaver J in *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at para 11, who cited with approval the following dictum in *R v Westminster City Council*:

> "… The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. **To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings**. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive."

[116] See the Full Court (per Mothle J and Thlapi J) in *Freedom Under Law (RF) NPC v National Director of Public Prosecutions* [2017] ZAGPPHC 791; 2018 (1) SACR 436 (GP) at paras 46-7:

> "As FUL correctly contends, these defences have no merit. In the first instance, in a review application the decision maker is bound by the reasons it advanced for its decision and is barred from relying on additional reasons. In the matter of *National Lotteries*, Cachalia JA writing for the SCA upheld the English Law principle that a decision that is invalid for want of adequate reasons cannot be validated by different reasons given later. The Learned Appeal Court Judge wrote :
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> > 'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly and the failure to give reasons, which includes proper or adequate reasons, should ordinary render the disputed decision reviewable. In England, the Courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show the original decision may have been justified.
> >
> > For in truth the latter reasons are not the true reasons for the decision, but rather an ex post facto realisation of a bad decision.'
>
> The after-the-fact efforts to provide a lengthy explanation in the affidavit in an attempt to justify the decision, results in new reasons being advanced, which were not stated in the record. Abrahams and Mokgatlhe are confined to the reasons stated in the record and nothing further."

of charges against Mr Zuma.[117] The Constitutional Court has also twice so held,[118] most recently affirming that: "*It is true that* *reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful*".[119]

156. Our courts are not alone in this regard. Helpfully, the United States Supreme Court has recently affirmed this rule in respect of efforts by President Trump's officials to "improve" their decisions by giving reasons after the fact. It has explained its rationale in two cases. First, in *Department of Commerce v New York*, the Court held that in order to permit meaningful judicial review, an agency must disclose the basis of its action.[120] In reviewing agency action, a court's focus is on evaluating the agency's *contemporaneous explanation* in light of the existing administrative record.[121]

157. On the facts before the Court, the administrative body had provided—

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[117] See *Zuma v Democratic Alliance Zuma v Democratic Alliancee* [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017) at para 24:

> "On 6 April 2009 Mr Mpshe announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. **It is against those reasons, and those reasons alone, that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined**".

[118] See first, *Minister of Defense and Military Veterans v Motau* 2014 (5) SA 69 (CC) at paragraph 55 (footnote 85):

> "I believe that the reasons cited by the Minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the Minister for her decision in her papers in this Court and the High Court. **In any event, I have reservations about whether it would be permissible for her to rely on these reasons as they were not relied on or disclosed when she took her decision (see in this regard Cachalia JA's judgment in National Lotteries Board [. . .] at paras 27-8**)."

[119] *National Energy Regulator of South Africa v PG Group (Pty) Limited* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at para 39 – emphasis added. The Constitutional Court cited the Supreme Court of Appeal's decision in *National Lotteries Board v South African Education and Environment Project* (788/10) [2011] ZASCA 154; [2012] 1 All SA 451 (SCA); 2012 (4) SA 504 (SCA).

[120] *Department of Commerce v New York* 588 U. S. 23 (2019).

[121] Id.

> "an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision-making process [. . .] we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'"[122]

158. Because the stated reasons for the decision were incongruent with the decision itself, the Court set aside the decision. It held:

> "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[123]

159. The US Supreme Court came to similar conclusions in *University of California*.[124] In that matter, much like this one, the decision-maker urged the Court to consider an additional memorandum that had been drafted after the decision was taken. The Court refused to do so because the reasons were a post hoc rationalisation. The Court held:[125]

159.1. It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.

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[122] Id at 28.

[123] Id.

[124] *Department of Homeland Security v Regents of the University of California* 591 U. S. 13 (2020)

[125] Id at 13-17.

159.2. Considering only contemporaneous explanations for agency action instils confidence that the reasons given are not simply convenient litigating positions.

159.3. Permitting agencies to invoke belated justifications can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target.

