HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

MINISTER FOR HOME AFFAIRS OF THE COMMONWEALTH & ORS APPELLANTS

AND

CHARLES ZENTAI & ORS RESPONDENTS

Minister for Home Affairs of the Commonwealth v Zentai
[2012] HCA 28
15 August 2012
P56/2011

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with H Younan for the appellants (instructed by Australian Government Solicitor)

G R Kennett SC with P W Johnston and V M Priskich for the first respondent (instructed by Fiocco's Lawyers)

Submitting appearance for the second and third respondents

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Home Affairs of the Commonwealth v Zentai

Extradition – First appellant determined to surrender first respondent for extradition to Republic of Hungary pursuant to s 22(2) of *Extradition Act* 1988 (Cth) ("Act") for qualifying extradition offence of "war crime" – "War crime" not offence under Hungarian law at time of acts said to constitute offence – Act applies in relation to Hungary subject to Treaty on Extradition between Australia and the Republic of Hungary ("Treaty") – Art 2.5(a) of Treaty states that extradition may be granted irrespective of when relevant offence committed, provided it was offence in Requesting State at time of acts or omissions constituting offence – Whether offence for which extradition sought must be offence in Requesting State at time of acts or omissions constituting offence.

Words and phrases – "offence in relation to which extradition is sought", "qualifying extradition offence", "surrender determination".

Extradition Act 1988 (Cth), ss 11, 22.
Extradition (Republic of Hungary) Regulations (Cth).
Treaty on Extradition between Australia and the Republic of Hungary, Art 2.5(a).

FRENCH CJ.

Introduction

1 In a joint judgment delivered in 2003 six members of this Court said[1]:

> "[I]t was, and is, settled law in the United Kingdom and Australia that a fugitive offender cannot be arrested for extradition overseas in the absence of a warrant issued under the authority of statute."

This appeal concerns a constraint upon the statutory power of the Minister for Home Affairs ("the Minister") to determine that a person is to be surrendered for extradition in relation to an offence which did not exist at law in the requesting country at the time of the acts or omissions said to constitute the offence.

2 On 12 November 2009 the Minister determined, pursuant to s 22(2) of the *Extradition Act* 1988 (Cth) ("the Act")[2], that the first respondent ("the respondent") was to be surrendered to the Republic of Hungary. The determination related to an extradition offence constituted by the alleged commission of a war crime involving the killing of a young Jewish man at Budapest in November 1944. The offence of committing a "war crime" did not exist under the law of the Republic of Hungary until 1945. The decision was evidently made on the basis that it was sufficient that the alleged conduct constituted a criminal offence in 1944, namely murder[3]. The Republic of Hungary did not seek the respondent's extradition for the crime of murder.

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1 *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 503-504 [13] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ; [2003] HCA 21. See also *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 134 [7] per Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ; [1998] HCA 25; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 634 [49] per Gummow and Hayne JJ; [2006] HCA 40.

2 Section 22 of the Act provided for the determination to be made by the Attorney-General. As appears from a departmental submission forwarded to the Minister on 6 November 2009, discussed further below, the Minister relied upon s 19A of the *Acts Interpretation Act* 1901 (Cth) to carry out the relevant functions of the Attorney-General under the Act. His power to do so was not disputed in these proceedings.

3 On 6 November 2009, a departmental submission was forwarded to the Minister: *O'Connor v Zentai* (2011) 195 FCR 515 at 535 [83] per Jessup J. According to that departmental submission, the Republic of Hungary had advised that the respondent's alleged conduct "would have constituted the offence of 'murder' in Hungary at the time of the alleged conduct under Article 278 of Act V of 1878 of

(Footnote continues on next page)

3 On 10 December 2010, a judge of the Federal Court (McKerracher J), on the application of the respondent, directed the issue of writs of certiorari and mandamus to quash the Minister's decision and require him to determine that the respondent be released and not be surrendered to the Republic of Hungary[4]. The Full Court of the Federal Court, on appeal by the Minister, held by majority that the Minister had misconstrued a key provision of the Treaty on Extradition between Australia and the Republic of Hungary ("the Treaty") in purporting to make his determination[5]. The Treaty did not provide for extradition in relation to an offence which did not exist at law at the time it was allegedly committed. The primary judge's order for the issue of certiorari stood. However, the Full Court made a substituted order for the issue of mandamus requiring the Minister:

> "to determine, according to law, whether [the respondent] is to be surrendered to the Republic of Hungary in relation to the offence of war crime referred to in the extradition request made by the Republic of Hungary in its letter dated 23 March 2005."

That order required the Minister, in effect, to reconsider his determination under s 22 on the basis that the Treaty, properly construed, did not provide for extradition in relation to an offence which did not exist at the time of the acts or omissions said to constitute that offence.

4 The reasoning of the primary judge and of the Full Court is set out in the joint reasons for judgment.

5 The Treaty is given effect in Australian domestic law by the Act and the Extradition (Republic of Hungary) Regulations (Cth) ("the Regulations") made pursuant to s 11 of the Act. The central question in this case concerns a proviso in Art 2.5(a) of the Treaty which, on the Full Court's reasoning, would prevent extradition for an offence which did not exist under the law of the Republic of Hungary at the time it was said to have been committed. By operation of s 22(3) of the Act that limitation is said to constrain the Minister's duty and power under

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the Hungarian Criminal Code and would therefore have been criminal at the time the conduct allegedly occurred." The departmental submission noted the respondent's objection that Art 2.5(a) of the Treaty deprived the alleged war crime of the status of an "extradition offence", but concluded that Art 2.5(a) required only "that the *conduct* constituting the offence for which extradition is sought must have been an offence in the Requesting [S]tate at the time the conduct occurred." (emphasis in original)

4 *Zentai v Honourable Brendan O'Connor (No 4)* [2010] FCA 1385.

5 (2011) 195 FCR 515.

s 22(2) to determine that the respondent is to be surrendered to the Republic of Hungary in relation to the war crime offence for which extradition was requested.

6 The Minister appeals against the decision of the Full Court pursuant to a grant of special leave made on 9 December 2011[6]. For the reasons that follow that appeal must be dismissed.

Procedural background

7 The Minister's determination that the respondent be surrendered to the Republic of Hungary came after a lengthy process which began on 3 March 2005. On that date, the Military Division of the Metropolitan Court of Budapest issued a warrant for the arrest of the respondent. On 23 March 2005 the Republic of Hungary wrote to the Commonwealth Attorney-General's Department requesting the extradition of the respondent to the Republic of Hungary for the purpose of prosecution under the warrant.

8 On the warrant it was alleged that in November 1944 the respondent, while stationed in Budapest as a member of the Horse-Drawn Train Division 1 of Corps 1 of the Hungarian Royal Army, Budapest, had recognised Peter Balazs, a young man of Jewish origin who was not wearing a mandatory yellow star. The respondent is alleged to have dragged Mr Balazs to an army post and, with others, to have beaten him to death. It was not in dispute that the war crime offence, first created under Hungarian law in 1945 and re-enacted as s 165 of the Criminal Code of the Republic of Hungary ("the Criminal Code"), did not exist as an offence when Mr Balazs was killed. Nor was it in dispute that the offence of murder did exist under Hungarian law at that time.

9 Section 165 of Act IV of 1978 on the Criminal Code[7] provided for war crimes defined by reference to a 1945 Decree[8]. The English translation of the relevant text of the Decree was as follows:

> "A person who seriously violated international legal rules applicable to war in respect of the treatment of the population of the occupied territories

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6 [2011] HCATrans 339 (French CJ, Gummow and Bell JJ).

7 The section, according to an English translation of its text, provided: "A special legal rule (Decree No 81/1945 (II.5.) ME, enacted by Act VII of 1945, amended and complemented by Decree No 1440/1945 (V.1.) ME shall provide for other war crimes".

8 Section 11(5) of Law-Decree No 81/1945 (II.5.) ME on People's Jurisdiction enacted by Act VII of 1945 and amended and complemented by Decree No 1440/1945 (V.1.) ME.

> or prisoners of war, or treated the population of the reannexed territories barbarously, misusing the power granted to him, or who was an instigator, perpetrator or accomplice of the unlawful execution or torture of persons either in Hungary or abroad".

10 The Minister, acting under s 16 of the Act, issued a notice on 8 July 2005 stating that the request from the Republic of Hungary had been received. On the same day a magistrate, acting on the notice under s 12 of the Act, issued a provisional warrant for the arrest of the respondent. The respondent was arrested and granted bail. Over three years later, on 20 August 2008, a magistrate determined, pursuant to s 19 of the Act, that the respondent was eligible for surrender to the Republic of Hungary. In the meantime the respondent had instituted proceedings in the Federal Court challenging the validity of the conferral upon State magistrates of the power to determine eligibility for surrender under s 19. That challenge was unsuccessful at first instance[9], on appeal to the Full Court[10] and on appeal to this Court[11].

11 The respondent applied to the Federal Court under s 21 of the Act for review of the magistrate's determination under s 19. On 31 March 2009, the magistrate's determination was affirmed by Gilmour J[12]. An appeal to the Full Federal Court (Black CJ, Tracey and Barker JJ) against that decision was dismissed on 8 October 2009[13]. The Minister's determination under s 22 and the challenge to the determination in the Federal Court that followed led ultimately to the appeal to this Court.

