

**THE HONOURABLE BRENDAN O'CONNOR COMMONWEALTH  
MINISTER FOR HOME AFFAIRS AND ORS v. ZENTAI AND ORS  
(P56/2011)**

Court appealed from: Full Court of the Federal Court of Australia  
[2011] FCAFC 102

Date of Judgment: 16 August 2011

Date of grant of special leave 9 December 2011

Charles Zentai's extradition is sought by the Republic of Hungary in respect of alleged war crimes. On 20 August 2008 a Magistrate determined that Mr Zentai was eligible for extradition to Hungary and issued a warrant committing Mr Zentai to prison under s 19(9) of the *Extradition Act* 1988 (Cth) ("the Act"). On that day Mr Zentai was granted bail pending the determination of his application under s 21 of the Act for review of the Magistrate's determination under s 19 of the Act. On 31 March 2009 Gilmour J affirmed the Magistrate's determination and on 8 October 2009 the Full Court of the Federal Court dismissed an appeal from Gilmour J's decision. On 12 November 2009 the Minister made a determination under s 22 of the Act that Mr Zentai be extradited to Hungary and issued a warrant under s 23 of the Act requiring Mr Zentai to be released from prison into the custody of Australian police officers and then placed in the custody of Hungarian police officers for transport to Hungary.

On 4 December 2009 Mr Zentai commenced a proceeding seeking a review of the Minister's s 22 determination. On 16 December 2009 McKerracher J made orders admitting Mr Zentai to bail. On 2 July 2010 his Honour found that 'war crime' was not an 'extradition offence'. On that basis his Honour found that "it was not open to the Minister in the exercise of his s 22 discretion to surrender for extradition a person when the offence of which the person was 'suspected' (not charged) did not exist at the relevant time". On 10 December 2010 McKerracher J ordered that writs of certiorari issue to quash the s 22 determination and the s 23 warrant and that a writ of mandamus issue to the Minister directing him to determine that Mr Zentai not be surrendered to the Republic of Hungary in response to the extradition request and to order his release.

On 4 January 2011 the appellants filed a notice of appeal. On 16 August 2011 the Full Court of the Federal Court allowed the appeal in part. The majority found that as the offence of "war crime" did not exist in Hungarian law on 8 November 1944 (the date of the conduct alleged to have constituted the offence) it was not open to the Minister to reach the state of satisfaction referred to in s 22(3)(e)(iii) of the Act.

The grounds of appeal include:

- The majority of the Full Court erred in holding that the first appellant committed a jurisdictional error in determining on 12 November 2009 pursuant to s 22 of the Act that the first respondent is to be surrendered to the Republic of Hungary in relation to the offence of 'war crime'.

## Particulars

- The majority of the Full Court erred in finding that extradition under the Treaty on Extradition between Australia and the Republic of Hungary ("the Treaty") and pursuant to the Act may take place only where the specific offence for which extradition is sought existed under Hungarian law at the time the acts or omissions constituting the offence occurred.

The first respondent has filed a Notice of Contention which contends that the decision of the Full Court should be affirmed on the following ground: "The Full Court erred in failing to hold that the First Appellant fell into jurisdictional error in failing to provide a statement of reasons explaining and justifying his decision of 12 November 2009."

On 19 January 2012 the first respondent issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). On 20 February 2012 the first respondent issued a further Notice of Constitutional Matter. The Attorney-General for South Australia is intervening pursuant to s 78A of the *Judiciary Act*. The Attorney-General's intervention is limited to the question raised in the Notice of Contention, namely whether the Minister is obliged to provide reasons to validly exercise his power under s 22 of the Act.