159.4. Any reasons provided after a decision is taken must be viewed critically to ensure that the decision is not upheld on the basis of impermissible post hoc rationalisation.

159.5. The new reasons provided by the administrator differed so much from the original reasons that they could only be a post hoc rationalisation.

160. The Court concluded with:

> "Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow [the decision-maker] to rely upon reasons absent from its original decision."[126]

161. The Minister, accordingly, cannot rely on ex post facto reasons in this litigation. The Minister's reasons were formulated ex post facto for six reasons.

162. First, the *timing* of the reasons. The Minister decided to extradite Mr Chang to Mozambique on 17 August 2021. The reasons are dated two weeks after: 30 August

[126] Id at 17.

2021. The reasons were formulated after the decision was taken, after the decision was communicated to parties, after the Minister was informed by the FMO that intends to review his decision, after the Minister saw FMO's founding and replying papers in Part A, after the Minister answered in Part A, after this Court's order in Part A, and after he filed the balance of the record of his decision. Because the reasons came after all these events, there is a high risk that the Minister tailored his reasons considering FMO's challenge. It is revealing: the Minister uses the heading of this litigation in his reasons, even citing all relevant parties, confirming for the Court that these reasons were created post hoc directly to deal with this litigation.

163. Second, the *context* of the reasons given the rest of the record. The reasons directly contradict the reasoning and conclusion of the July 2020 Memorandum. The July 2020 Memorandum is the only other document containing possible reasons for extraditing Mr Chang to Mozambique. After the memorandum, the Minister does nothing in relation to Mr Chang. Then, suddenly when these proceedings are launched, a set of reasons appear. The impression—not rebutted by the Minister—is that he only formulated his reasons when he saw the challenge brought by FMO. Until then, the Minister had every reason not to extradite Mr Chang to Mozambique, approved those reasons by his own signature, decided to do so anyway, and is now attempting to retrofit reasons to justify his capricious behaviour.

164. Third, the Minister has changed his reasoning and reasons throughout this litigation. He is constantly shifting the goalposts for FMO. The implication is that the Minister, when he drafted his "reasons" of 30 August 2021, similarly was changing and retrofitting his reasons.

164.1. In his answering affidavit in Part A, the Minister says that "there is no evidence that the USA government will forever not be able to prosecute Mr Chang if he is extradited to Mozambique".[127] This has always been false: Mozambique does not extradite its own citizens. Now, in his 30 August 2021 reasons and in his answering affidavit, the Minister has quietly dropped this reason, as though it would go unnoticed. He says "that if Mr Chang is surrendered to Mozambique, he may not be sent to the [US]" – this change is not explained.

164.2. In his answering affidavit in Part A, the Minister makes no mention of the July 2020 Memorandum or the various legal opinions he procured. Now, after seeing FMO's reply in Part A and FMO's supplementary founding affidavit, the Minister says that he considered various legal opinions and the memorandum before making his decision.

164.3. In his answering affidavit in Part A, the Minister repeatedly alleges that there is "no evidence" that Mozambique will not prosecute Mr Chang, thereby loudly disclaiming FMO's claim that Mr Chang had immunity. Now, his argument is adjusted. He only submits that his acceptance that Mr Chang will stand trial was rational. He accepts now, as he must, that there is evidence that Mr Chang is still immune – he never explains the change in his position.

164.4. In his answering affidavit in Part A, and his reasons of 30 August 2021, the Minister said that Mr Chang no longer has any immunity against prosecution. But now, in his answering affidavit in Part B, the Minister says that Chang has

[127] Minister's Part A AA at paragraph 65; Record at 06-41.

immunity from prosecution for conduct committed during his office related to his mandate.[128] We are not told why he changed his position.