Statutory framework

12 The Act establishes procedures and confers powers upon the Minister for the extradition of a person from Australia to an extradition country in respect of an "extradition offence"[14]. An "extradition country" is a country declared by

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9 *Zentai v Republic of Hungary* (2006) 153 FCR 104.

10 *Zentai v Republic of Hungary* (2007) 157 FCR 585.

11 The respondent's challenge was heard concurrently with two other matters: *O'Donoghue v Ireland* (2008) 234 CLR 599; [2008] HCA 14.

12 *Zentai v Republic of Hungary* [2009] FCA 284.

13 *Zentai v Republic of Hungary* (2009) 180 FCR 225.

14 Defined by s 5 of the Act in relation to a country other than Australia as including an offence against the law of that country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months.

regulations under the Act to be an extradition country[15]. The Republic of Hungary is so declared by reg 3 of the Regulations.

13 The multi-stage process leading to extradition involves the making of an extradition request by an extradition country; the issue of a notice by the Minister, expressed to be directed to any magistrate, that the request has been received[16]; and the issue of a provisional arrest warrant[17]. There follows either a consent by the person to surrender[18] or a determination by a magistrate in proceedings under s 19 of the Act of the person's eligibility for surrender. An application for a review of the magistrate's determination may be made under s 21 to the Federal Court or the Supreme Court of the relevant State or Territory. If eligibility is established before the magistrate, and is unchallenged or is affirmed on review, the Minister is required by s 22(2), as soon as is reasonably practicable, to determine whether the person is to be surrendered in relation to a qualifying extradition offence or offences. A determination having been made, the Minister is required to issue a warrant for the surrender of the person to the extradition country[19].

14 The duty and power of the Minister to make a determination pursuant to s 22(2) is qualified. By regulation made under s 11, the Act may apply 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 in relation to that country[20]. Regulation 4 of the Regulations so applies the Act in relation to the Republic of Hungary. That application does not involve any broadening of the powers conferred by the Act.

15 The scheme of s 11 has its ancestry in the *Extradition Act* 1870 (UK). That Act empowered the Queen in Council to make Orders in Council that the Act applied to a particular foreign state. The Queen in Council was also

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15 Act, s 5, definition of "extradition country".

16 Act, s 16.

17 Act, s 12.

18 Act, s 18.

19 Act, s 23. Section 26 of the Act provides for the warrant to be executed according to its tenor.

20 Act, s 11(1)(a). Section 11(1B) provides that regulations may be made under both s 11(1) and s 11(1A) in relation to a specified extradition country. By operation of s 11(1C) this effect is achieved by a regulation which states that the Act "applies to the country concerned subject to that treaty."

empowered to limit the operation of that Act or make it subject to such conditions, exceptions and qualifications as might be deemed expedient. That flexibility was reflected in Australian extradition legislation. As this Court observed in *Oates v Attorney-General (Cth)*[21]:

> "the legislation has always allowed for extradition arrangements with particular states to be subject to limitations, conditions, exceptions or qualifications seen as appropriate to the particular circumstances."

16 A limitation, condition, exception or qualification applied by operation of a regulation made under s 11 may have the effect that the surrender of the person in relation to the offence must be refused in certain circumstances. Section 22(3)(e) provides that in such a case the person is not to be surrendered in relation to the offence unless the Minister is satisfied that the circumstances do not exist. The disempowering circumstance said, by the respondent, to exist in this case is that the offence of "war crime" for which his extradition was sought was not an offence in Hungary at the time of the acts or omissions said to give rise to it.

17 The primary question in this appeal is whether the Minister committed a jurisdictional error by purporting to determine that the respondent is to be surrendered in circumstances in which a necessary condition for surrender, derived from Art 2.5 of the Treaty and, by operation of s 11 of the Act and reg 4 of the Regulations read with s 22(3)(e) of the Act, qualifying the powers conferred by the Act, had not been satisfied. It is necessary to consider the relevant terms of the Treaty and to do so in light of the rules of interpretation in the Vienna Convention on the Law of Treaties ("the Vienna Convention").

The approach to interpretation

18 Australia and the Republic of Hungary are, and were at the time they entered into the Treaty, parties to the Vienna Convention[22]. Both may therefore be taken to have entered into the Treaty on the basis that the rules of interpretation of treaties, set out in Arts 31 and 32 of the Vienna Convention, would apply to it. The relevant elements of Arts 31 and 32 are:

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21 (2003) 214 CLR 496 at 509 [31] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ.

22 Australia acceded to the Vienna Convention on 13 June 1974; the Republic of Hungary acceded on 19 June 1987.

"*Article 31*

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

   (a) leaves the meaning ambiguous or obscure; or

   (b) leads to a result which is manifestly absurd or unreasonable."

19 The rules of interpretation in Arts 31 and 32 have been said to represent customary international law[23]. Whether or not they are or have been adopted as

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23 *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Judgment)* [2002] ICJ Rep 625 at 645.

part of the common law of Australia, those rules are generally consistent with the common law[24]. The common law requires treaties to be construed "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation"[25]. That was the approach adopted by Dawson J in *Applicant A v Minister for Immigration and Ethnic Affairs*[26] who observed that:

> "Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear."

McHugh J, with whom Brennan CJ agreed in this respect[27], said the correct approach to Art 31 was "a *single combined operation* which takes into account all relevant facts as a whole."[28] It is that approach which is appropriate to the construction of Art 2.5(a) of the Treaty.

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24 As to the relationship between customary international law and the common law, see *Chow Hung Ching v The King* (1948) 77 CLR 449 at 462 per Latham CJ, 471 per Starke J, cf at 477 per Dixon J; [1948] HCA 37.

25 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159 per Mason and Wilson JJ, Gibbs J agreeing at 149, Aickin J agreeing at 168, citing *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152 per Lord Wilberforce; [1980] HCA 51. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 413 per Gaudron J; [1989] HCA 62.

26 (1997) 190 CLR 225 at 240; [1997] HCA 4.

27 (1997) 190 CLR 225 at 231.

28 (1997) 190 CLR 225 at 254 (emphasis in original), citing Judge Zekia in *Golder v United Kingdom* (1975) 1 EHRR 524 at 544. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 177 per Murphy J; [1983] HCA 21; *Riley v The Commonwealth* (1985) 159 CLR 1 at 15 per Deane J; [1985] HCA 82; *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349 per Dawson J, 356-357 per McHugh J; [1990] HCA 37; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 545-546 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 512 [43] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ.

The Treaty on Extradition between Australia and the Republic of Hungary

20 The Treaty was made at Budapest on 25 October 1995 and entered into force on 25 April 1997. It reflects, according to its recital, the desire of both countries to make more effective their cooperation in the suppression of crime. Article 1 sets out their primary obligation. That obligation is to extradite to each other, subject to the provisions of the Treaty, any persons found in the territory of one of the contracting states who is wanted for prosecution by a competent authority for, or who has been convicted of, an extraditable offence against the law of the other contracting state. Article 2.1 embodies a dual criminality[29] requirement in its definition of "extraditable offences" as "offences however described which are punishable under the laws of both Contracting States". That definition, and the dual criminality requirement which it embodies, are important elements of the context in which Art 2.5(a) is to be construed.

21 Dual criminality is a requirement usually included in extradition treaties, according to which extradition is only granted in respect of an act or omission which is a crime according to the law of the state which is asked to extradite as well as of the state which demands extradition. As Professor Bassiouni, a leading authority in the field of international law and practice relating to extradition, has written[30]:

> "Dual criminality embodies a reciprocal characterization of those offenses deemed extraditable. Treaties list or otherwise designate extraditable offenses and also require dual criminality. Both of these requirements characteristically contain an implicit element of mutuality." (footnote omitted)

It is not necessary to that mutuality that the conduct the subject of a request for extradition constitute a crime with the same name or designation in both the requesting and requested states[31].

22 The dual criminality requirement has become so widespread in treaties and domestic extradition statutes since its emergence in the nineteenth century that it is said to have become a customary rule of international law[32]. Absent any

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29 Sometimes also referred to as "double criminality".

30 Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (2007) at 494.

31 Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 958.

32 Shearer, *Extradition in International Law* (1971) at 138; Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (2007) at 497.

express provision in an extradition treaty it may be implied[33]. Nevertheless the answer to the question whether dual criminality is required by an extradition treaty and a domestic statute giving effect to it will depend upon the terms of the treaty and of the statute[34]. So too will the extent of its application and its precise content. As Gleeson CJ, McHugh and Heydon JJ said in *Truong v The Queen*[35]:

> "this is a general principle of extradition law which is ordinarily reflected in statutes governing extradition, and applies according to the terms of the relevant statute."

23 Dual criminality, as a general rule, does not mandate precise correspondence between the names or the elements of the corresponding offences in the requesting and in the requested states. Deane J in *Riley v The Commonwealth* said[36]:

> "The principle of double criminality is satisfied where, and only where, any alleged offence against the law of the requesting state in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested state if the acts constituting it had been done in that state."

