



HIGH COURT OF AUSTRALIA

15 August 2012

MINISTER FOR HOME AFFAIRS OF THE COMMONWEALTH & ORS v CHARLES ZENTAI
& ORS

[2012] HCA 28

Today the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia, which had held that the first appellant, the Minister, could not determine to surrender the first respondent, Charles Zentai, to the Republic of Hungary for an offence which was not an offence under Hungarian law at the time the acts alleged to constitute it were committed.

Mr Zentai is an Australian citizen. On 23 March 2005, Hungary requested his extradition for the offence of "war crime". The acts said to constitute the offence occurred on 8 November 1944 and involved a fatal assault on a young Jewish man. At that time, in Hungary, there was no offence of "war crime" but there was an offence of murder, however Hungary did not request Mr Zentai's surrender for the crime of murder. On 8 July 2005, the former Minister for Justice and Customs issued a notice of receipt of the extradition request. Mr Zentai was arrested on a provisional warrant and granted conditional bail. On 20 August 2008, the second respondent, a magistrate, determined that Mr Zentai was eligible for extradition to Hungary and issued a warrant committing him to prison. On 12 November 2009, the Minister determined that Mr Zentai was to be surrendered to Hungary under s 22(2) of the *Extradition Act* 1988 (Cth) ("the Act").

Section 22(2) of the Act requires the Attorney-General (in this case, the Minister) to determine as soon as is reasonably practicable after a person becomes an "eligible person" whether the person is to be surrendered in relation to a qualifying extradition offence. Section 11 of the Act provides that

regulations may state that the Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty. The Extradition (Republic of Hungary) Regulations (Cth) declare Hungary to be an extradition country and provide that the Act applies in relation to Hungary subject to the Treaty on Extradition between Australia and the Republic of Hungary ("the Treaty"). Article 2.5(a) of the Treaty states that extradition may be granted irrespective of when the offence in relation to which extradition is sought was committed, provided that "it was an offence in the Requesting State at the time of the acts or omissions constituting the offence". The Act precludes surrender of an eligible person in a case in which it applies in relation to an extradition country subject to a condition having the effect that surrender shall be refused in certain circumstances, unless the Minister is satisfied that those circumstances do not exist.

Mr Zentai commenced proceedings in the Federal Court claiming an order quashing the Minister's determination. McKerracher J found that it had not been open to the Minister to surrender Mr Zentai for extradition because "war crime" was not an offence in Hungary at the time the acts alleged to constitute it were committed. The appellants appealed to the Full Court of the Federal Court, which allowed the appeal in part and varied the primary judge's orders, but otherwise dismissed the appeal. A majority concluded that McKerracher J was correct in holding that the offence for which extradition was sought must have been an offence under Hungarian law at the time of the acts alleged to constitute it. The appellants appealed, by special leave, to the High Court of Australia.

The High Court dismissed the appeal. By majority, it held that the inquiry to which Art 2.5(a) directed attention was not whether the acts or omissions particularised in the request were capable of giving rise to *any* form of criminal liability under the laws of the Requesting State at the time they were committed, but whether, at that time, those acts or omissions constituted the offence for which extradition was sought. The Minister was precluded from surrendering Mr Zentai for

extradition unless he was satisfied that the offence of "war crime" was an offence against the law of Hungary on 8 November 1944.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*