164.5. In his reasons of 30 August 2021, the Minister mentions that Mr Chang is under an international warrant of arrest. This reason can only have been prompted by FMO's application and specifically what was said in its supplementary founding affidavit. Nowhere in the record, including the memorandum, is the international warrant mentioned or impugned.[129]

165. Fourth, the delay in formulating the reasons is never explained. The Minister does not explain why he did not write a single reason down before making his decision. He baldly alleges that the reasons were present in his mind when he took the decision. But there is not a scrap of paper backing up this allegation. For instance, the previous Minister hand-wrote his reasons on the memorandum given to him. But this Minister does not invoke any reason, like urgency, for why he did not write down *anything* before he took this crucial decision.

166. On the contrary, it is to beggar belief that the Minister never wrote down any reasons for his decision for over a year after receiving a comprehensive memorandum advising him to do the opposite to what he decided. In the absence of an explanation for how he could move from the July 2020 Memorandum (signing approval of extradition to the US) to his different reasons on 30 August 2021 (retrofitting his decision to approve extradition to Mozambique) the ineluctable conclusion is that his new "reasons" are clearly an ex post facto effort at justifying the impugned decision.

[128] Minister's Part B AA at para 31.1; Record at 06-189.

[129] Minister's "Reasons" at para 5.4.7; Record at 09-372.

167. Fifth, the reasons are extraneous to the record. The reasons reference legal opinions that are not part of the record. The reasons contain considerations that are clearly extraneous to the record since they are reasons that are the very opposite of the reasons (signed and approved by the Minister) in the July 2020 Memorandum.

168. Finally, allowing the Minister to provide reasons in this fashion would undermine the purpose of the rule 53 record. In *Turnbull-Jackson* the Constitutional Court held:

> "Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; *give the lie to unfounded ex post facto (after the fact) justification of the decision under review*; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision maker's stance; and in the performance of the reviewing court's function." (emphasis added).[130]

169. In *HSF*, the Court also held:

> "The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. *Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents*. (emphasis added).[131]

170. The ability to expose post hoc rationalisation, and the equality of arms, would be completely undermined if decision-makers were allowed to behave as the Minister has.

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[130] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 15.

[131] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 37.

Decision-makers would refrain from writing down any reasons for their decisions. Then, if their decisions are taken on review, they would write down their "reasons" after seeing the applicant's founding affidavit, which would not be their real reasons at all. At that point, their reasoning will – like the Minister's reasons in this case – respond to the allegations in the founding papers. Their reasoning will inevitably be shaped by what the applicant alleges. If the applicant objects, the administrator will just say that the reasons existed at the time; he just never wrote them down.

171. For these reasons, the document purporting to contain the Minister's decision cannot be considered by this Court.

(d) Irrational notwithstanding the reasons

172. As explained above, the Constitutional Court has held that the reasons for a decision must *justify* the decision.[132] Jafta J, for the majority, held that "[e]very action or decision taken in the exercise of public power must be supported by plausible reasons. Those reasons must show that power was exercised to achieve a legitimate government purpose, for which that specific power was conferred."[133]

173. Even if this Court considered the Minister's reasons of 30 August 2021, his decision would still be irrational. The Minister's reasons do not justify his decision. They do not rationally explain his decision to send Mr Chang to Mozambique given the evidence before him. This is for four reasons.

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[132] *SARIPA* at para 55.

[133] Id at para 54.

174. First, the Minister's reasons come to the opposite conclusion of the July 2020 Memorandum. In *Earthlife*, the Minister of Energy decided to act contrary to internal advice given to her by a state law advisor.[134] The Minister of Energy did so because she thought that the law advisor "was wrong". But, as in this case, "[t]here [was] no indication in the record however that the Minister sought or obtained any alternative legal advice and her decision [. . .] is not explained in any documents forming part of the record".[135] The Court concluded:

> "It follows that the Minister's decision [. . .] was, at the very least, irrational. At best the Minister appears to have either failed to apply her mind [. . .] or at worst to have deliberately bypassed [the Constitution's] provisions for an ulterior and unlawful purpose."[136]

175. The Minister in this matter curiously intimates that the advice he got was wrong. But he signed and approved that advice in July 2020. His ex post facto "reasons" before this Court provide no indication as to why he had a change of heart. He does not engage with the reasoning of the July 2020 Memorandum and the legal opinions he procured. He does not explain that he secured advice later to rebuff the July 2020 Memorandum. All he says is that he has "considered" the advice given to him. But this (a) is incorrect since he *approved* the advice given to him and (b) insufficient to explain why he departs from the compelling, comprehensive advice.