In describing contemporary treaty practice in this respect, Professor Bassiouni has written[37]:

> "Since the common crimes variety are invariably listed or designated in treaties, the two requirements of extraditable offense and dual criminality, whenever broadly interpreted, are satisfied by a single test, ie, the conduct is criminal in the jurisprudence of both states, even though not defined identically."

That does not go so far as to say that the dual criminality requirement is satisfied simply on the basis that the offending conduct contravenes the criminal law of

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33 Shearer, *Extradition in International Law* (1971) at 138.

34 *Riley v The Commonwealth* (1985) 159 CLR 1 at 12 per Gibbs CJ, Wilson and Dawson JJ, Brennan J agreeing at 14, Deane J agreeing at 14.

35 (2004) 223 CLR 122 at 136 [11]; [2004] HCA 10. See also Aughterson, *Extradition: Australian Law and Procedure* (1995) at 60.

36 (1985) 159 CLR 1 at 18.

37 Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (2007) at 504.

both the requesting and the requested states. Nor does it suggest that dual criminality is satisfied regardless of disparities between the definitions, content and seriousness of the offences constituted by that conduct in each state.

24 Relevantly to this appeal, Professor Bassiouni points to a link between dual criminality and retroactive criminal law. A person the subject of a request for extradition may claim that, at the time of the alleged offence, it was not a crime under the laws of either the requesting or requested state. That class of argument is said to raise a valid defence on general grounds of "principles of legality"[38]. The "principles of legality" are reflected in international law which, as Brennan J observed in *Polyukhovich v The Commonwealth*[39]:

> "condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done."

25 The qualification is important. It is found in Art 15 of the International Covenant on Civil and Political Rights which, while proscribing retroactive criminal laws, provides in Art 15(2) that:

> "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

No submission was made in this appeal that principles of international law qualifying the proscription of retroactive municipal criminal law had any part to play in the construction of the Treaty. That is perhaps not surprising as the Treaty is one of general application to a range of offences without distinction between those which might be regarded as crimes against international law and those which might not.

26 Particular provisions of the Act impose a dual criminality requirement in relation to the Minister's decision whether or not to issue a notice in response to an extradition request[40] and in relation to the magistrate's determination of eligibility for surrender[41]. The requirement so imposed is that if the conduct

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38 Bassiouni, *International Extradition: United States Law and Practice*, 5th ed (2007) at 747.

39 (1991) 172 CLR 501 at 575; [1991] HCA 32.

40 Act, s 16(2)(a)(ii).

41 Act, s 19(2)(c).

constituting the extradition offence had taken place in Australia at the time of the extradition request it, or equivalent conduct, would have constituted an extradition offence in relation to Australia[42]. It is not necessary for present purposes to determine the extent to which that statutory requirement can be modified in its application by a regulation made under s 11 and whether it has been so modified by reg 4. The statutory provision which is in issue for present purposes is s 22 of the Act and in particular s 22(3)(e). Consideration of the provisions of s 22(3)(e) directs attention to the terms of the Treaty.

27 The dual criminality requirement imposed by Art 2.1 is explained and qualified for the purposes of the Treaty by Art 2.2 which provides:

> "For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:
>
> (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
>
> (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ."

The requirement is further qualified, in relation to revenue offences by Art 2.3, and in relation to extraterritorial offences by Art 2.4.

28 Article 2.5 may be viewed as a further qualification or elaboration of the dual criminality requirement. It has the effect that the offence in relation to which extradition is sought need not have been a criminal offence in the requested state at the time that it occurred provided that it was an offence in that state when the request for extradition was made. Art 2.5 provides:

> "Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:

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42 Section 10(3)(a) of the Act provides that, for the purpose of considering conduct or equivalent conduct, regard may be had to all or to only one or some of the relevant acts or omissions. Section 10(3)(b) provides that differences in the denomination or categorisation of offences in Australia and the requesting state are to be disregarded.

(a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and

(b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State."

29 The respondent submitted that pars (a) and (b) of Art 2.5 are addressed to different issues and different points in time. That submission should not be accepted. It detaches Art 2.5(a) from its context in Art 2.5 and the rest of Art 2. It is inconsistent with the holistic approach to interpretation adopted by Brennan CJ and McHugh J in *Applicant A*. Article 2.5(a) should be regarded as a proviso or condition upon which Art 2.5 dispenses with a requirement for dual criminality at the time of the commission of the acts or omissions said by the requesting state to constitute the extradition offence. It may be noted that the existence of such a requirement was a feature of the *Extradition Act* 1870 (UK) and the *Extradition Act* 1989 (UK)[43].

30 As a matter of ordinary grammatical construction the proviso in Art 2.5(a) requires that the "offence in relation to which extradition is sought", mentioned in the chapeau to Art 2.5, was an offence in the requesting state at the time of the acts or omissions said to constitute the offence. The Minister submitted that the term "the offence in relation to which extradition is sought" is to be read, by reference to Art 2.2, as meaning the "acts or omissions constituting the offence". On that basis the Minister submitted that the enquiry required by Art 2.5(a) is whether, when the acts or omissions constituting the offence for which extradition is sought took place, those acts or omissions constituted an offence in the requesting state. The proviso, it was submitted, did not require that extradition be sought for an offence under the same law or in identical terms, only that the conduct in question was criminal at the time it occurred.

31 Subject to one qualification, the Minister's submission should not be accepted. As observed earlier in these reasons, dual criminality, in international practice, does not require precise correspondence between the offence constituted by the conduct of the offender in the requesting state and the offence which would be committed if the conduct had occurred in the requested state. A rule of precise correspondence would involve the requested state in undertaking close

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43 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 195-196 per Lord Browne-Wilkinson, Lord Goff of Chieveley agreeing at 208, Lord Hope of Craighead agreeing at 230, Lord Saville of Newdigate agreeing at 265, Lord Millett agreeing at 268, Lord Phillips of Worth Matravers agreeing at 279.

scrutiny of its own and the foreign law. That involves the risk of acontextual interpretation of the foreign law. As McHugh J said in *Theophanous v Herald & Weekly Times Ltd*[44]:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture."

32 Consistently with the avoidance of illusory precision the words "it was an offence in the Requesting State" in Art 2.5(a) can be construed broadly to encompass versions earlier in time of the "offence in relation to which extradition is sought" which is referred to in the chapeau to Art 2.5. That broad approach will not encompass an offence created after the offending conduct which is qualitatively different from the offence constituted by that conduct at the time that that conduct was committed. The distinction, which also gives practical effect to the general principle against retroactive municipal criminal law, involves a judgment of degree. There is a point at which the offence in the requesting state at the time of the relevant conduct cannot be equated to the "offence in relation to which extradition is sought". Whatever that judgment may be in this case it cannot proceed on the basis that if the conduct of the respondent constituted some species of criminal offence at the time it was committed, that circumstance will be sufficient to support a request for extradition in relation to any species of offence later created by law and retroactively covering that conduct. The request for the extradition of the respondent for commission of a war crime cannot rest simply upon the proposition that the alleged conduct would have constituted the offence of murder under Hungarian law in 1944. Yet, as reflected in the departmental submission to the Minister mentioned below, and the Minister's submission in this Court, that was evidently the basis upon which the Minister made his decision.

33 Counsel for the Minister conceded that if the construction of Art 2.5(a) for which he contended was not correct and the matter were remitted to the Minister, the Minister would be required to ascertain whether the law creating the offence of "war crime", allegedly committed by the respondent, was only a minor variation of pre-existing law.

34 The Minister also sought to draw support for his construction from Art 3 of the Treaty. That Article sets out exceptions to extradition on a number of grounds, including the ground that "final judgement has been passed in the Requested State or in a third state in respect of the offence for which the person's

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44 (1994) 182 CLR 104 at 196; [1994] HCA 46. In particular, see *Riley v The Commonwealth* (1985) 159 CLR 1 at 16 per Deane J.

extradition is sought"[45]. It was submitted, correctly, that the reference in that paragraph to "the offence for which the person's extradition is sought" only makes sense if read as a reference to the acts or omissions constituting that offence. A similar argument was advanced by reference to Art 3.2(b), (d) and (e). Those paragraphs refer to cases in which the requested state has decided to refrain from prosecuting a person for the offence in respect of which extradition is sought[46] or in which the offence is regarded under the law of the requested state as having been committed in whole or in part within that state[47] or where a prosecution is pending in respect of that offence in the requested state[48]. These are textual indicators for, but not determinative in favour of, the construction propounded by the Minister.

35 The Minister sought support for his interpretation of Art 2.5(a) in a "subsequent agreement" between Australia and the Republic of Hungary. He invoked Art 31(3) of the Vienna Convention. The subsequent agreement was said to have been reflected in a departmental submission which advised the Minister that the "conduct-based" interpretation of Art 2.5(a) of the Treaty "appears consistent with the view taken by the Hungarian Government." The submission also recorded that the Ministry of Justice in Hungary had indicated that it believed the request was not precluded by Art 2.5(a) given that "it can be established that the action [allegedly] committed by Zentai was an offence even at the time of its commission."[49] The Minister also relied upon the fact that the request by Hungary was itself based upon the premise that the requirements of Art 2.5(a) of the Treaty had been met, a premise accepted by Australia by way of the Minister's determination under s 22 of the Act.