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[134] *Earthlife Africa Johannesburg v Minister of Energy* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC).

[135] Id at para 115.

[136] Id at para 116.

176. Second, the Minister fails to address the crucial issue of immunity. The Minister simply says that Mr Chang has no immunity in Mozambique. For the reasons given above, there is no basis for this statement. Apart from five legal opinions telling him the exact opposite, all the Minister had before him on the issue of immunity was Mozambique's falsities and misleading statements – as confirmed by independent legal advice. This is no rational basis on which to conclude that Mr Chang has no immunity in Mozambique.

177. In any event, as explained above, the Minister has now changed his tune, again. In signing the July 2020 memorandum, he accepted that immunity was a threat to safely returning Mr Chang to Mozambique. In his 30 August reasons he reversed himself, contending that immunity was not a bar to returning Mr Chang to Mozambique. But now he has contorted himself once more in answer: he is driven to accept in his answering affidavit that Mr Chang is immune from prosecution for conduct relating to Mr Chang's mandate. The critical point is that the Minister's reasons do not say this, and they also do not say that Mr Chang's crimes were so unrelated to Mr Chang's mandate that this limited immunity is irrelevant. Accordingly, even on the Minister's version as now contained in his answering affidavit, his original reasoning on immunity does not justify his decision to send Mr Chang to Mozambique.

178. Third, the Minister justifies his decision to send Mr Chang to Mozambique, even though Mozambique's request came after the US's, because the difference is a matter of "mere days".[137]

[137] Record at 09-372.

179. But this reason is patently wrong. It was not a difference of mere days. It was a difference of years until Mozambique properly requested the extradition of Mr Chang. When Mozambique made its request on 11 February 2019, Mr Chang was immune from prosecution. He had not been indicted. This hardly constitutes a proper extradition request, as this Court recognised.[138]

180. It was only in November 2020, when Mozambique forwarded a provisional indictment to the Minister, that the request was (somewhat) complete. All the while, the US had submitted its complete request in January 2019. Chang had already been indicted in December 2018—almost two years prior.

181. The Minister failed to consider this substantive time difference. This is a ground for setting aside his decision. Article 15 of the US-SA Extradition Treaty provides:

> (1) Where requests are received from two or more States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the Requested State shall determine to which of those States, if any, the person is to be extradited and shall notify the Requesting State of its decision.
>
> (2) In determining to which State the person is to be extradited, the Requested State shall consider all relevant factors, including but not limited to:
>
> (a) whether the requests were made pursuant to an extradition treaty;
>
> (b) the relative seriousness of the offences, should those requests relate to different offences;
>
> (c) the time and place of commission of each offence;
>
> (d) the respective dates on which the requests were received from the respective States;
>
> (e) the interests of the respective States;
>
> (f) the nationality of the victim; and

[138] *Chang I* at para 80.

(g) the possibility of any subsequent extradition between the respective States.

182. Article 11 of the SADC Protocol provides:

(1) Where requests are received from two or more States for the extradition of the same person either for the same offence or for different offences, the Requested State shall determine to which of those States the person is to be extradited and shall notify those States of its decision.

(2) In determining to which State a person is to be extradited, the Requested State shall have regard to all the relevant circumstances, and, in particular, to:

(a) if the requests relate to different offences, the relative seriousness of those offences;

(b) the time and place of commission of each offence;

(c) the respective dates of the requests;

(d) the nationality of the person to be extradited;

(e) the ordinary place of residence of the person to be extradited;

(f) whether the requests were made pursuant to this Protocol;

(g) the interests of the respective States; and

(h) the nationality of the victim.