36 It may be debatable whether the making of a request for extradition and the accession to that request on the basis of a common opinion about the interpretation of the Treaty requires that opinion to be taken into account in interpreting the Treaty. That seems to have been the proposition underlying the Minister's invocation of Art 31(3) of the Vienna Convention. For the purposes of Australian domestic law and the application of s 11 of the Act and reg 4 of the Regulations, the Treaty is to be interpreted in the light of its text, context and purpose as at the time that reg 4 was made and by reference to such extrinsic

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45 Treaty, Art 3.1(d).

46 Treaty, Art 3.2(b).

47 Treaty, Art 3.2(d).

48 Treaty, Art 3.2(e).

49 The submission was forwarded to the Minister on 6 November 2009: (2011) 195 FCR 515 at 535 [83] per Jessup J.

material as was in existence at that time. Any later agreement which had the effect of varying the terms of the Treaty would not affect the application of the Act unless s 11 were enlivened by a further regulation or some other statutory means.

37 The appeal being dismissed, it is not necessary to consider the matters raised in the notice of contention.

Conclusion

38 For the preceding reasons the appeal should be dismissed with costs.

39 GUMMOW, CRENNAN, KIEFEL AND BELL JJ. The first respondent, Charles Zentai, is an Australian citizen whose extradition is sought by the Republic of Hungary for prosecution[50] for an offence described as a "war crime". The acts that are said to constitute the offence occurred in 1944 and involved a fatal assault on a young Jewish man. At the time, there was no offence of "war crime" but murder was an offence under the Hungarian Criminal Code[51]. The Republic of Hungary has chosen not to seek Mr Zentai's surrender for prosecution for murder. The fact that the Republic of Hungary has requested that Mr Zentai be surrendered for prosecution for the offence of "war crime" gives rise to the issue in this appeal. That issue concerns the effect of a limitation on the power of the first appellant, the Minister for Home Affairs ("the Minister"), to comply with the request. The limitation arises out of the *Extradition Act* 1988 (Cth) ("the Act"), which gives effect to Art 2.5(a) of 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 the acts constituting it occurred[52].

Factual background

40 The request for the extradition of Mr Zentai was made by the Hungarian Ministry of Justice in a letter dated 23 March 2005. An English translation of an arrest warrant issued by the Military Division of the Metropolitan Court of Budapest was attached to the letter. Particulars of the offence for which Mr Zentai's extradition is sought are set out in the warrant. They concern an incident that is alleged to have occurred in Budapest on 8 November 1944 at a time when it appears that Mr Zentai was a member of the Hungarian Royal Army. He is said to have captured a young man, Peter Balazs, whom he recognised as a Jew, and to have dragged him back to his unit's post. There, he and two other soldiers carried out a sustained, fatal, assault on Mr Balazs, after which Mr Zentai assisted in weighting down the body and throwing it into the Danube River.

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50 In this Court (although not below) it was accepted that Mr Zentai's extradition is sought as a person "wanted for prosecution", as to which see *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 562-563 per Gummow J; [1995] HCA 35.

51 Under Art 278 of Act V of 1878 of the Hungarian Criminal Code.

52 Extradition (Republic of Hungary) Regulations (Cth), reg 4 and Schedule, Treaty on Extradition between Australia and the Republic of Hungary.

The offence of war crime

41 The offence of "war crime" for which Mr Zentai's extradition is sought was first enacted in 1945[53] and has since been re-enacted in the Hungarian Criminal Code in 1978[54]. The offence is described in the arrest warrant as having the following characteristics:

> "A person who seriously violated international legal rules applicable to war in respect of the treatment of the population of the occupied territories or prisoners of war, or treated the population of the reannexed territories barbarously, misusing the power granted to him, or who was an instigator, perpetrator or accomplice of the unlawful execution or torture of persons either in Hungary or abroad".

42 The provisions operate retrospectively. The offence carries a "main punishment" of "imprisonment for life, or imprisonment from ten to fifteen years".

Proceedings under the *Extradition Act*

43 Part I of the Act (ss 1-11) deals with preliminary matters. One of the principal objects of the Act is "to enable Australia to carry out its obligations under extradition treaties"[55]. Section 5 relevantly defines "extradition offence" to include an offence in relation to a country other than Australia "for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months". That requirement is satisfied in this case.

44 Part II of the Act (ss 12-27) governs extradition from Australia to an extradition country. The scheme has been described as proceeding in four interdependent stages: commencement, remand, determination by a magistrate of eligibility for surrender and executive determination (subject to legislative constraints) that the person is to be surrendered[56]. Aspects of the operation of

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53 Prime Minister's Decree No 81 of 1945, enacted by Act VII of 1945 and amended and complemented by Decree No 1440 of 1945.

54 Section 165 of Act IV of 1978.

55 Act, s 3(c).

56 *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389.

each stage have been discussed on a number of occasions by this Court[57]. This appeal is concerned with the fourth stage, the executive determination to surrender for extradition.

45 The earlier stages may be briefly noticed. On 8 July 2005, the former Minister for Justice and Customs issued a notice of receipt of the extradition request[58] in respect of a "war crime" and referred to the relevant Hungarian legislation set out in the warrant. Mr Zentai was arrested on a provisional warrant[59] and granted conditional bail[60]. Mr Zentai made an unsuccessful challenge to the validity of the conferral of certain functions under the Act on State magistrates, which proceeding concluded in April 2008[61].

46 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 pursuant to s 19(9) of the Act. Such a determination is a precondition which must be satisfied before the Minister can surrender an individual pursuant to s 22 of the Act. Mr Zentai applied for a review of the magistrate's determination under s 21 of the Act and he was released on bail pending the outcome of that review. The magistrate's determination was affirmed in the Federal Court by Gilmour J[62] and an appeal from that decision was dismissed by the Full Court of the Federal Court[63].

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57 *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496; [2003] HCA 21; *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; [2006] HCA 40; *O'Donoghue v Ireland* (2008) 234 CLR 599; [2008] HCA 14; *Republic of Croatia v Snedden* (2010) 241 CLR 461; [2010] HCA 14.

58 Act, s 16.

59 Act, s 12(1).

60 Act, s 15(2).

61 *O'Donoghue v Ireland* (2008) 234 CLR 599.

62 *Zentai v Republic of Hungary* [2009] FCA 284.

63 *Zentai v Republic of Hungary* (2009) 180 FCR 225.

47 Following receipt of the request for Mr Zentai's extradition, it appears that the Department of the Attorney-General raised with the Hungarian authorities the question of whether the conduct alleged against Mr Zentai amounted to an offence against Hungarian law at the date of its alleged commission. By July 2005, the Department had received advice that in 1944 the conduct particularised in the arrest warrant constituted the crime of murder under the Hungarian Criminal Code.

48 In August 2009, lawyers acting for Mr Zentai wrote to the Department of the Attorney-General contending that Mr Zentai's surrender for extradition for the offence of "war crime" was precluded under the proviso in Art 2.5(a) of the Treaty, which states:

> "Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:
>
> (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence".

49 Officers of the Department advised the Minister respecting this contention in these terms:

> "Although [Mr Zentai's] interpretation is arguably open on the basis of the language used in Article 2(5), when considered in the context of the provision, and its background, our view is that Article 2(5) does not preclude extradition. … We do not consider Article 2(5)(a) requires that the precise offence provision under which the person is to be prosecuted had to be in force at the time the relevant conduct was committed."

50 It would seem that the Minister accepted the Department's advice. On 12 November 2009, acting under a delegation from the Attorney-General, the Minister determined that Mr Zentai was to be surrendered to Hungary in relation to the extradition offence of "war crime"[64].

51 Mr Zentai commenced proceedings in the Federal Court of Australia under s 39B(1) and (1A) of the *Judiciary Act* 1903 (Cth) claiming an order quashing the Minister's decision to surrender him and declaring the decision to

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64 Act, s 22(2).

have been "void and of no legal effect"[65]. He was granted bail on 16 December 2009.

52 On 2 July 2010, McKerracher J found that it had not been open to the Minister to surrender Mr Zentai for extradition because the offence of "war crime" was not an offence under the laws of Hungary at the time Mr Balazs was killed[66]. On 10 December 2010, his Honour ordered certiorari to quash the Minister's determination (and the warrant issued upon it)[67] and mandamus requiring the Minister to determine (i) that Mr Zentai not be surrendered to Hungary and (ii) that Mr Zentai be released[68]. His Honour made declarations including that the offence for which Mr Zentai's extradition is sought is not an "extraditable offence"[69].

53 The Minister appealed to the Full Court of the Federal Court contending that McKerracher J erred in his construction of the Treaty and in his conclusion that it had not been open to determine that Mr Zentai is to be surrendered for extradition in relation to the offence of "war crime". On 16 August 2011, the Full Court of the Federal Court (Besanko and Jessup JJ, North J dissenting) made orders allowing the Minister's appeal in part and varying the orders made by the primary judge but otherwise dismissing the appeal. Besanko and Jessup JJ concluded that McKerracher J was correct in holding that the offence for which

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65 Orders were also sought against the Minister for Justice in relation to the decision to issue the notice under s 16; the magistrate in relation to the issue of the warrant committing Mr Zentai to custody to await surrender under s 19(9); and the officer in charge of Hakea Prison in Western Australia to produce Mr Zentai to the Court. This appeal is concerned only with the relief claimed against the Minister arising out of the determination under s 22(2) to surrender Mr Zentai to Hungary for extradition.