183. There are four points about these two articles.

183.1. First, they are substantively similar. Both provide that the requested state has a discretion in deciding between two competing requests. Both provide that the requesting state must ("shall") consider certain factors in deciding between competing requests.

183.2. Second, the factors that are first listed in the respective articles relate to a situation where the extradition requests concern different offences. But whether the extradition requests concern the same offence, the **first factor** to be

considered is the respective dates of the requests. This factor is listed before any other factor relevant to two requests concerning the same offence.

183.3. Third, the doctrine of first in time first in law is entrenched in South African law. The maxim is expressed as *qui prior ext tempore potior est jure.* In the context of competing claims, "the priority of the competing claims [has] to be decided [. . .] according to the *qui prior est tempore potior est iure* principle *unless the respondent had raised special circumstances that would tilt the balance of fairness in his favour*".[139]

183.4. Where a party exercises its legal rights before another, or has rights that predate the other's, the first party is generally afforded their remedy over the later party. The doctrine encourages expedition and rewards those who are decisive in exercising and acquiring their rights.

183.5. In the context of extradition, the doctrine's rationale is critical. It ensures that extraditions can happen speedily, ensuring that accountability is not thwarted. If the doctrine was ignored, requested states can hold off on extradition to state A in the hope of another state (state B) making a request. And state B can hold off requesting extradition of its own nationals to see if there is a competing request by state A – and then when or if state A makes the request, quickly put in a competing request to thwart or delay the process. So requesting states would not be incentivized to make their request efficiently, allowing fugitives to go unpunished or resulting in arrested fugitives languishing in custody.

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[139] Per Brand JA in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* (2002) (2) SA 776 (SCA) at 779A-B and 784F–G. See *Krauze v Van Wyk* 1986 (1) SA 158 (A).

183.6. Fourth, if a requested state failed to consider this factor, or failed to consider it appropriately, then it would be breaching international law. Accordingly, when the Minister failed to consider it properly, then he caused South Africa to breach its international duties, rendering his decision unlawful.

184. Fourth, the Minister and Mozambique are of the view that since a New York court found that it lacked jurisdiction to try Mr Boustani, one of Mr Chang's co-accused in the US, it might find the same for trying Mr Chang. More specifically, in his reasons, the Minister says: "I have *no evidence* before me that the same will not happen if Mr Chang were surrendered to the United States".[140] This is patently false:

184.1. First, the Magistrate, as they were obliged to do, found that the US has jurisdiction over Mr Chang's crimes. Before the Magistrate could commit Mr Chang, they needed to be satisfied that Mr Chang was sought for a crime committed in the jurisdiction of the US.[141] Otherwise, Mr Chang would not be liable for extradition as required in section 3(1) of the Extradition Act. Accordingly, (a) the Minister had evidence before him that the crime was within the US's jurisdiction and (b) in any event could not revisit the Magistrate's decision.

184.2. Second, the US, in its submissions, assured the Minister that the US has jurisdiction over Mr Chang's crimes. The Minister seems happy to accept Mozambique's assurances of Mr Chang's immunity; his comfort inexplicably

[140] Record at 09-371.

[141] Section 10(1) read with section 3(1) of the Extradition Act. See more recently the judgment of Rogers J in *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2020] ZAWCHC 185; [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC).

does not extend to the assurance by the US. Moreover, the Minister was happy to invite rounds and rounds of opinions from Mozambique and counsel on immunity in Mozambique; but the Minister hardly raised a finger to inquire about jurisdiction in the US.

184.3. In the July 2020 Memorandum, the Department's official explained that the US had secured the conviction of Mr Pierce, and that Mr Chang could then be tried in the US.

184.4. In that same memorandum, the first legal opinion advises that even if Mr Chang is acquitted for lack of jurisdiction, this does not mean that Mozambique cannot try Mr Chang.

185. Accordingly, the Minister had evidence showing that Mr Chang can be tried in the US. He studiously chose to ignore it. His reason not to send Mr Chang to the US because of Mr Boustani is, accordingly, not a real reason.

186. These four reasons, taken together, demonstrate how the Minister's reasons fail to justify his decision. His reasons ultimately are a summary of Mozambique's submissions. They are terse and do not engage with the important issues of immunity raised in the memorandum. Accordingly, even if the reasons are considered, they not only do not assist the Minister, but they also introduce further reasons to review his decision.

(e) Irrational process

187. As explained above, rationality depends on the means adopted by a functionary to achieve a legitimate purpose. The means is not only the decision itself, but also the

process the functionary adopts in reaching their decision. If the process is not linked rationally to the purpose of the power, then the decision is irrational.

188. The process adopted by the Minister was irrational. The Minister began his process by inviting submissions and briefing counsel on where to extradite Mr Chang. This was within months of the judgment (and included an "urgent opinion"). The Minister, after receiving all this advice, then did nothing for over a year. Meanwhile, Mr Chang languished in jail.

189. There is no explanation at all, or any evidence of activity during, this long period of silence. The Minister then suddenly decides to act contrary to all the evidence before him. He does so without considering any further materials or procuring advice contrary to that given to him. In these circumstances, the failure to account for this inordinate delay and inactivity renders the Minister's decision procedurally irrational.

190. The Minister's process was also not transparent. As the Constitutional Court has held, "one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information."[142] Though the requirement of transparency has only been considered in the procurement process, given that South

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[142] *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC) para 63. The SCA in *South African National Roads Agency Limited v Toll Collect Consortium* [2013] 4 All SA 393 (SCA) has held at para 18:

> "[w]hen the Constitution, in section 217, requires that the procurement of goods and services by organs of State shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the State or those whose interests the relevant officials and office bearers in organs of State wish to advance. It requires that public procurement take place in public view and not by way of back door deals, the peddling of influence or other forms of corruption."

Africa is founded on a government ensuring openness,[143] it cannot be rational for a decision-maker to adopt a secretive, opaque process to exercise his public powers. The Minister in this case has been far from transparent, ensuring that his decision has not been taken in the public view. In turn, the object of transparency, to prevent "back door deals, the peddling of influence or other forms of corruption", was undermined by the Minister's process.[144]

IV REMEDY

191. The Minister's decision, as in *Chang I*, must be declared inconsistent with the Constitution, invalidated, and set aside.

192. This time, justice and equity demand that this Court substitute the Minister's decision with one sending Mr Chang to Mozambique.

193. This Court will only grant substitution in exceptional circumstances. When deciding whether justice and equity demand substitution, a court will consider various factors. As the Constitutional Court has held:

> "To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an

[143] Section 1(d) of the Constitution. See also Chaskalson CJ's account of the principle of open, transparent and responsive government in response to a challenge to the dispensing fee by pharmacies at paras 110ff in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), and Sachs J at paras 625 and 626.

[144] *South African National Roads Agency Limited v Toll Collect Consortium* at para 18.

administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."[145]

194. Each of these factors, applied to this case, speaks to substitution.

195. ***As good a position***: with respect to this factor, the Constitutional Court in *Trencon* held:

"A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision."[146]

196. On these facts, the extradition decision-making process has run its course—twice. The Court has before it all the evidence that was before the Minister. There are no new facts. There is nothing about this Court's institutional nature and competence that prevents it from making the decision. The Court is well-versed with this matter, given that this is a sequel to *Chang I*.

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[145] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 47.

[146] Id at para 48.

197. The Minister says that his decision is polycentric and "policy-laden". But his reasons do not support that. The Minister does not invoke complex, sensitive reasons of diplomacy or policy to make his decision. The Minister's decision is a question of considering what is set out in the July 2020 Memorandum. Moreover, once we accept—as we must—that Mr Chang is immune from prosecution in Mozambique, it can only follow that the US request should be acceded to. The Minister does not use some special expertise—which this Court does not have—in determining this question (on the contrary, in respect of the impugned decision, its reasoning, and the process by which he arrived at it, the Minister has not manifested the necessary expertise in this case).