66 *Zentai v O'Connor (No 3)* (2010) 187 FCR 495 at 541 [186], 545 [214].

67 Which repeated the description of the extradition offence as a "war crime" and set out the relevant Hungarian legislation as in the s 16 notice.

68 *Zentai v O'Connor (No 4)* [2010] FCA 1385.

69 *Zentai v O'Connor (No 4)* [2010] FCA 1385 at [88].

extradition was sought must have been an offence under Hungarian law at the time of the acts alleged to constitute it[70].

54 On 2 December 2011, this Court ordered by consent that, pending the determination of the appellants' application for special leave to appeal and, if special leave were granted, pending the determination of the appeal, the order of the Full Court that a writ of mandamus issue to the Minister be stayed; Mr Zentai be admitted to bail upon conditions; and the s 19(9) warrant issued by the magistrate on 20 August 2008 committing Mr Zentai to imprisonment in Hakea Prison be stayed.

55 On 9 December 2011, French CJ, Gummow and Bell JJ granted the appellants special leave to appeal from the orders of the Full Court made on 16 August 2011. For the reasons that follow, the appeal should be dismissed.

56 The Minister did not give reasons for his determination. It is not a decision to which the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) applies[71]. By Notice of Contention, Mr Zentai seeks to have the orders of the Full Court upheld on the ground that the Minister did not "provide a statement of reasons explaining and justifying his decision of 12 November 2009". Mr Zentai asserts that the conferral of a public power unaccompanied by an express or implied obligation to explain the purported exercise of the power is to "create islands of power immune from supervision and restraint"[72]. Given the fate of the appeal, it is not necessary to address Mr Zentai's contention beyond observing that his successful challenge to the Minister's purported exercise of the power tends against acceptance of the premise of his argument.

The power to surrender for extradition

57 The determination with which this appeal is concerned was made under s 22(2) of the Act, which 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*. Mr Zentai is an eligible person, having been

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70 *O'Connor v Zentai* (2011) 195 FCR 515 at 531 [71] per Besanko J, 571 [160] per Jessup J.

71 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 3, par (d) of the definition of "decision to which this Act applies" and Sched 1, par (r).

72 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]; [2010] HCA 1.

committed to prison by order of a magistrate made under s 19(9)[73]. The qualifying extradition offence for the purposes of the determination is the offence of "war crime", since this is the extradition offence in relation to which the magistrate determined Mr Zentai is eligible for surrender[74].

58 The Minister's power to determine to surrender Mr Zentai for extradition is subject to the limitations and conditions that are set out in s 22(3). These limitations and conditions apply to the extradition of persons from Australia to any extradition country and reflect principles that are internationally acknowledged in extradition law[75]. They include that the Minister may not extradite a person to face prosecution or punishment for a political offence in the extradition country[76]. Nor may the Minister surrender a person for extradition where extradition is sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or where the person may be prejudiced at his or her trial or punished on account of such considerations[77]. Nor may the Minister surrender a person for extradition unless the Minister is satisfied that the person will not be subjected to torture[78].

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73 Section 22(1) of the Act defines "***eligible person***" to mean, relevantly, a person who has been committed to prison:

> "by order of a magistrate made under subsection 19(9) or required to be made under subparagraph 21(2)(b)(ii) (including by virtue of an appeal referred to in section 21), being an order in relation to which no proceedings under section 21 are being conducted or available."

74 Section 22(1) of the Act defines "***qualifying extradition offence***" to mean, relevantly, in relation to an eligible person, any extradition offence:

> "in relation to which the magistrate referred to in that paragraph or the court that conducted final proceedings under section 21, as the case requires, determined that the person was eligible for surrender within the meaning of subsection 19(2)."

75 United Nations General Assembly, Model Treaty on Extradition (A/RES/45/116) 14 December 1990.

76 Act, ss 7(a), 7(b), 22(3)(a).

77 Act, ss 7(b), 7(c), 22(3)(a).

78 Act, s 22(3)(b).

Nor may the Minister surrender a person for extradition where the offence is punishable by a penalty of death unless the extradition country has provided an undertaking having the effect that the death penalty will not be carried out[79]. More generally, the principles of speciality[80], double jeopardy[81] and double criminality[82] also find expression in the limitations and conditions on the Minister's power to surrender a person for extradition to any extradition country. The last-mentioned principle prevents extradition unless the act or omission that is the subject of the request amounts to a crime under the laws of the Requesting and the Requested State[83]. Consideration of whether conduct constitutes an offence under Australian law is directed to the time at which the extradition request is received[84]. The limitations on the power to surrender a person for extradition under the Act are not concerned with whether the person may be exposed to criminal punishment for conduct that was not a crime at the time it took place. However, as earlier stated, Australia and Hungary have agreed to limit their mutual obligation to surrender persons for extradition by such a consideration.

59 The proviso in Art 2.5(a) which protects against surrender in the case of threatened imposition of criminal liability or punishment retrospectively is given effect in Australian law by the operation of ss 11(1)(a) and 22(3)(e) of the Act. The former 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. This may be achieved by a regulation that provides that the Act applies to the country concerned subject to such a treaty[85]. This is the manner in which Australia has effected its extradition arrangements with Hungary. The Extradition (Republic of Hungary) Regulations (Cth) ("the Regulations") declare

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79 Act, s 22(3)(c).

80 Act, s 22(3)(d).

81 Act, ss 7(e), 22(3)(a).

82 Act, ss 7(d), 22(3)(a).

83 *Truong v The Queen* (2004) 223 CLR 122 at 136 [11], citing *Oppenheim's International Law*, 8th ed (1955), vol 1 at 701.

84 Act, ss 7(d), 16(2)(a)(ii).

85 Act, s 11(1C).

Hungary to be an extradition country[86] and provide that the Act applies in relation to Hungary subject to the Treaty, which is set out in the Schedule[87].

60 Article 2.5(a) embodies a general objection to retrospectively applied criminal law that is recognised both in municipal law[88] and in international instruments, including the European Convention on Human Rights[89] ("the ECHR"). Under the ECHR, the general objection is subject to an exception in the case of acts or omissions which at the time they were done or omitted to be done were criminal according to the general principles of law recognised by civilised nations[90]. This exception, which is apt to cover conduct recognised under international law as amounting to a war crime, does not find expression in the Treaty.

61 Section 22(3)(e) precludes the surrender of an eligible person in a case in which the Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception having the effect that surrender in relation to the offence shall be refused in certain circumstances unless the Minister is satisfied that those circumstances do not exist[91]. In this case, the Minister's

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86 Regulations, reg 3.

87 Regulations, reg 4.

88 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 609-612 per Deane J, 642-643 per Dawson J, 686-690 per Toohey J; [1991] HCA 32. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 543 [142] per Kirby J; [1999] HCA 65; *Haskins v The Commonwealth* (2011) 244 CLR 22 at 48 [72] per Heydon J; [2011] HCA 28. See further *R v Miah* [1974] 1 WLR 683 at 694 per Lord Reid; [1974] 2 All ER 377 at 379.

89 Article 7.1 of the ECHR provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

90 ECHR, Art 7.2.

91 Section 22(3)(e) provides:

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

(Footnote continues on next page)

power to determine to surrender Mr Zentai for extradition to Hungary was subject to his satisfaction of the existence of the circumstance stated in Art 2.5(a).

The Federal Court

62 The primary judge considered that the plain meaning of Art 2.5(a) precluded the determination to surrender a person for extradition for an offence that did not exist at the time the acts or omissions said to constitute it are alleged to have taken place[92]. The majority in the Full Court upheld this construction[93]. However, their Honours differed from the primary judge with respect to the form of the orders made to reflect this conclusion. The order for mandamus was reframed to direct the Minister to determine according to law whether Mr Zentai is to be surrendered to Hungary in relation to the offence of war crime. This recognises that it is for the Minister and not the Court to determine whether the offence of war crime was an offence in Hungary at the material time[94]. The declarations made by the primary judge were also set aside.

63 North J, in dissent, approached the question upon a view that the object and purpose of the Treaty is "to ensure that people are called to account for their

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…

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

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

in certain circumstances – the Attorney-General is satisfied:

(iii) where subparagraph (i) applies – that the circumstances do not exist".

92 *Zentai v O'Connor (No 3)* (2010) 187 FCR 495 at 544-545 [211], referring to 540-541 [184]-[185].

93 *O'Connor v Zentai* (2011) 195 FCR 515 at 531 [70] per Besanko J, 570 [155] per Jessup J.