198. ***Foregone conclusion***: A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and it would merely be a waste of time to order the administrator to reconsider the matter. In instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.[147]

199. The July 2020 Memorandum reveals that the choice between the US and Mozambique is a foregone conclusion. On the one hand there is a request made in bad faith by a country where the sought person enjoys immunity; on the other hand, there is a good faith request by a state in which the sought person enjoys no immunity at all. In the words of in the words of Froneman J, this is a "no-brainer".[148]

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[147] Id at para 49.

[148] Compare the decision discussed in *Holomisa v Holomisa* [2018] ZACC 40; 2019 (2) BCLR 247 (CC) at para 24.

200. The decision depends on the application of a simple, straightforward rule: if Mr Chang enjoys immunity in Mozambique, then he cannot be surrendered there. Mr Chang has immunity in Mozambique. So, it is foregone that he cannot be surrendered there. In turn, he must be surrendered to the US. And we know from the Minister's approval of this memorandum, that he agrees. That approval by him stands and has legal consequences on its own. With his later impugned decision being set aside, and no explanation by the Minister for his change of mind that led to the impugned decision, the only true reasons before this Court are those contained in the July memorandum, and which bear the Minister's signature – they point to extradition to the USA.

201. ***Delay***: the Minister has not explained the delay in making his decision. This Court cannot know if remittal will imply another two years of detention for Mr Chang without trial. The unexplained delay, and the prejudice to Mr Chang, strongly speak to this Court ordering substitution.

202. ***Incompetence and bias***: If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction.

203. The Minister has revealed incompetence and potentially bias in his answering affidavit. The Minister was on notice to look out for immunity after this Court's judgment in *Chang I*. He failed to do so. He was advised in the clearest terms—and he accepted this advice—that Mr Chang is immune in Mozambique. He then later decided to ignore this advice, for no reason. His reasons of 30 August 2021 do not engage with the

material concerns raised by his advisors and lawyers about Mr Chang's immunity. In light of this, there is reason to think that if the matter is remitted to the Minister, he will once again make an unlawful, irrational decision.

204. There is, moreover, reason to believe that the Minister is biased and acting in bad faith. The reason is inferred from the Minister's staunch, inexplicable opposition to this matter. In *Cash Paymaster Services*, the Court held:

> "The perception of bias may quite possibly be enhanced by another factor which appeared to the Court to be somewhat unusual. Unlike what normally occurs in review matters of this nature, the tribunal (the Board) has in this case offered extremely strenuous opposition to the review proceedings. I have great difficulty in understanding why.
>
> It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of Rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of Rule 53, take the attitude that they abide the decision of the Court and leave the other matters to the interested parties to dispute before the Court …… Regrettably this attitude of the Board in this case may well be to some extent support for a suggestion that they are not entirely independent and disinterested."[149]

205. These findings apply with equal force here. The Minister does not and should not have any interest in where Mr Chang is extradited. He is an independent decision-maker,

[149] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (CKH) at 353F - 353I, endorsed in *Tantoush v Refugee Appeal Board* [2007] ZAGPHC 191; 2008 (1) SA 232 (T) at para 87.

effectively adjudicating between two competing extradition requests. His fierce opposition to this matter, however, suggests otherwise of his impartiality.

206. Further reason to believe that there is bad faith and bias can be inferred from the Minister's behaviour in these proceedings. FMO's replying affidavit gives thirteen reasons for why the Minister should be liable personally for the costs of this matter. These thirteen reasons are equally applicable to the remedy of substitution.

207. Accordingly, justice and equity demand that the reason be substituted.

208. For these reasons, FMO is entitled to the remedy sought in its notice of motion.

MAX DU PLESSIS SC

ESHED COHEN (PUPIL)

14 September 2021

Chambers, Durban and Cape Town