94 *O'Connor v Zentai* (2011) 195 FCR 515 at 573 [165] per Jessup J.

wrongdoing"[95]. His Honour interpreted Art 2.5(a) by reference to the Vienna Convention on the Law of Treaties, which provides that, in the interpretation of a treaty, any subsequent agreement between the parties regarding its interpretation or the application of its provisions is to be taken into account[96]. His Honour considered that Mr Zentai faced the hurdle of demonstrating that Art 2.5(a) bears a meaning that differs from the meaning upon which Australia and Hungary are agreed[97]. In his Honour's view, Arts 2.1 and 2.2 together define what constitutes an extraditable offence. Article 2.2(b) requires that the totality of the acts or omissions of the person whose extradition is sought are to be taken into account. It follows that the "offence in relation to which extradition is sought" in Art 2.5 is to be understood as referring to the totality of the acts or omissions that are said to constitute it. Since murder was an offence under the Hungarian Criminal Code in November 1944, the proviso in Art 2.5(a) was satisfied[98].

The Minister's submissions: the interpretive approach

64 The Minister adopted North J's reasons in support of his submission that Art 2.5(a) precludes extradition only where the conduct constituting the offence for which extradition is sought was not *an* offence in the Requesting State at the time it occurred. The Minister relied on Art 31.3(a) of the Vienna Convention and submitted that it was evident that Australia and Hungary had reached a subsequent agreement that Art 2.5(a) is satisfied if the acts and omissions alleged against the person amounted to *an* offence in the Requesting State at the date they occurred. Hungary's agreement was evidenced by the fact of its request for extradition for the offence of "war crime", notwithstanding that the offence did not exist in 1944. Australia's agreement was evidenced by the Minister's accession to the extradition request. The Minister embraced North J's characterisation of the object and purpose of the Treaty and submitted that this favoured a broad and generous interpretation of its provisions, including Art 2.5(a). The latter, although stating a limitation on the circumstances in which surrender is to be granted, was to be interpreted as part of "a treaty between States [having] no direct impact upon liberty".

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95 *O'Connor v Zentai* (2011) 195 FCR 515 at 521 [27].

96 Vienna Convention on the Law of Treaties (1969), Art 31.3(a).

97 *O'Connor v Zentai* (2011) 195 FCR 515 at 519 [14].

98 *O'Connor v Zentai* (2011) 195 FCR 515 at 521 [25]-[26].

Discussion: the interpretive approach

65 It is well settled that the Executive requires the authority of statute to surrender a person for extradition[99] and that the power "cannot be exercised except in accordance with the laws which prescribe in detail the precautions to be taken to prevent unwarrantable interference with individual liberty"[100]. The limitation on the power of surrender with which this appeal is concerned arises in consequence of the engagement of s 22(3)(e) and the Regulations made under s 11(1) annexing the Treaty. The meaning of the limitation set out in Art 2.5(a) is to be ascertained by the application of ordinary principles of statutory interpretation[101]. The limitation is not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian Government. Moreover, it is an error to characterise the purpose of the Treaty as "ensur[ing] that people are called to account for their wrongdoing". The purpose of the Treaty stated in Art 1[102] is to give effect to the reciprocal obligations to extradite persons for *extraditable offences*. Extraditable offences are defined in Art 2 and are subject to a limitation that does not apply to extradition from Australia for extradition

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99 *Barton v The Commonwealth* (1974) 131 CLR 477 at 497 per Mason J; [1974] HCA 20; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 503-504 [13] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ.

100 *Brown v Lizars* (1905) 2 CLR 837 at 852 per Griffith CJ; [1905] HCA 24. See also *Riley v The Commonwealth* (1985) 159 CLR 1 at 15 per Deane J; [1985] HCA 82; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 618 [6] per Gleeson CJ, 634 [49] per Gummow and Hayne JJ.

101 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

102 Article 1 of the Treaty provides:

> "The Contracting States undertake to extradite to each other, subject to the provisions of this Treaty, any person found in the territory of one of the Contracting States who is wanted for prosecution by a competent authority for, or has been convicted of, an extraditable offence against the law of the other Contracting State."

offences under the Act[103]. Consideration of the object and purpose of the Treaty does not assist in ascertaining the meaning of that limitation.

Article 2

66 At this point it is convenient to set out the relevant provisions of Art 2:

"**EXTRADITABLE OFFENCES**

1. For the purposes of this Treaty, extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty. Where the request for extradition relates to a person convicted of such an offence who is wanted for the enforcement of a sentence of imprisonment, extradition shall be granted only if a period of at least six months of such penalty remains to be served.

2. For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:

   (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

   (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.

…

5. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:

   (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and

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103 Act, s 5, par (a) of the definition of "extradition offence".

(b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State."

The Minister's submissions: three textual considerations

67 In the Minister's submission, "offence" in the chapeau to Art 2.5(a) is not confined to the legal construct of "war crime" under Hungarian law, but encompasses the totality of the acts and omissions alleged against Mr Zentai in the extradition request. On this analysis, the proviso in Art 2.5(a) requires the Minister to ask, was the conduct that is alleged against Mr Zentai *an* offence under Hungarian law in 1944? This expansive interpretation is said to be justified by three textual considerations. First, Art 2.1, which speaks of "offences however described", demonstrates, so it is said, a focus on conduct as distinct from the legal analysis of an offence. Secondly, Art 2.2 is expressed to apply for "the purpose of this Article" and, in terms, directs attention to the conduct and not to analysis of the elements of an offence. Thirdly, the use of the word "offence" in Art 3[104] is suggested to encompass the acts and omissions alleged

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104 Article 3 relevantly provides:

"1. Extradition shall not be granted in any of the following circumstances:

…

(d) if final judgement has been passed in the Requested State or in a third state in respect of *the offence for which the person's extradition is sought*;

…

2. Extradition may be refused in any of the following circumstances:

…

(b) if the competent authorities of the Requested State have decided to refrain from prosecuting the person for *the offence in respect of which extradition is sought*;

…

(Footnote continues on next page)

against the person since otherwise the exclusions for which the Article provides would lose much of their utility.

Discussion: three textual considerations

68 Extradition treaties commonly define the offences for which extradition is to be granted. In some treaties, this is done by listing extraditable offences by name: "the enumerative method". One deficiency with the enumerative method is that, in the event an offence is omitted from the list, the Contracting States will usually have to undertake the time-consuming task of entering into a supplementary treaty. This deficiency is addressed by the adoption of the "eliminative method", by which extraditable offences are defined by reference to a minimum standard of severity[105]. The latter is the method adopted in the Treaty. Article 2.1 provides that an offence is an extraditable offence regardless of how the offence is described under the law of Australia or Hungary provided that it is an offence subject to a penalty of one year's imprisonment or more. Article 2.1 also gives effect to the principle of double criminality. One problem that arises in the application of double criminality is whether the offence must have the same name and constituent elements under the law of the Requested State or whether it is sufficient that the facts alleged against the person in the extradition request constitute a crime in the Requested State[106]. Article 2.2 answers this question. It applies "[f]or the purpose of this Article *in determining whether an offence is an offence against the law of both Contracting States*" (emphasis added). Differences in nomenclature and the identification of constituent elements are to be put aside when determining whether the offence for which the eligible person's extradition is sought is an offence in the Requested State. The determination of whether an offence is an offence against the law of both Contracting States, pertinent to the application of double criminality, has no relevance to the question with which Art 2.5(a) is concerned. There is no need to take account of dissimilar systems of criminal law under the

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(d) if *the offence for which extradition is sought* is regarded under the law of the Requested State as having been committed in whole or in part within that State;

(e) if a prosecution in respect of *the offence for which extradition is sought* is pending in the Requested State against the person whose extradition is sought" (emphasis added).

105 See Shearer, *Extradition in International Law* (1971) at 133-137.

106 Shearer, *Extradition in International Law* (1971) at 141-146.

proviso in Art 2.5(a). Article 2.5(a) asks whether the offence for which extradition is sought (by the Requesting State) was an offence (in the Requesting State) at the time the acts or omissions said to constitute it occurred.

69 The Minister's submissions respecting Art 3[107] addressed par (d) of Art 3.1 and pars (b), (d) and (e) of Art 3.2. Each is concerned with the effect of decisions of courts or the Executive or the content of the law of the Requested State on the determination to surrender for extradition. As with the determination of double criminality, consideration of the offence for which extradition is sought by the Requesting State in this context may require that account be taken of the differences between systems of criminal justice[108]. Again, this provides no reason for giving an extended meaning to "the offence in relation to which extradition is sought" for the purposes of Art 2.5(a), which is concerned solely with the law of the Requesting State.

70 The ordinary, grammatical, meaning of Art 2.5(a) is that extradition is not to be granted unless the Minister is satisfied that the offence in relation to which extradition is sought was an offence in the Requesting State at the time of its alleged commission. If the pronoun "it" is replaced with the phrase for which it is surrogate, Art 2.5(a) reads "extradition may be granted … irrespective of when the offence in relation to which extradition is sought was committed, provided that the offence in relation to which extradition is sought was an offence in the Requesting State at the time of the acts or omissions constituting the offence". Article 2.5(a) reflects the adoption by Australia and Hungary of a policy against the imposition of criminal liability or punishment retrospectively. Had the intention been to confine that protection to a consideration of whether the acts or omissions alleged against the eligible person constituted *any* offence against the law of the Requesting State at the time of their alleged commission, it might be expected that the opening words of Art 2.5(a) would have mirrored those of Art 2.5(b) (dealing with double criminality), which asks whether "the acts or omissions alleged would, if they had taken place in the territory of the Requested State … have constituted an offence".

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107 See above at fn 104.

108 *Riley v The Commonwealth* (1985) 159 CLR 1 at 17 per Deane J; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 633 [46] per Gummow and Hayne JJ.

Treatment of speciality under the Treaty

71 The Minister's final submission in support of his preferred construction of Art 2.5(a) draws on Art 12[109]. That Article permits the conviction and punishment of an eligible person for an extraditable offence other than that for which extradition was granted where the person could be convicted upon proof of the facts on which the extradition request was based, provided that the offence does not carry a more severe penalty than the offence for which extradition was granted[110]. This treatment of the rule of speciality conforms to the treatment of the rule under the Act for extradition to Australia from other countries[111]. It is less restrictive than the treatment of the rule in the United Nations Model Treaty on Extradition[112] and in the European Convention on Extradition[113]. The Minister contends that the more flexible approach to the rule of speciality in Art 12 supports his interpretation of Art 2.5(a) because it is consistent with "the whole tenor of the Treaty [which] is ... directed to the underlying facts for the offence and not just on legal constructs". However, the reservation in Art 12

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109 Article 12(1) provides, relevantly:

> "a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of his personal liberty, in the territory of the Requesting State for any offence committed before his extradition other than:
>
> (a) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that that offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition was granted; or
>
> (b) any other extraditable offence in respect of which the Requested State consents."

110 See *Truong v The Queen* (2004) 223 CLR 122.

111 Act, s 42.

112 United Nations General Assembly, Model Treaty on Extradition (A/RES/45/116) 14 December 1990, Art 14.

113 European Convention on Extradition (1957), Art 14.

tends against acceptance of the Minister's submission. The offence for which extradition is sought remains controlling in that the person may not be detained or tried for another extraditable offence having a more severe penalty.

Conclusion

72 The inquiry to which Art 2.5(a) directs attention is 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 is sought. Hungary seeks Mr Zentai's surrender for extradition for the offence of "war crime". The facts set out in the arrest warrant, if proved, may support Mr Zentai's conviction for the offence of murder. However, Hungary has chosen not to request Mr Zentai's extradition for prosecution for that offence. Under Australian law as modified to give effect to the Treaty, the Minister is precluded from surrendering Mr Zentai for extradition unless he is satisfied that the offence of "war crime" was an offence against the law of Hungary on 8 November 1944.

73 The appeal should be dismissed with costs.

74 HEYDON J. The appeal should be allowed.

Background

75 Counsel for the first respondent referred to the "general antipathy in international law … against retrospectivity" – an antipathy which can be somewhat selectively displayed. Analysis should not be diverted by that antipathy in this case. Nor should analysis be diverted by the characteristic vagueness with which war crimes are defined. Finally, analysis should not be diverted by reflections upon the zeal with which the victors at the end of the Second World War punished the defeated for war crimes. The victors were animated by the ideals of the Atlantic Charter and of the United Nations. The Universal Declaration of Human Rights was about to peep over the eastern horizon. But first, they wanted to have a little hanging.

76 At least in its application to the first respondent, the Prime Minister's Decree No 81 of 1945 ("the Decree") is not open to criticisms of retroactivity, vagueness or excessive zeal. The provision of the Decree that creates the crime in respect of which Hungary seeks the first respondent's extradition sets up three categories of offender. One is "[a] person who seriously violated international legal rules applicable to war in respect of the treatment of the population of the occupied territories or prisoners of war". The second category refers to a person who "treated the population of the reannexed territories barbarously, misusing the power granted to him". The third category refers to "an instigator, perpetrator or accomplice of the unlawful execution or torture of persons … in Hungary". The case Hungary puts against the first respondent places him in the third category, not the first two categories. Those first two categories are replete with indeterminate and even uncertain phrases. At least in its application to the facts alleged against the first respondent, the third category does not share those vices.

77 The facts that Hungary alleges against the first respondent are as follows. On 8 November 1944, the first respondent:

> "provided patrol service in the territory of Budapest …, with the aim of capturing hiding persons of Jewish origin and presenting them at their place of service. In the course of his patrol service, [the first respondent], reserve ensign, recognized, on a tram line, [the victim], a young man of Jewish origin, also [like the first respondent] residing at Budafok, and known by him earlier, who did not wear the yellow star, which was otherwise prescribed for him on a mandatory basis. Thereafter, [the first respondent] dragged [the victim] to the army post of his Unit located at Budapest … Thereafter, [the first respondent] and his two other accomplices [both also officers], assaulted [the victim] in one of the offices of the Unit from about 3.00 p.m. until the evening hours continuously and so badly that [the victim] died of his injuries late in the evening. [The first respondent] delivered the dead body of [the victim]

> from the territory of the Unit on the same night together with his several fellow-soldiers, and then, after having fixed ballast to the dead body, they threw it into the Danube."

78 The first respondent was a Hungarian citizen in 1944. He is alleged to have carried out this conduct on Hungarian soil. The alleged victim appears to have been a Hungarian citizen. Unlike the instruments relied on to try the major war criminals at Nuremburg and Tokyo after the Second World War, the Decree is legislation enacted by a competent legislator. The Decree is supported by the territorial and active personality principles of jurisdiction under international law. Although the Decree is retrospective in form, in substance, as it applies to this case, it merely repeats an existing prohibition against murder. Indeed, the crime the Decree created requires antecedently "unlawful" conduct. In this case, that conduct was murder.

79 In 1946 the Allies hanged the former German Foreign Minister for crimes against peace. No doubt he was an unlovely character. No doubt other things that he may have done were repellent. But critics find the way he was forced to the scaffold unattractive because the existence of crimes against peace before 1945 was at best questionable. They also find it unattractive because the prosecution comprised four countries with very large empires, significant parts of which had been acquired by starting wars. That was an example of behaviour which gave war crimes trials a bad name. On the other hand, post-1949 German governments could not be criticised for punishing Germans who committed war crimes by murdering or physically maltreating Germans in Germany during the Second World War contrary to German law at that time. The same is true of post-1945 Hungarian governments seeking to punish Hungarians who murdered Hungarians in Hungary in 1944 – a time when the conduct alleged against the first respondent, though the Decree now calls it a "war crime", was criminal under Hungarian law.

A preliminary point

80 The appellants submitted that to assault a person to the point of death was murder in Hungarian law in 1944. In contrast, the first respondent submitted:

> "the alleged conduct as described in the Arrest Warrant … does not contain any allegation concerning *mens rea*, and the [Commonwealth] Director of Public Prosecutions had advised that under Western Australian law it might constitute one of several offences … While it must be accepted that the [first appellant] was entitled to conclude that the alleged conduct was criminal, he did not have a proper basis to be satisfied – if it were relevant – that it constituted the crime of murder."

Parties who offer this type of submission tend to prompt in the recipient the reflection: "if they see this as an argument which is necessary for success, they must regard the rest of their case as bad".

81 The submission has two difficulties. First, it is wrong. Secondly, even if it were right it would be immaterial. It is wrong because presuming Hungary succeeds in establishing the facts alleged, the circumstances described in the Arrest Warrant point strongly to murder, whatever mental element was required to establish murder in Hungary in 1944. In particular, the rank of the perpetrators, the way they behaved, the time their conduct took, and the first respondent's alleged conduct after the victim died suggest an intention to cause the victim's death. Further, Hungary advised Australia that it was murder. And even if it were not murder, it would not matter for the purposes of Art 2(5)(a) of the Treaty[114]. All that matters under Art 2(5)(a) is that it was an offence – not necessarily murder – in Hungary in 1944. If the conduct was not murder, it was an offence. It has doubtless been an offence at least since the time of Árpád.

82 The first respondent's point is an extremely technical one. He appeals to the need to protect liberty. It is true that the protection of liberty often turns on technicality. But is the first respondent's technical point sound? No.

Reasoning

83 Some of the arguments the appellants advanced are less convincing than others. It is not necessary to deal with them all. The appeal should be allowed for the following reasons.

84 Was "the offence in relation to which extradition is sought" an offence in Hungary in 1944 within the meaning of Art 2(5)(a)? Hungary describes the offence for which extradition is sought as a "war crime" that falls within the third category outlined above. In the context of Art 2(5)(a), for the reasons given below, the word "offence" refers to the factual criteria necessary to establish criminal guilt. The elements of the offence in relation to which Hungary seeks extradition are assault on a person which is intentional and which causes that person's death. If the first respondent satisfied those criteria, he would have been an instigator of, perpetrator of, or accomplice in the unlawful execution of a person in Hungary. Intentionally assaulting a person and causing that person's death constituted an offence in Hungary in 1944. Even if that offence was not murder, it was still an offence. Therefore "the offence in relation to which extradition is sought" was an offence in Hungary in 1944. The criteria of liability for murder or for any lesser offence corresponded with the criteria of liability for the third category of war crime under the Decree. It is not necessary that the

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114 For Art 2 see above at [66].

named offence, "war crime", should have existed in Hungarian law in 1944. It is sufficient that the alleged acts or omissions which Hungary contends amount to the named offence constituted an existing offence in 1944, even if that offence had another name.

85 This construction of the Treaty can be tested as a matter of ordinary English. Assume that the first respondent returns to Hungary. Assume that he is prosecuted for and convicted of the "war crime" alleged. If a questioner later asked him what he was convicted for, an accurate answer would be: "Beating a Jew to death in Budapest in 1944." The questioner could equally accurately answer: "That's murder. That was certainly an offence in Hungary in 1944." The accuracy of these answers is not diminished by the fact that it would have been equally truthful for the first respondent to say that he was convicted of a war crime, and for the questioner to say that there was no offence by that name in Hungary in 1944.

86 The majority of the Full Court of the Federal Court of Australia concluded that the "offence" referred to in Art 2(2) and (5)(a) for which the Requesting State seeks a person's extradition must be "a known, fixed, entity"[115]. Their Honours concluded that the search which sub-Arts (2) and (5)(a) call for is a search for factual correspondence between the "known, fixed, entity" charged and the criminal law of the Requesting State. The first respondent submitted that the word "offence" denoted "a legal construct rather than a set of acts or omissions." He submitted that it referred to "a particular, identified offence with which a person is to be charged (eg 'murder' or 'war crime')." But Art 2(1) refers to "offences however described", and these cannot be "particular, identified offences".

87 Paragraphs (a) and (b) of Art 2(5) are directed to "determining whether an offence is an offence against the law of" Australia and Hungary. Here, they are directed to determining whether the first respondent's alleged conduct in assaulting a person until he died was an offence against the law of both Australia and Hungary. Article 2(2)(a) provides: "[I]t shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology". That is, it does not matter whether the acts or omissions that Hungary alleges constitute a war crime are placed in the same category as murder under Hungarian law. It does not matter whether the acts or omissions that Hungary alleges constitute a war crime are placed under the category of murder under Australian law. And it does not matter whether Hungary denominates the intentional assault of a person until he dies by the terminology of a war crime or by the terminology of a murder.

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115 *O'Connor v Zentai* (2011) 195 FCR 515 at 569 [153] per Jessup J.

88 Article 2(2)(b) provides that in determining whether the first respondent's alleged conduct in assaulting a person until he died is an offence against the law of both Australia and Hungary: "the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account". It also provides: "it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ." Proving some types of war crime under Hungarian law may call for proof of more than must be proved to establish murder. But the totality of the acts or omissions alleged must be taken into account in determining whether the allegation of a "war crime" is an allegation of the crime "murder". It does not matter that the constituent elements of a "war crime" may be greater in number than those of "murder". It does not matter that they may otherwise be different. The language of the Treaty directs attention to "the totality of the acts or omissions alleged". Complying with that direction is inconsistent with concentrating on a "legal construct", a "particular identified offence" or a "known, fixed, entity". Article 2(2)(b) directs that "offence" in Art 2(5) is not used in those latter senses. In fact, in the Arrest Warrant issued against the first respondent the allegation that he committed a "war crime" does not differ from an allegation that he committed a murder.

89 It is possible to draw attention to incongruities and infelicities in Art 2(5). It is also possible to point to problems which would have been solved if its terms were different. And it is possible to contend that the absence of certain language points to a construction adverse to the appellants' position. There is a certain disconformity in the use of the words "offence", conduct "constituting the offence" and "acts or omissions" in Art 2(5). An analyst could seek to draw conclusions adverse to the appellants from that disconformity. That type of reasoning is common in linguistic construction. It can be overdone. It is easy for counsel to conduct a minute and leisurely examination of a document years after it was drafted and ingeniously detect flaws in the drafting if it is read one way. If those flaws could easily have been remedied, it may be contended that it should be read another way. This is a hypercritical approach. It is reminiscent of the approach criminal defence counsel often take to a summing-up when drafting a notice of appeal.

90 So far as that type of reasoning has merit, its merit certainly depends on context. The present context concerns a bilateral treaty entered by Australia and Hungary and negotiated by State representatives who, most probably, did not share fluency in a common language. It is true that the drafting might have been better adapted to achieve the result for which the appellants contend. But that fact does not negate the conclusion that the drafting actually employed achieved that result. As Deane J said in *Commonwealth v Tasmania* (*Tasmanian Dam*

Case)[116]: "International agreements are commonly 'not expressed with the precision of formal domestic documents as in English law'."

Notice of Contention: failure to give reasons

91 The first respondent contended that even if the appellants' arguments in support of the appeal were accepted, the decision of the Full Court of the Federal Court of Australia should nevertheless be affirmed. He submitted that the first appellant made a jurisdictional error by failing to provide a statement of reasons for his 12 November 2009 decision. That decision determined that the first respondent be extradited to Hungary. It was made under s 22 of the *Extradition Act* 1988 (Cth) ("the Act").

92 The first respondent alleged in his Further Amended Grounds of Review that the first appellant's failure to supply reasons made his decision "a nullity and of no legal effect".

93 The first respondent submitted that the first appellant was obligated to give reasons when the decision was made, independently of any request for them. He conceded that there was no common law duty to give reasons[117]. But he submitted that in the federal sphere a duty to give reasons arises from the limited nature of the Commonwealth Parliament's powers. He submitted that s 22 of the Act should be construed as conditioned by an obligation to give reasons. In the alternative, if s 22 could not be so construed, the first respondent submitted that it was invalid. Section 22 cannot be so construed. Accordingly, the first respondent's alternative submission becomes relevant. The first respondent submitted that the Commonwealth Parliament could not confer an unlimited power on the Executive. The power to make an unreasoned decision is an unlimited power. The power to make a decision without giving reasons is a power to make an unreasoned decision. It is equivalent to the power to give an unexaminable decision, contrary to an implication from s 75(v) of the Constitution. The first respondent also argued that the enforcement of limits on statutory power cannot be achieved unless decision-makers give reasons. Therefore, he contended, the provision of reasons was essential to the validity of the provision conferring the statutory power.

94 These arguments must be rejected. It does not follow from the fact that a decision-maker has not provided reasons that the decision-maker's decision is unreasoned. Nor does it follow that it is unexaminable. The publication of

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116 (1983) 158 CLR 1 at 261; [1983] HCA 21, quoting Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 299.

117 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; [1986] HCA 7.

reasons certainly helps those who wish to challenge administrative decisions. But it is not essential to a challenge. A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by a subpoena duces tecum or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena ad testificandum to reveal those reasons in the witness box. It is true that judicial review proceedings cannot be commenced on an entirely speculative basis. But non-speculative inferences can be drawn from the nature of the decision and from the dealings between the decision-maker and the affected person before the decision was made. It is also true that it would be difficult for a person challenging the decision to frame non-leading questions capable of eliciting answers that would reveal the decision-maker's reasons. But the person challenging the decision can question the decision-maker as though on cross-examination where the decision-maker is not making a genuine attempt to give evidence on a matter of which that decision-maker may reasonably be supposed to have knowledge: *Evidence Act* 1995 (Cth), s 38(1)(b). Reluctance on the decision-maker's part to give reasons would support an inference that there were no reasons, or no convincing reasons. It would be likely to stimulate close curial scrutiny. That is particularly so of adherence to a code of *omerta* in the witness box[118].

95 Further, it is not possible to derive from s 75(v) of the Constitution an implication that all decision-making powers subject to s 75(v) review must be construed as carrying with them a duty to provide reasons. Section 75(v) is extremely important. But it is a grant of jurisdiction. It is not a source of substantive law governing the conduct of Commonwealth officers in relation to their reasoning processes.

96 Another difficulty for the first respondent is that the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which in s 13 creates a duty in some cases to give reasons, assumes that his argument is flawed. As the first respondent conceded, s 13 of that Act is predicated on the fact that there is no underlying obligation to give reasons. The first respondent endeavoured to meet that difficulty by submitting that his argument was novel, but that novelty was no bar to success. However, his argument cannot overcome the fact that Sched 1 par (r) of that Act specifically relieves the first appellant from the s 13 duty to give reasons. The first respondent's argument can scarcely stand with that express provision about the specific topic at hand.

97 The first respondent relied on passages in *Cunliffe v The Commonwealth*[119]. Those passages do not support the first respondent's

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118 *Wainohu v New South Wales* (2011) 243 CLR 181 at 239 [149]; [2011] HCA 24.

119 (1994) 182 CLR 272 at 303 and 331; [1994] HCA 44.

argument. They record the difficulties of challenging administrative decisions if reasons are not provided. They lament the consequential inadequacy to that extent of curial control over the exercise of administrative powers. But they do not state that a decision for which reasons are not provided is void.

98 For those reasons the contention the first respondent advanced must be rejected.

Orders

99 The appeal should be allowed. By reason of their undertaking recorded in the argument on the special leave application, the appellants should pay the first respondent's costs of the appeal. The appellants seek their costs of the Notice of Contention, however. No argument was advanced against that application. The appellants are entitled to those costs. Consequential orders should be made, including the dismissal of the Further Amended Application.